

**THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY**

UNIVERSITY OF LONDON LIBRARY

346.4
Mx North Gallery





Digitized by the Internet Archive
in 2026

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS. THE PRIVY COUNCIL.
ALL DIVISIONS OF THE SUPREME COURT
AND
COURTS OF SPECIAL JURISDICTION

1938

VOLUME 3

Consulting Editor :

ROLAND BURROWS, K.C.

Recorder of Cambridge

Managing Editor of Halsbury's Laws of England, Hailsham Edition

General Editor :

W. J. WILLIAMS, B.A.,

of Lincoln's Inn, Barrister-at-Law

THE LAW JOURNAL,
37-39 ESSEX STREET, LONDON, W.C.2



THE
ALL ENGLAND
LAW REPORTS
ANNOTATED
BY CASE DECISIONS IN
THE HOUSE OF LORDS
ALL DECISIONS OF THE SUPREME COURT
AND
COURTS OF SPECIAL JURISDICTION

These reports are cited thus :

[1938] 3 All E. R.

CASES REPORTED IN VOLUME 3

	PAGE		PAGE
AHMED ANGULLIA BIN HADJEE MOHAMED SALLEH	106	CARTWRIGHT, <i>Re</i> , CARTWRIGHT <i>v.</i> SMITH [CH.D.]	391
ANGULLIA <i>v.</i> ESTATE & TRUST AGENCIES (1927), LTD. [P.C.]	483	CASWELL <i>v.</i> POWELL DUFFRYN ASSOCIATED COLLIERIES, LTD. [C.A.]	21
AIZKARAI MENDI, THE [ADM.]	375	CHADWYCK-HEALEY <i>v.</i> CRAWFORD, <i>Re</i> NICHOLSON [CH.D.]	270
ALLEN (T. W.) & SONS, LTD., VSESJOJWZOJE OBJEDINENIJE "EXPORTLES" <i>v.</i> [K.B.D.]	333	CHURCH OF ENGLAND SCHOOLS SOCIETY (TRUSTEES) AND ST. CLEMENT'S SCHOOL, LIVERPOOL (MANAGERS), GRIFFITHS <i>v.</i> [K.B.D. LIVERPOOL SUMMER ASSIZES]	537
ARANTZAU MENDI, THE [ADM.]	367	CLARKE, MEREDITH <i>v.</i> , <i>Re</i> MEREDITH'S TRUSTS [CH.D.]	199
ATTORNEY-GENERAL (AT THE RELATION OF ESHER URBAN DISTRICT COUNCIL) <i>v.</i> WILCOX [CH.D.]	711	CLEGHORN, R. <i>v.</i> [C.C.A.]	398
ATTORNEY-GENERAL (AT THE RELATION OF THOMAS) <i>v.</i> BARNES BOROUGH COUNCIL AND RANELAGH CLUB, LTD. [CH.D.]	341	COHEN, R. <i>v.</i> [C.C.A.]	380
ATTORNEY-GENERAL, BROOKES <i>v.</i> , <i>Re</i> HODSON'S SETTLEMENT [CH.D.]	329	COKE <i>v.</i> LEICESTER, <i>Re</i> LEICESTER'S SETTLED ESTATES [CH.D.]	553
ATTORNEY-GENERAL <i>v.</i> CANTER [K.B.D.]	605	COLERIDGE-TAYLOR <i>v.</i> NOVELLO & CO., LTD. [C.A.]	506
ATTORNEY-GENERAL <i>v.</i> GLYN, MILLS & CO. [K.B.D.]	32	COLLINS, R. <i>v.</i> [C.C.A.]	130
ATTORNEY-GENERAL <i>v.</i> PROSSER [C.A.]	90	CONLAN, <i>Ex parte</i> , R. <i>v.</i> BARNES BOROUGH COUNCIL [K.B.D. DIVL CT.]	226
ATTORNEY-GENERAL, QUEEN ANNE'S BOUNTY <i>v.</i> , <i>Re</i> BARON BURTON'S CHARITY [CH.D.]	263	CORNHILL INSURANCE CO., LTD., SMITH <i>v.</i> [K.B.D.]	145
ATTORNEY-GENERAL FOR THE ISLE OF MAN <i>v.</i> MOORE [P.C.]	259	COTTINGHAM'S EXECUTORS <i>v.</i> INLAND REVENUE COMMISSIONERS [K.B.D.]	560
BAIFOUR'S SETTLEMENT, <i>Re</i> , PUBLIC TRUSTEE <i>v.</i> OFFICIAL RECEIVER [CH.D.]	790	COUNSELL (INSPECTOR OF TAXES), DAWSON <i>v.</i> [C.A.]	5
BALL, GEORGE HOTEL (COLCHESTER), LTD. <i>v.</i> [K.B.D. DIVL CT.]	80	CRAWFORD, CHADWYCK-HEALEY <i>v.</i> , <i>Re</i> NICHOLSON [CH.D.]	270
BANTHAM S.S., CO., LTD., KAWASAKI KISEN KABUSHIKI KAISHA OF KOBE <i>v.</i> [K.B.D.]	690	CREWDSON, TATE <i>v.</i> [CH.D.]	43
BANTHAM S.S. CO., LTD., KAWASAKI KISEN KABUSHIKI KAISHA <i>v.</i> [C.A.]	327	CROFT, HUME AND, <i>Re</i> [K.B.D.]	311
BARNES, <i>Re</i> [K.B.D.]	98	CROYDON BOROUGH COUNCIL, PERRY <i>v.</i> [C.A.]	670
BARNES (INSPECTOR OF TAXES) <i>v.</i> HEILY HUTCHINSON [C.A.]	711	CURRYER'S WILL TRUSTS, <i>Re</i> , WYLY <i>v.</i> CURRYER [CH.D.]	574
BARNES BOROUGH COUNCIL AND RANELAGH CLUB, LTD., ATTORNEY-GENERAL (AT THE RELATION OF THOMAS) <i>v.</i> [CH.D.]	226	DA COSTA, <i>Ex parte</i> , R. <i>v.</i> HOWARD [K.B.D. DIVL CT.]	241
BARNES BOROUGH COUNCIL, R. <i>v.</i> , <i>Ex parte</i> CONLAN [K.B.D. DIVL CT.]	214	DARTFORD BREWERY CO., LTD., FREEMAN <i>v.</i> [K.B.D.]	120
BEATTIE <i>v.</i> BEATTIE (E. & F.), LTD. [C.A.]	647	DARTON URBAN DISTRICT COUNCIL, NEWSOME <i>v.</i> [C.A.]	93
BEDFORDSHIRE COUNTY COUNCIL, HANSCOMBE <i>v.</i> [CH.D.]	244	DAWSON <i>v.</i> COUNSELL (INSPECTOR OF TAXES) [C.A.]	5
BELCHER, APPEAL OF, <i>Re</i> ESSEX FLOUR & GRAIN CO., LTD. [K.B.D.]	566	DEBTOR (No. 382 of 1938), <i>Re</i> A, DEBTOR (THE) <i>v.</i> PETITIONING CREDITORS AND OFFICIAL RECEIVER [C.A.]	744
BERESFORD'S WILL TRUSTS, <i>Re</i> , STURGES <i>v.</i> BERESFORD [CH.D.]	615	DEBTOR (THE) <i>v.</i> PETITIONING CREDITORS AND OFFICIAL RECEIVER, <i>Re</i> A DEBTOR (No. 382 of 1938) [C.A.]	744
BOURNE, R. <i>v.</i> [C.C.C.]	314	DISMORE <i>v.</i> MILTON [C.A.]	762
BOYD, EASTEN <i>v.</i> , <i>Re</i> RHAGG [CH.D.]	194	DOBSON SHIP REPAIRING CO., LTD., BURTON <i>v.</i> [C.A.]	410
BRITISH METAL CORPORATION, LTD. <i>v.</i> LUDLOW BROTHERS (1913), LTD. [CH.D.]	1	DODSWORTH <i>v.</i> LENG, <i>Re</i> LENG [CH.D.]	181
BRITISH OAK INSURANCE CO., LTD., MCCARTHY <i>v.</i> [K.B.D.]	283	DREWNO (WILENSKO SLASKI TOWARZYSTWO) <i>v.</i> FENWICK & CO. (WEST HARTLEPOOL), LTD. [K.B.D.]	429
BRITISH SALMONS AERO ENGINES, LTD., INLAND REVENUE COMMISSIONERS <i>v.</i> [C.A.]	341	EAST MIDLAND TRAFFIC AREA TRAFFIC COMMISSIONERS <i>v.</i> TYLER [K.B.D. DIVL CT.]	39
BROOKES <i>v.</i> ATTORNEY-GENERAL, <i>Re</i> HODSON'S SETTLEMENT [CH.D.]	580	EASTEN <i>v.</i> BOYD, <i>Re</i> RHAGG [CH.D.]	314
BRYANT, SOUTH BEDFORDSHIRE ELECTRICAL FINANCE, LTD. <i>v.</i> [C.A.]	469	EASTERN NATIONAL OMNIBUS CO., LTD. <i>v.</i> INLAND REVENUE COMMISSIONERS [K.B.D.]	526
BURLINGTON PROPERTY CO., LTD. <i>v.</i> ODEON CINEMAS, LTD. [C.A.]	410	ESHER URBAN DISTRICT COUNCIL (AT THE RELATION OF), ATTORNEY-GENERAL <i>v.</i> WILCOX [CH.D.]	367
BURTON <i>v.</i> DOBSON SHIP REPAIRING CO., LTD. [C.A.]	90	ESSEX FLOUR & GRAIN CO., LTD., <i>Re</i> , APPEAL OF BELCHER [K.B.D.]	244
BURTON'S (BARON) CHARITY, <i>Re</i> , QUEEN ANNE'S BOUNTY <i>v.</i> ATTORNEY-GENERAL [CH.D.]	384	ESTATE & TRUST AGENCIES (1927), LTD., AHMED ANGULLIA BIN HADJEE MOHAMED SALLEH	106
CABLE & WIRELESS, LTD., HAILE SELASSIE <i>v.</i> [C.A.]	677	EVANS, HIRSCHORN <i>v.</i> [C.A.]	491
CABLE & WIRELESS, LTD., HAILE SELASSIE <i>v.</i> [CH.D.]	72	FASSBENDER <i>v.</i> FASSBENDER [DIV.]	389
CALEDONIA STEVEDORING CO., LTD., McLAUGHLIN <i>v.</i> [H.L.]	52	FENWICK & CO. (WEST HARTLEPOOL), LTD., WILENSKO SLASKI TOWARZYSTWO DREWNO <i>v.</i> [K.B.D.]	429
CANNELL LAIRD & CO., LTD., SMITH <i>v.</i> [C.A.]	329		
CANTER, ATTORNEY-GENERAL <i>v.</i> [K.B.D.]			

	PAGE		PAGE
FILDES, RYAN <i>v.</i> [K.B.D. LIVERPOOL SUMMER ASSIZES]	517	LONDON GENERAL INSURANCE CO., LTD., <i>Re</i> [CH.D.]	748
FIRTH, R. <i>v.</i> [C.C.A.]	783	LUDLOW BROTHERS (1913), LTD., BRITISH METAL CORPORATION, LTD. <i>v.</i> [CH.D.]	194
FORSTER, <i>Re</i> , GELLATLY <i>v.</i> PALMER [CH.D.]	767	LURIE <i>v.</i> LURIE [CH.D.]	156
FORSTER, <i>Re</i> , HUDSON <i>v.</i> FOSTER [CH.D.]	357	MALPINE (SIR ROBERT) & SONS (LONDON), LTD., MAY <i>v.</i> [K.B.D.]	85
FOSTER, <i>Re</i> , HUDSON <i>v.</i> FOSTER (No. 2) [CH.D.]	610	MCCALMONT <i>v.</i> INLAND REVENUE COMMISSIONERS [C.A.]	174
FOX, SHARPE <i>v.</i> , <i>Re</i> SHARPE'S DEED OF RELEASE [CH.D.]	449	MCCARTHY <i>v.</i> BRITISH OAK INSURANCE CO., LTD. [K.B.D.]	1
FREEMAN <i>v.</i> DARTFORD BREWERY CO., LTD. [K.B.D.]	120	MAGGOWAN, SMITH <i>v.</i> [CH.D.]	447
FREEMAN, HARDY & WILLIS, LTD., LAYCOCK (INSPECTOR OF TAXES) <i>v.</i> [K.B.D.]	571	MCLAUGHLIN <i>v.</i> CALEDONIA STEVEDORING CO., LTD. [H.L.]	72
GAMBOA, TATEM (W.J.), LTD. <i>v.</i> [K.B.D.]	135	MALLABY-DEELEY (BART.) (SIR HARRY) (PERSONAL REPRESENTATIVES), INLAND REVENUE COMMISSIONERS <i>v.</i> [K.B.D.]	463
GELLATLY <i>v.</i> PALMER, <i>Re</i> FORSTER [CH.D.]	767	MAVILLE HOSE, LTD., <i>Re</i> [CH.D.]	621
GEORGE HOTEL (COLCHESTER), LTD. <i>v.</i> BALL [K.B.D. DIVL. CT.]	790	MAY <i>v.</i> MALPINE (SIR ROBERT) & SONS (LONDON), LTD. [K.B.D.]	85
GERMANY <i>v.</i> GERMANY [DIV.]	64	MEREDITH'S TRUSTS, <i>Re</i> , MEREDITH <i>v.</i> CLARKE [CH.D.]	199
GLYN, MILLS & CO., ATTORNEY-GENERAL <i>v.</i> [K.B.D.]	605	MIDDLESEX COUNTY COUNCIL, WIMPEY (GEORGE) & CO., LTD. <i>v.</i> [K.B.D. DIVL. CT.]	781
GOODING, R. <i>v.</i> [C.C.A.]	134	MILTON, DISMORE <i>v.</i> [C.A.]	762
GRIFFITHS <i>v.</i> ST. CLEMENT'S SCHOOL, LIVERPOOL (MANAGERS), AND CHURCH OF ENGLAND SCHOOLS SOCIETY (TRUSTEES) [K.B.D. LIVERPOOL SUMMER ASSIZES]	537	MOLONY <i>v.</i> NICHOLSON, <i>Re</i> NICHOLSON'S SETTLEMENT [C.A.]	532
H ——— <i>v.</i> H ——— [DIV.]	415	MONMOUTHSHIRE & SOUTH WALES MUTUAL INDEMNITY SOCIETY, LTD., WOODING <i>v.</i> ; SAME, JAMES <i>v.</i> ; SAME, HAWKINS <i>v.</i> [C.A.]	625
HAILE SELLIASSIE <i>v.</i> CABLE & WIRELESS, LTD. [C.A.]	384	MOORE, ATTORNEY-GENERAL FOR THE ISLE OF MAN <i>v.</i> [P.C.]	263
HAILE SELLIASSIE <i>v.</i> CABLE & WIRELESS, LTD. [CH.D.]	677	MORESDALE FUR FARM, <i>Re</i> [K.B.D.]	311
HALE, SIGLEY <i>v.</i> [C.A.]	87	MORLEY (INSPECTOR OF TAXES) <i>v.</i> TATTERSALL [C.A.]	296
HALL BROTHERS S.S. CO., LTD., <i>v.</i> YOUNG, THE TRIDENT [K.B.D.]	234	MORRISON, R. <i>v.</i> [C.C.A.]	787
HAMMERSMITH BOROUGH COUNCIL, THOMAS <i>v.</i> [C.A.]	203	MOSS' EMPIRES, LTD., OLYMPIA (LIVERPOOL), LTD. <i>v.</i> [C.A.]	166
HAMMOND, <i>Re</i> , HAMMOND <i>v.</i> TREHARNE [CH.D.]	308	MOUNT, RACECOURSE BETTING CONTROL BOARD <i>v.</i> [C.A.]	547
HAMMOND <i>v.</i> SALISBURY-JONES, <i>Re</i> SALISBURY-JONES [CH.D.]	459	MYERS <i>v.</i> ROTHFIELD [C.A.]	498
HANSCOMBE <i>v.</i> BEDFORDSHIRE COUNTY COUNCIL [CH.D.]	647	NEAVE'S SETTLEMENT TRUSTS, <i>Re</i> , NEAVE <i>v.</i> NEAVE [CH.D.]	220
HARRISON, R. <i>v.</i> [C.C.A.]	134	NEWSOME <i>v.</i> DARTON URBAN DISTRICT COUNCIL [C.A.]	93
HAWKINS <i>v.</i> MONMOUTHSHIRE & SOUTH WALES MUTUAL INDEMNITY SOCIETY, LTD. [C.A.]	625	NICHOLSON, <i>Re</i> , CHADWYCK-HEALEY <i>v.</i> CRAWFORD [CH.D.]	270
HELY HUTCHINSON, BARNES (INSPECTOR OF TAXES) <i>v.</i> [C.A.]	98	NICHOLSON'S SETTLEMENT, <i>Re</i> , MOLONY <i>v.</i> NICHOLSON [C.A.]	532
HEROD <i>v.</i> HEROD [DIV.]	722	NOMIKOS (PETROS M.), LTD. <i>v.</i> ROBERTSON [C.A.]	249
HILLMAN, ST. JOSEPH'S SOCIETY FOR FOREIGN MISSIONS AND, SEDLEIGH-DENFIELD <i>v.</i> [K.B.D.]	321	NORTHERN ONTARIO POWER CO., LTD. <i>v.</i> LA ROCHE MINES, LTD. [P.C.]	755
HIRSCHORN <i>v.</i> EVANS [C.A.]	491	NOVELLO & CO., LTD., COLERIDGE-TAYLOR <i>v.</i> [C.A.]	506
HODSON'S SETTLEMENT, <i>Re</i> , BROOKES <i>v.</i> ATTORNEY-GENERAL [CH.D.]	341	OCEANIC STEAM NAVIGATION CO., LTD., <i>Re</i> [CH.D.]	740
HOWARD, R. <i>v.</i> , <i>Ex parte</i> DA COSTA [K.B.D. DIVL. CT.]	241	ODEON CINEMAS, LTD., BURLINGTON PROPERTY CO., LTD. <i>v.</i> [C.A.]	469
HUDSON <i>v.</i> FOSTER, <i>Re</i> FOSTER [CH.D.]	357	OFFICIAL RECEIVER AND PETITIONING CREDITORS, DEBTOR (THE) <i>v.</i> , <i>Re</i> A DEBTOR (No. 382 OF 1938) [C.A.]	744
HUDSON <i>v.</i> FOSTER, <i>Re</i> FOSTER (No. 2) [CH.D.]	610	OFFICIAL RECEIVER, PUBLIC TRUSTEE <i>v.</i> , <i>Re</i> BALFOUR'S SETTLEMENT [CH.D.]	259
HUME AND CROFT, <i>Re</i> [K.B.D.]	311	OLDS DISCOUNT CO., LTD. <i>v.</i> PLAYFAIR (JOHN), LTD. [K.B.D.]	275
INFIELDS, LTD. <i>v.</i> ROSEN (P.) & SON [C.A.]	591	OLYMPIA (LIVERPOOL) LTD. <i>v.</i> MOSS' EMPIRES, LTD. [C.A.]	166
INLAND REVENUE COMMISSIONERS <i>v.</i> BRITISH SALMONS AERO ENGINES, LTD. [C.A.]	283	ORAM, R. <i>v.</i> [C.C.A.]	793
INLAND REVENUE COMMISSIONERS, COTTINGHAM'S EXECUTORS <i>v.</i> [K.B.D.]	560	OTWAY (E.), <i>Re</i> K. T. STEPHENS & R. H. BRANTHWAITE (TRADING AS MORESDALE FUR FARM) AND [K.B.D.]	311
INLAND REVENUE COMMISSIONERS, EASTERN NATIONAL OMNIBUS CO., LTD. <i>v.</i> [K.B.D.]	526	PALMER, GELLATLY <i>v.</i> , <i>Re</i> FORSTER [CH.D.]	767
INLAND REVENUE COMMISSIONERS, MCCALMONT <i>v.</i> [C.A.]	174	PEARLBERG, REFUGE ASSURANCE CO., LTD. <i>v.</i> [C.A.]	231
INLAND REVENUE COMMISSIONERS <i>v.</i> MALLABY-DEELEY (BART.) (SIR HARRY) (PERSONAL REPRESENTATIVES) [K.B.D.]	463	PERKINS <i>v.</i> PERKINS [DIV.]	116
INSOLE'S SETTLEMENT, <i>Re</i> [C.A.]	406	PERRY <i>v.</i> CROYDON BOROUGH COUNCIL [C.A.]	670
INTENDED ACTION, <i>Re</i> AN, SHOESMITH <i>v.</i> LANCASHIRE MENTAL HOSPITALS BOARD [C.A.]	186	PETITIONING CREDITORS AND OFFICIAL RECEIVER, DEBTOR (THE) <i>v.</i> , <i>Re</i> A DEBTOR (No. 382 OF 1938) [C.A.]	744
JAMES <i>v.</i> MONMOUTHSHIRE & SOUTH WALES MUTUAL INDEMNITY SOCIETY, LTD. [C.A.]	625	PHILIPS, R. <i>v.</i> [C.C.A.]	674
JOHNSON <i>v.</i> JOHNSON [DIV.]	765	PLAYFAIR (JOHN), LTD., OLDS DISCOUNT CO., LTD. <i>v.</i> [K.B.D.]	275
KAWASAKI KISEN KABUSHIKI KAISHA OF KOBE <i>v.</i> BANTHAM S.S. CO., LTD. [K.B.D.]	80	POTELIAKHOFF <i>v.</i> TEAKLE [C.A.]	686
KAWASAKI KISEN KABUSHIKI KAISHA <i>v.</i> BANTHAM S.S. CO., LTD. [C.A.]	690	POWELL DUFFRYN ASSOCIATED COLLIERIES, LTD., CASWELL <i>v.</i> [C.A.]	21
KENT COUNTY COUNCIL, WARDELL <i>v.</i> [C.A.]	473	PROSSER, ATTORNEY-GENERAL <i>v.</i> [C.A.]	32
KNIGHT <i>v.</i> SAMPSON [K.B.D.]	309	PUBLIC TRUSTEE <i>v.</i> OFFICIAL RECEIVER, <i>Re</i> BALFOUR'S SETTLEMENT [CH.D.]	259
LA ROCHE MINES, LTD., NORTHERN ONTARIO POWER CO., LTD. <i>v.</i> [P.C.]	755	QUAYLE, R. <i>v.</i> [C.C.A.]	674
LANCASHIRE MENTAL HOSPITALS BOARD, SHOESMITH <i>v.</i> , <i>Re</i> AN INTENDED ACTION [C.A.]	186		
LAYCOCK (INSPECTOR OF TAXES) <i>v.</i> FREEMAN, HARDY & WILLIS, LTD. [K.B.D.]	571		
LEICESTER'S SETTLED ESTATES, <i>Re</i> , COKE <i>v.</i> LEICESTER [CH.D.]	553		
LENG, <i>Re</i> , DODSWORTH <i>v.</i> LENG [CH.D.]	181		

	PAGE
QUEEN ANNE'S BOUNTY v. ATTORNEY-GENERAL, Re BARON BURTON'S CHARITY [CH.D.]	90
QUEEN ANNE'S BOUNTY (GOVERNORS) v. TITHE REDEMPTION COMMISSION [CH.D.]	664
R. v. BARNES BOROUGH COUNCIL, <i>Ex parte</i> CONLAN [K.B.D. DIVL. CT.]	226
R. v. BOURNE [C.C.C.]	615
R. v. CLEGHORN [C.C.A.]	398
R. v. COHEN [C.C.A.]	380
R. v. COLLINS [C.C.A.]	130
R. v. FIRTH [C.C.A.]	783
R. v. GOODING [C.C.A.]	134
R. v. HARRISON [C.C.A.]	134
R. v. HOWARD, <i>Ex parte</i> DA COSTA [K.B.D. DIVL. CT.]	241
R. v. MORRISON [C.C.A.]	787
R. v. ORAM [C.C.A.]	793
R. v. PHILIPS [C.C.A.]	674
R. v. QUAYLE [C.C.A.]	674
R. v. VALE [C.C.A.]	355
R. v. WALLIS [C.C.A.]	134
R. v. WARD [C.C.A.]	134
R. v. WHIBLEY [C.C.A.]	777
RACECOURSE BETTING CONTROL BOARD v. MOUNT [C.A.]	547
RANELAGH CLUB, LTD., BARNES BOROUGH COUNCIL AND, ATTORNEY-GENERAL (AT THE RELATION OF THOMAS) v. [CH.D.]	711
RATCLIFFE v. RATCLIFFE [DIV.]	41
REFUGE ASSURANCE CO., LTD. v. PEARLBERG [C.A.]	231
RHAGG, <i>Re</i> , EASTEN v. BOYD [CH.D.]	314
RHONDDA URBAN DISTRICT COUNCIL, SUMMERS v. [C.A.]	585
ROBERTSON, NOMIKOS (PETROS M.), LTD. v. [C.A.]	249
ROSEN (P.) & SON, INFIELDS, LTD. v. [C.A.]	591
ROTHFIELD, MYERS v. [C.A.]	498
ROWLES (INSPECTOR OF TAXES), SCAMMELL (G.) & NEPHEW, LTD. v. [K.B.D.]	577
RYAN v. FILDES [K.B.D. LIVERPOOL SUMMER ASSIZES]	517
ST. CLEMENT'S SCHOOL, LIVERPOOL (MANAGERS), AND CHURCH OF ENGLAND SCHOOLS SOCIETY (TRUSTEES), GRIFFITHS v. [K.B.D. LIVERPOOL SUMMER ASSIZES]	537
ST. JOSEPH'S SOCIETY FOR FOREIGN MISSIONS AND HILLMAN, SEDLEIGH-DENFIELD v. [K.B.D.]	321
SALISBURY-JONES, <i>Re</i> , HAMMOND v. SALISBURY- JONES [CH.D.]	459
SAMMUT v. STRICKLAND [P.C.]	693
SAMPSON, KNIGHT v. [K.B.D.]	309
SCAMMELL (G.) & NEPHEW, LTD. v. ROWLES (INSPECTOR OF TAXES) [K.B.D.]	577
SEDLEIGH-DENFIELD v. ST. JOSEPH'S SOCIETY FOR FOREIGN MISSIONS AND HILLMAN [K.B.D.]	321
SHARPE'S DEED OF RELEASE, <i>Re</i> , SHARPE v. FOX [CH.D.]	449
SHOESMITH v. LANCASHIRE MENTAL HOSPITALS BOARD, <i>Re</i> AN INTENDED ACTION [C.A.]	186
SHORROCK, WILSON v., <i>Re</i> WILSON SYNDICATE CONVEYANCE [CH.D.]	599
SIFTON v. SIFTON [P.C.]	435
SIGLEY v. HALE [C.A.]	87
SIMMONS & SON, LTD. v. WILTSHIRE [C.A.]	403
SIMONS v. WINSLADE [C.A.]	774

	PAGE
SINCLAIR'S LIFE POLICY, <i>Re</i> [CH. D.]	124
SMITH, CARTWRIGHT v., <i>Re</i> CARTWRIGHT [CH.D.]	391
SMITH v. CAMMELL LAIRD & CO., LTD. [C.A.]	52
SMITH v. CORNHILL INSURANCE CO., LTD. [K.B.D.]	145
SMITH v. MACGOWAN [CH.D.]	447
SOUTH BEDFORDSHIRE ELECTRICAL FINANCE, LTD. v. BRYANT [C.A.]	580
SOUTHERN RAILWAY CO., SWAIN v. [K.B.D.]	705
STARKEY v. STARKEY [DIV.]	773
STEPHENS (K. T.) AND BRANTHWAITE (R. H.) (TRADING AS MORESDALE FUR FARM) AND OTWAY (E.), <i>Re</i> [K.B.D.]	311
STRICKLAND, SAMMUT v. [P.C.]	693
STURGES v. BERESFORD, <i>Re</i> BERESFORD'S WILL TRUSTS [CH.D.]	566
SUMMERS v. RHONDDA URBAN DISTRICT COUNCIL [C.A.]	585
SWAIN v. SOUTHERN RAILWAY CO. [K.B.D.]	705
SWETTENHAM v. SWETTENHAM [DIV.]	183
TATE v. CREWDSON [CH.D.]	43
TATEM (W. J.), LTD. v. GAMBOA [K.B.D.]	135
TATTERSALL, MORLEY (INSPECTOR OF TAXES) v. [C.A.]	296
TEAKLE, POTEIACHOFF v. [C.A.]	686
TEALL v. TEALL [DIV. DIVL. CT.]	349
THOMAS, ATTORNEY-GENERAL AT THE RELATION OF, v. BARNES BOROUGH COUNCIL AND RANE- LAGH CLUB, LTD. [CH.D.]	711
THOMAS v. HAMMERSMITH BOROUGH COUNCIL [C.A.]	203
TITHE REDEMPTION COMMISSION, QUEEN ANNE'S BOUNTY (GOVERNORS) v. [CH.D.]	664
TREHARNE, HAMMOND v., <i>Re</i> HAMMOND [CH.D.]	308
TRIDENT, THE, HALL BROTHERS S.S. CO., LTD. v. YOUNG [K.B.D.]	234
TYLER, EAST MIDLAND TRAFFIC AREA TRAFFIC COMMISSIONERS v. [K.B.D. DIVL. CT.]	39
VALE, R. v. [C.C.A.]	355
VSESOJWZOJE OBJEDINENIJE "EXPORTLES" v. ALLEN (T. W.) & SONS, LTD. [K.B.D.]	375
WALLIS, R. v. [C.C.A.]	134
WARD, R. v. [C.C.A.]	134
WARDELL v. KENT COUNTY COUNCIL [C.A.]	473
WATSON v. WATSON [DIV.]	770
WESTMINSTER BANK, LTD. v. WILSON [C.A.]	652
WHIPLEY, R. v. [C.C.A.]	777
WHITELEY, LTD., WILLARD v. [C.A.]	779
WILCOX, ATTORNEY-GENERAL (AT THE RELATION OF ESHER URBAN DISTRICT COUNCIL) v. [CH.D.]	367
WILENSKO SLASKI TOWARZYSTWO DREWNO v. FENWICK & CO. (WEST HARTLEPOOL), LTD. [K.B.D.]	429
WILLARD v. WHITELEY, LTD. [C.A.]	779
WILSON SYNDICATE CONVEYANCE, <i>Re</i> , WILSON v. SHORROCK [CH.D.]	599
WILSON, WESTMINSTER BANK, LTD. v. [C.A.]	652
WILTSHIRE, SIMMONS & SON, LTD. v. [C.A.]	403
WIMPEY (GEORGE) & CO., LTD. v. MIDDLESEX COUNTY COUNCIL [K.B.D. DIVL. CT.]	781
WINSLADE, SIMONS v. [C.A.]	774
WOODING v. MONMOUTHSHIRE & SOUTH WALES MUTUAL INDENTMENT SOCIETY, LTD. [C.A.]	625
WYLY v. CURRYER, <i>Re</i> CURRYER'S WILL TRUSTS [CH.D.]	574
YOUNG, HALL BROTHERS S.S. CO., LTD. v. THE TRIDENT [K.B.D.]	234

CASES REFERRED TO

	PAGES
Abbott v. Isham (1920), 90 L.J.K.B. 309; 19 Digest 563, 52; 124 L.T. 734 ..	537, 545
Abeyesekera v. Jayatilake, [1932] A.C. 260; Digest Supp.; 101 L.J.P.C. 40; 146 L.T. 193	694
Ackerley, Re, Chapman v. Andrew, [1913] 1 Ch. 510; 37 Digest 454, 562; 82 L.J.Ch. 260; 108 L.T. 712 ..	566, 567, 571
Adamson v. A.-G., [1933] A.C. 257; Digest Supp.; 102 L.J.K.B. 129; 148 L.T. 365	341, 344, 345, 346
Admiralty Comrs. v. Amerika (S.S.), [1917] A.C. 38; 34 Digest 182, 1489; 86 L.J.P. 58; 116 L.T. 34; affg. S.C. sub nom. The Amerika, [1914] P. 167 ..	483, 485, 483
Airway, Ltd. v. Dunphy, Memoranda of Decisions by the Minister of Health, Supp. No. 4, No. 658 ..	245, 248
Aksionairnoye Obschestvo A.M. Luther v. Sagor (James) & Co., [1921] 3 K.B. 532; 11 Digest 536, 387; 90 L.J.K.B. 1202; 125 L.T. 705 334, 339, 384, 385, 387, 678, 683, 684	532, 533
Aleyn v. Belchier (1758), 1 Eden, 132; 37 Digest 503, 962 ..	532, 533
American Thread Co. v. Joyce (1913), 108 L.T. 353; 28 Digest 30, 157; 6 Tax Cas. 163	284, 295
Amos v. Chadwick (1878), 9 Ch.D. 459; Digest, Practice, 983, 5136; 47 L.J.Ch. 871; 39 L.T. 50 ..	671, 672
Anchor Trust Co., Ltd. v. Bell, [1926] Ch. 805; 35 Digest 512, 2425; 95 L.J.Ch. 564; 135 L.T. 311 ..	231, 233
Anderson-Berry, Re, Harris v. Griffith, [1928] Ch. 290; Digest Supp.; 97 L.J.Ch. 111; 138 L.T. 354 ..	44, 49, 50
Anglo-Continental Supply Co., Re, [1922] 2 Ch. 723; 10 Digest 1056, 7385; 91 L.J.Ch. 658; 128 L.T. 59 ..	740, 743
Angullia v. Estate & Trust Agencies (1927), Ltd., [1938] 3 All E.R. 106; Digest Supp. 610, 611	610, 611
Armour v. British International Pictures (1930), 23 B.W.C.C. 367; Digest Supp. 474	474
Ascherson v. Tredegar Dry Dock & Wharf Co., Ltd., [1909] 2 Ch. 401; 26 Digest 127, 902; 78 L.J.Ch. 697; 101 L.T. 519 ..	44, 48, 49, 50, 51
Astor, Re, Astor v. Astor, [1922] 1 Ch. 364; 40 Digest 733, 2632; sub nom. Re Astor (Viscount), Astor v. Adams, 91 L.J.Ch. 277 ..	451, 459
Athlumney, Re, Ex p. Wilson, [1898] 2 Q.B. 547; 42 Digest 702, 1191; 67 L.J.Q.B. 935; sub nom. Re Athlumney (Lord), Ex p. Wilson v. Hasluck, 79 L.T. 303 ..	694, 695
A.-G. v. Burges (1726), Bunb. 223; 36 Digest 375, 524 ..	330, 331
A.-G. v. Dickinson & Baron, [1937] 2 K.B. 574; [1937] 2 All E.R. 485; Digest Supp.; 106 L.J.K.B. 615; 157 L.T. 550 ..	342, 346
A.-G. v. Great Northern Ry. Co., [1916] 2 A.C. 356; 26 Digest 582, 2719; 85 L.J.Ch. 717; 115 L.T. 235 ..	707, 708, 710
A.-G. v. Lloyds Bank, Ltd., [1935] A.C. 382; Digest Supp.; 104 L.J.K.B. 523; 152 L.T. 577 ..	341, 344, 347
A.-G. for British Honduras v. Bristowe (1880), 6 App. Cas. 143; 17 Digest 415, 11; 50 L.J.P.C. 15; 44 L.T. 1 ..	694
A.-G. for Isle of Man v. Mylchreest (1879), 4 App. Cas. 294; 34 Digest 608, 52; 48 L.J.P.C. 36; 40 L.T. 764 ..	263, 264, 267
Auld v. Auld (1874), 1 R. (Ct. of Sess.) 1015; 27 Digest 430, case c ..	723, 737
Auld v. Pinney (1910), 54 Sol. Jo. 399 ..	437, 438
Back v. Daniels, [1925] 1 K.B. 526; 28 Digest 15, 74; 94 L.J.K.B. 304; 132 L.T. 455; 9 Tax Cas. 183 ..	5, 8, 13, 14, 15, 16
Bailey v. Geddes, [1938] 1 K.B. 156; [1937] 3 All E.R. 671; Digest Supp.; 107 L.J.K.B. 38; 157 L.T. 364 ..	309, 310
Balfour's Trustees v. Johnston, [1936] S.C. 137 ..	437, 438
Ball v. Hunt (William) & Sons, Ltd., [1912] A.C. 496; 34 Digest 395, 3228; 81 L.J.K.B. 782; 106 L.T. 911; 5 B.W.C.C. 459 ..	626, 636
Banco de Bilbao v. Rey, [1938] 2 K.B. 176; [1938] 2 All E.R. 253; Digest Supp. 333, 334, 336, 337, 338, 339, 340	678, 684
Banco de Bilbao v. Sancha, [1938] 2 K.B. 176; [1938] 2 All E.R. 253; Digest Supp. 211; 120 L.T. 129 ..	136, 144
Bank of Ethiopia v. National Bank of Egypt & Liguori, [1937] Ch. 513; [1937] 3 All E.R. 8; Digest Supp.; 106 L.J.Ch. 279; 157 L.T. 428 ..	678, 683, 684
Barfield, Re, Goodman v. Child (1901), 84 L.T. 28; 44 Digest 693, 5339 ..	315, 317, 320
Barker v. Herbert, [1911] 2 K.B. 633; 36 Digest 197, 374; 80 L.J.K.B. 1329; 105 L.T. 349 ..	321, 326
Barnes v. Irwell Valley Water Board, [1937] 4 All E.R. 675; Digest Supp.; on appeal, [1938] 2 All E.R. 650 ..	671, 672
Barnett v. Howard, [1900] 2 Q.B. 784; 27 Digest 121, 973; 69 L.J.Q.B. 955; 83 L.T. 301 ..	199, 200
Bartell v. Gray (W.) & Co., [1902] 1 K.B. 225; 24 Digest 917, 122; 71 L.J.K.B. 115; 85 L.T. 658 ..	52, 53, 54, 56
Bathurst Borough v. Macpherson (1879), 4 App. Cas. 256; 26 Digest 405, 1274; 48 L.J.P.C. 61; 41 L.T. 778 ..	93, 94
Batten Pool v. Kennedy, [1907] 1 Ch. 256; 34 Digest 718, 1019; 76 L.J.Ch. 162 ..	599, 600
Beard, Re, Simpson v. Beard (1888), 57 L.J.Ch. 887; 44 Digest 693, 5335; 58 L.T. 629	314, 317

	PAGES
Beasley v. Roney, [1891] 1 Q.B. 509; 21 Digest 630, 2135; 60 L.J.Q.B. 408; 65 L.T. 153	491, 492, 497
Bell v. Balls, [1897] 1 Ch. 663; 3 Digest 9, 63; 66 L.J.Ch. 397; 76 L.T. 254	447, 448
Bell v. National Provincial Bank of England, [1904] 1 K.B. 149; 28 Digest 41, 211; 73 L.J.K.B. 142; 90 L.T. 2; 5 Tax Cas. 1	572, 573
Bennett v. Bennett (1934), 103 L.J.P. 38; Digest Supp.; 150 L.T. 460	116, 118
Bennett v. Bury (Lord) (1880), 5 C.P.D. 339; 9 Digest 514, 3370; 49 L.J.Q.B. 411; 42 L.T. 480	671, 673
Bensaude v. Thames & Mersey Marine Insurance Co., [1897] A.C. 609; 29 Digest 47, 93; 66 L.J.Q.B. 666; 77 L.T. 282	250, 251
Berkeley v. Hardy (1826), 5 B. & C. 355; 17 Digest 216, 283; 4 L.J.O.S.K.B. 184	358, 359
Betts v. Metropolitan Police District Receiver & Carter Paterson & Co., Ltd., [1932] 2 K.B. 595; Digest Supp.; 101 L.J.K.B. 588; 147 L.T. 336	707, 708
Biddell Brothers v. Clemens (E.) Horst Co., [1911] 1 K.B. 934; <i>reversd.</i> , [1912] A.C. 18; 39 Digest 575, 1801; 81 L.J.K.B. 42; 105 L.T. 563	430
Birmingham & District Land Co. v. London & North Western Ry. Co. (1886), 34 Ch.D. 261; 26 Digest 222, 1747; 56 L.J.Ch. 956; 55 L.T. 699	235, 238
Black v. Dawson, [1895] 1 Q.B. 848; Digest, Practice, 707, 3014; 64 L.J.Q.B. 646; 72 L.T. 525	187, 188, 191
Blackburn, <i>Re</i> , Smiles v. Blackburn (1889), 43 Ch.D. 75; 37 Digest 424, 333; 59 L.J.Ch. 208	566, 568
Blagrove's Settled Estates, <i>Re</i> , [1903] 1 Ch. 560; 30 Digest 287, 129; 72 L.J.Ch. 317; 88 L.T. 253	406, 408, 409
Blake v. Shaw (1860), John. 732; 44 Digest 693, 5346; 2 L.T. 84	314, 316
Blandford v. Blandford (1883), 8 P.D. 19; 27 Digest 338, 3175; 52 L.J.P. 17; 48 L.T. 238	723, 734
Blencowe v. Northamptonshire County Council, [1907] 1 Ch. 504; 19 Digest 560, 35; 76 L.J.Ch. 276; 96 L.T. 385	537, 545
Bolivia Republic v. Indemnity Mutual Marine Assurance Co., Ltd., [1909] 1 K.B. 785; 17 Digest 276, 901; 78 L.J.K.B. 596; 100 L.T. 503	80, 84
Borwick, <i>Re</i> , Borwick v. Borwick, [1933] Ch. 657; Digest Supp.; 102 L.J.Ch. 199; 149 L.T. 116	436, 437
Bottomley, <i>Ex p.</i> , [1909] 2 K.B. 14; 14 Digest 194, 1734; 78 L.J.K.B. 547; 100 L.T. 782	674, 676
Boulter, <i>Re</i> , Capital & Counties Bank v. Boulter, [1922] 1 Ch. 75; 44 Digest 459, 2804; 91 L.J.Ch. 250; 126 L.T. 653	436, 437, 438
Bowers v. Nixon (1848), 12 Q.B. 558, n.; 2 Digest 22, 126; 18 L.J.Q.B. 35	166, 167
Bowman v. Bowman (1866), 4 Maeph. (Ct. of Sess.), 384	723, 738
Bowron v. Bowron, [1925] P. 187; 27 Digest 561, 6168; 94 L.J.P. 33; 132 L.T. 773	723, 730, 731, 738
Boyd, <i>Re</i> , Nield v. Boyd (1890), 63 L.T. 92; 37 Digest 451, 538	566, 567, 571
Bradbury v. English Sewing Cotton Co., [1923] A.C. 744; 28 Digest 81, 445; 92 L.J.K.B. 736; 129 L.T. 546; 8 Tax Cas. 481	98, 103
Bradford v. Gammon, [1925] 1 Ch. 132; 26 Digest 128, 918; 94 L.J.Ch. 193; 132 L.T. 342	44, 49
Bradford Corpn. v. Myers, [1916] 1 A.C. 242; 38 Digest 110, 784; 85 L.J.K.B. 146; 114 L.T. 83; <i>affg.</i> , [1915] 1 K.B. 417	706, 707, 708, 710
Bradford Old Bank v. Sutcliffe, [1918] 2 K.B. 833; 32 Digest 333, 182; 88 L.J.K.B. 85; 119 L.T. 727	45, 51
Bradley & Cohn, Ltd. v. Ramsay & Co. (1912), 106 L.T. 771; 21 Digest 222, 567	580, 581
Braybrooke (Lord) v. A.-G. (1861), 9 H.L. Cas. 150; 21 Digest 94, 694; 31 L.J.Ex. 177; 4 L.T. 218; <i>varying</i> (1860), 5 H. & N. 488	605, 608, 609
Brendon v. Spiro, [1938] 1 K.B. 176; [1937] 2 All E.R. 496; Digest Supp.; 157 L.T. 265	499, 501
Brewer's Settlement, <i>Re</i> , Morton v. Blackmore, [1896] 2 Ch. 503; 5 Digest 656, 5855; 65 L.J.Ch. 821; 75 L.T. 177	259, 261, 262
Briggs v. Dryden (T.) & Sons, Talbot v. Vickers, Ltd., [1925] 2 K.B. 667; 34 Digest 458, 3752; 95 L.J.K.B. 275; 133 L.T. 409; 18 B.W.C.C. 163	411, 414
Brindley, <i>Re</i> , <i>Ex p.</i> Taylor Sons & Co., [1906] 1 K.B. 377; 4 Digest 129, 1182; 75 L.J.K.B. 46	745
Brinsmead v. Harrison (1871), L.R. 6 C.P. 584; 43 Digest 531, 668; 40 L.J.C.P. 281; 24 L.T. 798; <i>on appeal</i> (1872), L.R. 7 C.P. 547; 41 L.J.C.P. 190; 27 L.T. 99	580, 581, 584
Bristow v. Warde (1794), 2 Ves. 336; 37 Digest 403, 146	221, 222
Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Insurance Asscn., [1921] 1 A.C. 99; 41 Digest 990, 8753; 89 L.J.K.B. 881; 123 L.T. 721	80
British & Foreign Marine Insurance Co., Ltd. v. Sanday (Samuel) & Co., [1916] 1 A.C. 650; 29 Digest 276, 2236; 85 L.J.K.B. 550; 114 L.T. 521; <i>affg.</i> , [1915] 2 K.B. 781	250, 251
British Columbia Electric Ry. Co., Ltd. v. Loach, [1916] 1 A.C. 719; 36 Digest 117, 781; 85 L.J.P.C. 23; 113 L.T. 946	722, 728
British Mexican Petroleum Co., Ltd. v. Jackson, British Mexican Petroleum Co., Ltd. v. Inland Revenue Commissioners (1932), 16 Tax Cas. 570; Digest Supp.	296, 304
Brodie v. Brodie, [1917] P. 271; 27 Digest 223, 1937; 86 L.J.P. 140; 117 L.T. 542	390
Brooking-Phillips v. Brooking-Phillips, [1913] P. 80; 27 Digest 369, 3560; 82 L.J.P. 57; 108 L.T. 397; <i>affg.</i> S.C. <i>sub nom.</i> P. v. P. (1912), 107 L.T. 721	723, 735
Brooks v. Beirnsstein, [1909] 1 K.B. 98; 3 Digest 96, 258; 78 L.J.K.B. 243; 99 L.T. 970	580, 581, 584
Brown v. Dimpleby, [1904] 1 K.B. 28; 27 Digest 121, 974; 73 L.J.K.B. 35; 89 L.T. 424	200
Brown's Estate, <i>Re</i> , Brown v. Brown, [1893] 2 Ch. 300; 32 Digest 338, 219; 62 L.J.Ch. 695; 69 L.T. 12	45, 50
Bryant v. Herbert (1878), 3 C.P.D. 389; 42 Digest 969, 12; 47 L.J.Q.B. 670; 39 L.T. 17	157, 158
Buckmaster v. Buckmaster (1869), L.R. 1 P. & D. 713; 27 Digest 311, 2888; 38 L.J.P. & M. 73; 21 L.T. 231	390
Burgess's Policy, <i>Re</i> (1915), 85 L.J.Ch. 273; 27 Digest 151, 1220; <i>sub nom.</i> <i>Re</i> Burgess's Policy, <i>Lee v. Scottish Union & National Insurance Co.</i> , 113 L.T. 443	358, 359
Burrell & Son v. Leven (1926), 42 T.L.R. 407; Digest Supp.	686, 687, 688
Bustros v. White (1876), 1 Q.B.D. 423; 18 Digest 96, 478; 45 L.J.Q.B. 642; 34 L.T. 835	592, 595, 598
Butler & Baker's Case (1591), 3 Co. Rep. 25a; 17 Digest 205, 169	653, 657

	PAGES
Caledonian Ry. Co. v. Glenboig Union Fireclay Co., [1911] A.C. 290; 34 Digest 606, 36; 80 L.J.P.C. 128; 104 L.T. 657	263, 267
Campbell v. Hall (1774), 1 Cowp. 204; 17 Digest 414, 5	694, 702, 703, 704
Cardigan (Earl) v. Armitage (1823), 2 B. & C. 197; 34 Digest 714, 992	599, 600, 603, 604
Carey v. Ocean Coal Co., Ltd., Carey v. Richards, Carey v. Rees, [1938] 1 K.B. 365; [1937] 4 All E.R. 219; Digest Supp.; 157 L.T. 516	22, 29
Carmichael v. Carmichael (1925), 42 T.L.R. 133; 27 Digest 332, 3125	157, 158
Carras v. London & Scottish Assurance Corp., Ltd., [1936] 1 K.B. 291; Digest Supp.; 105 L.J.K.B. 689; 154 L.T. 69	250, 251, 257
Chandler v. Pocock (1881), 16 Ch.D. 648; 20 Digest 371, 1095; 50 L.J.Ch. 380; 44 L.T. 115	391, 392, 393
Chaney v. Maclow, [1929] 1 Ch. 461; Digest Supp.; 98 L.J.Ch. 345; 140 L.T. 312	447, 448
Chapman v. Franklin (1905), 21 T.L.R. 515; 25 Digest 402, 65	686, 687
Chapman v. Marshall, Sons & Co., Ltd. (1936), 29 B.W.C.C. 14; Digest Supp.	73, 75, 78
Charrington & Co., Ltd. v. Woolder, [1914] A.C. 71; 17 Digest 327, 1336; 83 L.J.K.B. 220; 110 L.T. 548	599, 600
Chisholm v. London Passenger Transport Board, [1938] 2 All E.R. 579; Digest Supp.	309, 310
Chorley Corp. v. Nightingale, [1906] 2 K.B. 602; <i>affd.</i> , [1907] 2 K.B. 637; 26 Digest 315, 472; 76 L.J.K.B. 1003; 97 L.T. 465	647, 648, 650
Chrimmes, <i>Re</i> , Locovich v. Chrimmes, [1917] 1 Ch. 30; 27 Digest 124, 1002; <i>sub nom. Re</i> Chrimmes, Locovich v. Chrimmes, 86 L.J.Ch. 217; 115 L.T. 706	653, 659
Churchill v. Churchill (1867), L.R. 5 Eq. 44; 37 Digest 498, 907; 37 L.J.Ch. 92	221, 222
Clark v. Lindsay (1903), 88 L.T. 198; 12 Digest 369, 3080	136, 142
Clark's Trust, <i>Re</i> (1875), 1 Ch.D. 497; 8 Digest 262, 241; 45 L.J.Ch. 194	767, 770
Clarke v. Clarke (1925), 42 T.L.R. 132; 27 Digest 332, 3126	157, 158
Clavering v. Ellison (1859), 7 H.L. Cas. 707; 44 Digest 440, 2667; 29 L.J.Ch. 761; <i>affg.</i> (1857), 8 De G.M. & G. 662; <i>affg.</i> (1856), 3 Drew. 451	436, 437, 438, 441, 444
Clay's Policy of Assurance, <i>Re</i> , Clay v. Earnshaw, [1937] 2 All E.R. 548; Digest Supp.	125, 128
Cleaver v. Mutual Reserve Fund Life Assocn., [1892] 1 Q.B. 147; 29 Digest 369, 2969; 61 L.J.Q.B. 128; 66 L.T. 220	125, 128, 357, 359, 364
Cleveland's (Duke) Settled Estates, <i>Re</i> , [1893] 3 Ch. 244; 20 Digest 372, 1096; 62 L.J.Ch. 955; 69 L.T. 735	391, 392, 393
Clydebank Engineering & Shipbuilding Co. v. Yzquierdo y Castañeda (Don Jose Rams), [1905] A.C. 6; 12 Digest 344, 3514; 74 L.J.P.C. 1; 91 L.T. 666	157, 158
Cock v. Cock (1864), 3 Sw. & Tr. 514; 27 Digest 317, 2941; 33 L.J.P.M. & A. 157; 10 L.T. 726	771, 772
Coker v. Bolton, [1912] 3 K.B. 315; 29 Digest 289, 2348; 82 L.J.K.B. 91; 107 L.T. 54	250, 251
Collier, <i>Re</i> , [1930] 2 Ch. 37; Digest Supp.; 99 L.J.Ch. 241; 143 L.T. 329	358, 359
Colman v. Watson, <i>Re</i> , [1908] 1 K.B. 47; Digest, Practice, 707, 3021; 77 L.J.K.B. 121; 97 L.T. 857	187, 188
Compania Naviera Vascongada v. Cristina (The), The Cristina, [1937] 4 All E.R. 313; Digest Supp.; 107 L.J.P. 1	334, 340, 384, 388
Comptoir Commercial Anversois & Power, Son & Co., <i>Re</i> , [1920] 1 K.B. 868; 12 Digest 396, 3218; 89 L.J.K.B. 849; 122 L.T. 567	136, 137
Constantinesco v. R. (1926), 42 T.L.R. 383; 28 Digest 19, 97; 11 Tax Cas. 730	284, 290
Cooch v. Goodman (1842), 2 Q.B. 580; 17 Digest 203, 140; 11 L.J.Q.B. 225	653, 657
Cook v. Cook, [1934] S.A.S.R. 298	722, 727
Cooke, <i>Re</i> (1889), 5 T.L.R. 407; 42 Digest 344, 3900; <i>revg.</i> S.C. <i>sub nom. Re</i> A Solicitor, 5 T.L.R. 335	499, 503
Cooper v. Jarman (1866), L.R. 3 Eq. 98; 23 Digest 477, 5460; 36 L.J.Ch. 85	107, 108, 110, 111, 112, 113, 114
Cotton, <i>Re</i> , Wood v. Cotton (1888), 40 Ch.D. 41; 37 Digest 451, 539; 58 L.J.Ch. 174	566, 567, 568, 569, 570, 571
Cottrell, <i>Re</i> , Buckland v. Beddingfield, [1910] 1 Ch. 402; 23 Digest 421, 4924; 79 L.J.Ch. 189; 102 L.T. 157	270, 271
Countess of Warwick S.S. Co. v. Nickel Société Anonyme, Anglo-Northern Trading Co. v. Emlyn Jones & Williams, [1918] 1 K.B. 372; 12 Digest 390, 3195; 87 L.J.K.B. 309; 118 L.T. 196; <i>affg.</i> , 33 T.L.R. 291; <i>affg.</i> , [1917] 2 K.B. 78	136, 137, 144, 145
Cowley v. Newmarket Local Board, [1892] A.C. 345; 26 Digest 400, 1251; 62 L.J.Q.B. 65; 67 L.T. 486	707
Coyle (or Brown) v. Watson (John), Ltd., [1915] A.C. 1; 34 Digest 268, 2284; 83 L.J.P.C. 307; 111 L.T. 347; 7 B.W.C.C. 259	146, 152
Crawshay, <i>Re</i> , Crawshay v. Crawshay (1890), 43 Ch.D. 615; 37 Digest 514, 1056; 59 L.J.Ch. 395; 62 L.T. 489	533
Craze v. Meyer-Dumore Bottlers' Equipment Co., Ltd., [1936] 2 All E.R. 1150; Digest Supp.	22, 24
Crocker v. Crocker, [1921] P. 25; 27 Digest 338, 3178; 90 L.J.P. 136; 124 L.T. 493; <i>affg.</i> (1920), 122 L.T. 749	65, 70
Crofts v. Haldane (1867), L.R. 2 Q.B. 194; 19 Digest 92, 564; 36 L.J.Q.B. 85; 16 L.T. 116	470, 471
Cromie v. Moore, [1936] 2 All E.R. 177; Digest Supp.	157, 158
Daff v. Midland Colliery Owners' Mutual Indemnity Co. (1913), 82 L.J.K.B. 1340; 29 Digest 407, 3206; 109 L.T. 418; 6 B.W.C.C. 799	626, 635, 637, 639
Dale & Perry v. Lolley (1808), 2 Bro. C.C. 582, n.	44, 48
Danube II, The, [1921] P. 183; 38 Digest 103, 741; 90 L.J.P. 314; 125 L.T. 156	707, 708
Dashwood v. Magniac, [1891] 3 Ch. 306; 34 Digest 627, 233; 60 L.J.Ch. 809; 65 L.T. 811	599, 600
Daubeny v. Cockburn (1816), 1 Mer. 626; 37 Digest 510, 1026	532, 533
David v. Britannic Merthyr Coal Co., [1909] 2 K.B. 146; 34 Digest 219, 1816; 78 L.J.K.B. 659; 100 L.T. 678; <i>on appeal sub nom. Britannic Merthyr Coal Co., Ltd. v. David</i> , [1910] A.C. 74	330, 331
Davies v. Elmslie, [1938] 1 K.B. 337; [1937] 4 All E.R. 68, 471; Digest Supp.	157, 158
Davies v. Scott Lewis, [1918] W.N. 166; Digest, Practice, 482, 1615	87, 88, 89
Dawkins v. Penrhyn (Lord) (1878), 4 App. Cas. 51; 32 Digest 484, 1463; 48 L.J.Ch. 304; 39 L.T. 583	762, 763, 764
Day, <i>Re</i> , Sprake v. Day, [1898] 2 Ch. 510; 23 Digest 477, 5461; 67 L.J.Ch. 619; 79 L.T. 436	108, 112, 113, 114

	PAGES
Debtor (No. 11 of 1935), <i>Re</i> , [1936] Ch. 165; Digest Supp.; 105 L.J.Ch. 146; 154 L.T. 397	745, 746, 748
Delany v. Delany (1885), 15 L.R.Ir. 55; 44 Digest 693, case <i>f</i>	314, 316
De Laubenque v. De Laubenque, [1899] P. 42; 27 Digest 306, 2837; 68 L.J.P. 20; 79 L.T. 708	390
Deller's Estate, <i>Re</i> , Warman v. Greenwood, [1888] W.N. 62; 44 Digest 693, 5337	315, 317
Dempter, <i>Re</i> , Borthwick v. Lovell, [1915] 1 Ch. 795; 23 Digest 420, 4918; 84 L.J.Ch. 597; 112 L.T. 1124	270, 271
De Vaux v. Salvador (1836), 4 Ad. & El. 420; 29 Digest 212, 1695; 51 L.J.K.B. 134	235
Devonald v. Rosser & Sons, [1906] 2 K.B. 728; 12 Digest 623, 5132; 75 L.J.K.B. 688; 95 L.T. 232	203, 208
Dixon v. Sutton Heath & Lea Green Colliery, Ltd. (No. 2) (1930), 23 B.W.C.C. 135; Digest Supp.	146, 151
Docherty v. Baird (William) & Co., Ltd. (1935), 28 B.W.C.C. 89; Digest Supp.	73, 75, 78
Doggett v. Waterloo Taxi-cab Co., Ltd., [1910] 2 K.B. 336; 34 Digest 35, 114; 79 L.J.K.B. 1085; 102 L.T. 874; 3 B.W.C.C. 371	245, 248
Donachie v. Whitehaven Colliery Co., Ltd. (1933), 150 L.T. 6; Digest Supp.; 26 B.W.C.C. 63	73, 75, 78
Donald v. Thomson, [1922] S.C. 237; 28 Digest 20, case <i>g</i>	5, 14
Donaldson v. Donaldson (1854), Kay 711; 40 Digest 534, 774; 23 L.J.Ch. 788; 23 L.T.O.S. 306	653, 659
Donovan v. Laing, Wharton & Down Construction Syndicate, [1893] 1 Q.B. 629; 34 Digest 26, 49; 63 L.J.Q.B. 25; 68 L.T. 512	779, 780
Douglas v. Douglas (1903), 23 N.Z.L.R. 584; 27 Digest 322, case <i>s</i>	722, 726, 727, 738
Dow v. McNeill, [1925] S.C. 50; 34 Digest 259, 2216i	474
Driefontein Consolidated Gold Mines v. Janson, West Rand Central Gold Mines Co. v. De Rougemont, [1900] 2 Q.B. 339; 38 Digest 5, 4; 69 L.J.Q.B. 771; 83 L.T. 79; <i>affd.</i> , [1902] A.C. 484	80, 82
Drummond v. Drummond (1861), 2 Sw. & Tr. 269; 27 Digest 336, 3158; 30 L.J.P.M. & A. 177; 4 L.T. 416	723, 735
Dublin Corp'n. v. M'Adam (Surveyor of Taxes) (1887), 2 Tax Cas. 387; 28 Digest 21, case <i>l</i>	571, 572
Dublin United Tramways Co. v. Fitzgerald, [1903] A.C. 99; 43 Digest 344, 37; 72 L.J.P.C. 52; 87 L.T. 532	707, 708
Dunham v. Clare, [1902] 2 K.B. 292; 34 Digest 341, 2759; 71 L.J.K.B. 683; 86 L.T. 751; 4 W.C.C. 102	146, 151, 152
Dunkley v. Farris (1851), 11 C.B. 457; 42 Digest 343, 3886	499, 502, 503, 505
Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd., [1915] A.C. 79; 17 Digest 138, 426; 83 L.J.K.B. 1574; 111 L.T. 862	157, 158
Dunne v. Dunne (1855), 7 De G.M. & G. 207; 44 Digest 442, 2676; 25 L.T.O.S. 60	436, 437, 438
Dutch v. Dutch (1928), 98 L.J.P. 44; Digest Supp.; 140 L.T. 96	349, 350
Dyson v. Forster, Dyson v. Seed, Quinn, Morgan, etc., [1909] A.C. 98; 34 Digest 680, 799; 78 L.J.K.B. 246; 99 L.T. 942	166, 167
Eardley v. Granville (1876), 3 Ch.D. 826; 34 Digest 652, 497; 45 L.J.Ch. 669; 34 L.T. 609	599, 600
Ecclesiastical Commissioners for England's Conveyance, <i>Re</i> , [1936] Ch. 430; Digest Supp.; 105 L.J.Ch. 168; 155 L.T. 281	125, 129, 357, 358, 365
Edgington v. Fitzmaurice (1885), 29 Ch.D. 459; 15 Digest 990, 11069; 65 L.J.Ch. 650; 53 L.T. 369	722, 731
Edwards (Job), Ltd. v. Birmingham Navigations, [1924] 1 K.B. 341; 36 Digest 214, 575; 93 L.J.K.B. 261; 130 L.T. 622	321, 326, 327
Egerton v. Brownlow (Earl) (1853), 4 H.L.Cas. 1; 12 Digest 240, 1971; 23 L.J.Ch. 348; 21 L.T.O.S. 306	157, 158
Egyptian Hotels, Ltd. v. Mitchell (1914), 6 Tax Cas. 542; [1914] 3 K.B. 118; 83 L.J.K.B. 1510; 111 L.T. 189; <i>affd.</i> , [1915] A.C. 1022; 28 Digest 26, 139; 84 L.J.K.B. 1772; 113 L.T. 882	577, 579
Eley v. Positive Government Security Life Assurance Co. (1876), 1 Ex. D. 88; 9 Digest 88, 351; 45 L.J.Q.B. 451; 34 L.T. 190	214, 218
Ellis, <i>Re</i> , Nettleton v. Crimmins, [1935] Ch. 193; Digest Supp.; 104 L.J.Ch. 53; 152 L.T. 370	270, 271
Ellis v. Noakes, [1932] 2 Ch. 98, <i>n.</i> ; Digest Supp.; 101 L.J.Ch. 409, <i>n.</i> ; 147 L.T. 453, <i>n.</i>	599, 600, 601
Emmerson v. Heelis (1809), 2 Taunt. 38; 3 Digest 8, 57	447, 448
Engelbach's Estate, <i>Re</i> , Tibbetts v. Engelbach, [1924] 2 Ch. 348; 29 Digest 422, 3288; 93 L.J.Ch. 616; 130 L.T. 401	125, 128, 357, 358, 359, 363, 364, 366
Engelke v. Musmann, [1928] A.C. 433; Digest Supp.; 97 L.J.K.B. 789; 139 L.Ch. 586; <i>reversd.</i> , [1928] 1 K.B. 90	80
Espie v. British Basket Co., Ltd. (1920), 13 B.W.C.C. 492; 34 Digest 288, case <i>f</i>	73, 79
Etherington & Lancashire & Yorkshire Accident Insurance Co., <i>Re</i> , [1909] 1 K.B. 591; 29 Digest 396, 3148; 78 L.J.K.B. 684; 100 L.T. 568	146, 154
Evans v. Liverpool Corp'n., [1906] 1 K.B. 160; 34 Digest 40, 160; 74 L.J.K.B. 742	474, 476
Everett v. Everett & McCullum, [1919] P. 298; 27 Digest 368, 3540; 88 L.J.P. 130; 121 L.T. 503	723, 734, 735
Exmouth (Viscount), <i>Re</i> , Exmouth (Viscount) v. Praed (1883), 23 Ch.D. 158; 44 Digest 441, 2668; 52 L.J.Ch. 420; 48 L.T. 422	436, 437, 442
Eyre, <i>Re</i> , Palmer v. Evans (1856), 1 C.B.N.S. 151; 42 Digest 353, 4017; 28 L.T.O.S. 125	499, 501, 503, 505
Falcke v. Scottish Imperial Insurance Co. (1886), 34 Ch.D. 234; 29 Digest 383, 3069; 56 L.J.Ch. 707; 56 L.T. 220	610, 612
Farrant v. Olmius (1820), 3 B. & Ald. 692; 2 Digest 19, 109	100, 167
Feay v. Barnwell, [1938] 1 All E.R. 31; Digest Supp.	85, 86
Fender v. Midmay, [1937] 3 All E.R. 402; Digest Supp.; 106 L.J.K.B. 641; 157 L.T. 340	157
Fidelity & Casualty Co. of New York v. Mitchell, [1917] A.C. 592; 29 Digest 394, 3140; 86 L.J.P.C. 204; 117 L.T. 494	146, 154
Fillingham v. Bromley (1823), Turn. & R. 530; 44 Digest 442, 2675	436, 437, 438, 442
Finlay (James) & Co. v. N. V. Kwik Hoo Tong H.M., [1929] 1 K.B. 400; Digest Supp.; 98 L.J.K.B. 251; 140 L.T. 389	430

	PAGES
Fisher v. Fisher (1861), 2 Sw. & Tr. 410; 27 Digest 501, 5362; 31 L.J.P.M. & A. 1; 5 L.T. 364	116, 118
Fleetwood's Policy, <i>Re</i> , [1926] Ch. 48; Digest Supp.; 95 L.J.Ch. 195; 135 L.T. 374	358, 359
Flint v. Lovell, [1935] 1 K.B. 354; Digest Supp.; 104 L.J.K.B. 199; 152 L.T. 231	483, 486, 487
Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd., [1934] 2 K.B. 132; Digest Supp.; 103 L.J.K.B. 465; 151 L.T. 87; <i>reversd.</i> on other grounds, [1936] A.C. 206	21, 22, 24, 28, 31
Flowers v. Chambers, [1899] 2 Q.B. 142; 24 Digest 916, 109; 68 L.J.Q.B. 648; 80 L.T. 834	53, 56
Forsey & Hollebone's Contract, <i>Re</i> , [1927] 2 Ch. 379; 40 Digest 82, 634	712, 713, 719
Forster v. Elvet Colliery Co., Ltd., [1908] 1 K.B. 629; 77 L.J.K.B. 521; 98 L.T. 736; <i>affd.</i> , [1909] A.C. 98; 34 Digest 686, 799	358, 359
Frere & Staveley Taylor & Co. & North Shore Mill Co., Ltd., <i>Re</i> , [1905] 1 K.B. 366; Digest, Practice, 707, 3020; 74 L.J.K.B. 208; 92 L.T. 194	187, 188
Friend v. Solly (1847), 10 Beav. 329; Digest, Practice, 955, 4948	195, 197
Frost, <i>Re</i> , [1936] 2 All E.R. 182; Digest Supp.	187, 188, 190, 192
Frowd v. Frowd, [1904] P. 177; 27 Digest 556, 6106; 73 L.J.P. 60; 90 L.T. 175	722, 728, 729, 730
Fry v. Salisbury House Estate, Ltd., Jones v. City of London Real Property Co., Ltd., [1930] A.C. 432; Digest Supp.; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; <i>affg.</i> , [1930] 1 K.B. 304	5, 10, 16
Furness Withy & Co., Ltd. v. Düder, [1936] 2 K.B. 461; [1936] 2 All E.R. 119; Digest Supp.; 105 L.J.K.B. 473; 154 L.T. 663	234, 235, 239
Gabriel, Wade & English, Ltd. v. Arcos, Ltd. (1929), 73 Sol. Jo. 483; Digest Supp.	430
Gagara, The, [1919] P. 95; Digest Supp.; 88 L.J.P. 101; 122 L.T. 498	334, 337, 338
Garrard v. Lewis (1882), 10 Q.B.D. 30; 6 Digest 25, 149; 47 L.T. 408	308
Gerard (Lord) & London & North Western Ry. Co.'s Arbitration, <i>Re</i> , [1895] 1 Q.B. 459; 34 Digest 715, 995; 64 L.J.Q.B. 260; 72 L.T. 142	599, 600, 601
Gerard's (Lord) Settled Estate, <i>Re</i> , [1893] 3 Ch. 252; 30 Digest 288, 145; 63 L.J.Ch. 23; 69 L.T. 393	406, 408
Gibson v. Gibson (1894), 21 R. (Ct. of Sess.) 470	723, 738
Gibson v. Preston Corpn. (1870), L.R. 5 Q.B. 218; 26 Digest 357, 834; 39 L.J.Q.B. 131; 22 L.T. 293	707
Gilbert v. Gilbert, [1937] S.A.S.R. 79	722, 727
Gilbertson v. Fergusson (1881), 7 Q.B.D. 562; 28 Digest 79, 431; 46 L.T. 10; 1 Tax Cas. 501	98, 101, 102, 103, 104
Giffillan v. Giffillan, [1931] S.L.T. 454	723, 737
Gillow v. Durham County Council, [1913] A.C. 54; 19 Digest 560, 32; 82 L.J.K.B. 206; 107 L.T. 689	537, 545, 546
Glanely (Lord) v. Wightman, [1933] A.C. 618; Digest Supp.; 102 L.J.K.B. 456; 149 L.T. 121; 17 Tax Cas. 634	5, 8, 12
Glasgow Assurance Corpn., Ltd. (Liquidators) v. Welsh Insurance Corpn., Ltd., [1914] S.C. 320; 29 Digest 48, case o	749, 750
Goldsmiths' Co. v. West Metropolitan Ry. Co., [1904] 1 K.B. 1; 42 Digest 950, 237; 72 L.J.K.B. 931; 89 L.T. 428	665, 666, 667
Goodson v. Baker (1908), 98 L.T. 415; 25 Digest 401, 57	686, 688
Gordon Hotels, Ltd. v. London County Council, [1916] 2 K.B. 27; 24 Digest 928, 193; 85 L.J.K.B. 1042; 114 L.T. 1126	791, 792
Goslin v. Clark (1862), 12 C.B.N.S. 681; 27 Digest 232, 2038; 31 L.J.C.P. 330; 6 L.T. 824	416, 427
Grassi, <i>Re</i> , Stubberfield v. Grassi, [1905] 1 Ch. 584; 37 Digest 154, 4; 74 L.J.Ch. 341; 92 L.T. 455	391, 392
Gray v. Gray, [1925] Q.S.R. 166	722, 727
Great Western Ry. Co. v. Carpalla United China Clay Co., Ltd., [1909] 1 Ch. 218; 34 Digest 608, 60; 78 L.J.Ch. 105; 99 L.T. 869; <i>affd. on appeal</i> , [1910] A.C. 83	263, 269
Great Western Ry. Co. v. Mostyn (Owners), The Mostyn, [1928] A.C. 57; Digest Supp.; 97 L.J.P. 8; 138 L.T. 403	235, 238
Green v. Arcos, Ltd. (1931), 30 L.L.R. 229; Digest Supp.	430, 434, 435
Greenwood v. Atherton, [1938] 2 All E.R. 475; Digest Supp.	537, 545
Groves v. Wimborne (Lord), [1898] 2 Q.B. 402; 34 Digest 218, 1815; 67 L.J.Q.B. 862; 79 L.T. 284	22, 25, 28
Guardian Assurance Co., <i>Re</i> , [1917] 1 Ch. 431; 10 Digest 1054, 7370; 86 L.J.Ch. 214; 116 L.T. 193	740, 743
Guilfoyle v. Port of London Authority, [1932] 1 K.B. 336; Digest Supp.; 101 L.J.K.B. 91; 146 L.T. 91	706, 707, 709
Hale v. Hale (1915), 32 T.L.R. 53; 27 Digest 362, 3464	723, 734, 737, 739
Hall v. Hall, [1915] P. 105; 27 Digest 506, 5410; 81 L.J.P. 93; 113 L.T. 58	116, 118
Hall v. Lees, [1904] 2 K.B. 602; 34 Digest 26, 51; 73 L.J.K.B. 819; 91 L.T. 20	474, 476, 480
Hallows v. Fernie (1863), 3 Ch. App. 467; Digest, Pleading, 26, 227; 18 L.T. 340	195, 197
Hamlyn & Co. v. Wood & Co., [1891] 2 Q.B. 488; 12 Digest 610, 5042; 60 L.J.Q.B. 734; 65 L.T. 286	491, 493
Hancock v. Smith (1889), 41 Ch.D. 456; 3 Digest 185, 364; 58 L.J.Ch. 725; 61 L.T. 341	491, 492
Hancock v. Watson, [1902] A.C. 14; 43 Digest 644, 792; 71 L.J.Ch. 149; 85 L.T. 729; <i>affg. S.C. sub nom. Re Hancock</i> , Watson v. Watson, [1901] 1 Ch. 482	341, 345, 574, 575, 576
Hancox v. Balfour, Beattie & Co., Ltd. (1932), 25 B.W.C.C. 596; Digest Supp.	73, 75, 78
Harriman v. Harriman, [1909] P. 123; 27 Digest 321, 2995; 78 L.J.P. 62; 100 L.T. 557	723, 738
Harrison v. Harrison, [1910] 1 K.B. 35; 27 Digest 224, 1943; 79 L.J.K.B. 133; 101 L.T. 638	157, 158
Harrison v. Rutland (Duke), [1893] 1 Q.B. 142; 26 Digest 317, 491; 62 L.J.Q.B. 117; 68 L.T. 35	647, 648
Harrods, Ltd. v. Tester, [1937] 2 All E.R. 236; Digest Supp.; 157 L.T. 7	491, 492, 493
Harrold v. Watney, [1898] 2 Q.B. 320; 36 Digest 69, 443; 67 L.J.Q.B. 771; 78 L.T. 788	321, 326
Harvey, <i>Re</i> , Peek v. Savory (1888), 39 Ch.D. 289; 37 Digest 105, 395; 60 L.T. 79	574, 575, 576
Hawkins v. Billhead (1635), Cro. Car. 404; 32 Digest 541, 1934	762, 763
Hawkins, <i>Re</i> , Hawkins v. Argent (1913), 109 L.T. 969; 44 Digest 693, 5338	315, 318
Hearts of Oak Assurance Co., Ltd., <i>Re</i> , [1936] Ch. 558; Digest Supp.; 105 L.J.Ch. 211; 155 L.T. 407	749, 750

	PAGES
Heastie v. Veitch & Co., [1934] 1 K.B. 535; Digest Supp.; 103 L.J.K.B. 492; 150 L.T. 228; 18 Tax Cas. 305	5, 9
Helby v. Matthews, [1895] A.C. 471; 3 Digest 93, 245; 64 L.J.Q.B. 465; 72 L.T. 841; revsg., [1894] 2 Q.B. 262	580, 581, 583
Henton, Re, Henton v. Henton (1882), 30 W.R. 702; 44 Digest 693, 5341	314, 316
Herne Bay Steam Boat Co. v. Hutton, [1903] 2 K.B. 683; 12 Digest 385, 3170; 72 L.J.K.B. 879; 89 L.T. 422	136, 142
Hext v. Gill (1872), 7 Ch. App. 699; 34 Digest 606, 41; 41 L.J.Ch. 761; 27 L.T. 291	263, 269, 599
Hickie v. Rodocanachi (1859), 4 H. & N. 455; 29 Digest 289, 2351; 28 L.J.Ex. 273; 33 L.T.O.S. 150	601, 602
Hickman v. Kent or Romney Marsh Sheep-Breeders' Assn., [1915] 1 Ch. 881; 9 Digest 86, 341; 84 L.J.Ch. 688; 113 L.T. 159	250, 256
Hillier v. St. Bartholomew's Hospital (Governors), [1909] 2 K.B. 820; 34 Digest 26, 52; 78 L.J.K.B. 958; sub nom. Hillier v. London Corp'n. (St. Bartholomew's Hospital, Governors), 101 L.T. 368	214, 218
Hindle v. Birtwistle, [1897] 1 Q.B. 192; 24 Digest 909, 71; 66 L.J.Q.B. 173; 76 L.T. 159	473, 474, 475, 476, 477, 480, 481, 482
Hirji Mulji v. Cheong Yue S.S. Co., [1926] A.C. 497; Digest Supp.; 95 L.J.P.C. 121; 134 L.T. 737	22, 26
Holgate v. Lancashire Mental Hospitals Board, Gill and Robertson (1937), Unreported	136, 137
Holt v. Holt (1694), 2 Vern. 322; 24 Digest 619, 6492	187, 188
Hopkins v. Hitchcock (1863), 14 C.B.N.S. 65; 39 Digest 419, 521; 32 L.J.C.P. 154; 8 L.T. 204	107, 108, 110, 111, 112
Hopkins v. Hopkins, [1936] V.L.R. 218; Digest Supp.	376, 379
Hotchkys, Re, Freke v. Calmady (1886), 32 Ch. D. 408; 40 Digest 647, 1869; 55 L.J.Ch. 546; 55 L.T. 110	722, 727, 728
Houlder Line, Ltd. v. Griffin, [1905] A.C. 220; 24 Digest 915, 104; 74 L.J.K.B. 466; 92 L.T. 580; revsg., [1904] 1 K.B. 510	553, 554
Hughes v. Penmaenmawr & Welsh Granite Co., Ltd. (1933), 148 L.T. 485; Digest Supp.; 26 B.W.C.C. 99	53, 54, 57
Hughes-Hallett v. Indian Mammoth Gold Mines Co. (1882), 22 Ch.D. 561; 26 Digest 128, 913; 52 L.J.Ch. 418; 48 L.T. 107	73, 75, 78
Hulton v. Hulton, [1916] 1 P. 57; 27 Digest 503, 5382; 85 L.J.P. 137; 114 L.T. 449	44, 48
Hunter v. Hunter (1883), 11 R. (Ct. of Sess.) 359; 27 Digest 332, case 3121 i	116, 118
Hunter v. Hunter, [1905] P. 217; 27 Digest 481, 5103; 74 L.J.P. 157; 93 L.T. 451	723, 737
Hunter v. South Shields Corp'n. (1922), 15 B.W.C.C. 264; 34 Digest 429, 3494	723, 733, 737, 739
Hussey v. Hussey (1913), 109 L.T. 192; 27 Digest 317, 2948	585, 586, 587, 588
Hyams v. Coombes (1912), 28 T.L.R. 413; 25 Digest 403, 70	771, 773
Hyams v. Stuart King, [1908] 2 K.B. 696; 25 Digest 401, 58; 77 L.J.K.B. 794; 99 L.T. 424	686, 687, 688, 689
Hyman v. Hyman, [1929] A.C. 601; Digest Supp.; 98 L.J.P. 81; 141 L.T. 329	157, 158, 416, 424
Indermaur v. Dames (1866), L.R. 1 C.P. 274; 36 Digest 35, 208; 35 L.J.C.P. 184; 14 L.T. 484; affd. (1867), L.R. 2 C.P. 311	775, 776
Ingfield (George), Ltd., Re, [1935] Ch. 1; Digest Supp.; 101 L.J.Ch. 360; 147 L.T. 411	275, 277, 279, 282
Inland Revenue v. Ardross Estates Co., [1930] S.C. 487; Digest Supp.	311, 312, 313
Inland Revenue Comrs. v. Angus, Same v. Lewis (1889), 23 Q.B.D. 579; 39 Digest 254; 378; 61 L.T. 832; affg. S.C. sub nom. Lewis v. Inland Revenue Comrs., Angus v. Inland Revenue Comrs., 53 J.P. 453	527, 530
Inland Revenue Comrs. v. Melross, [1935] S.C. 812; 19 Tax Cas. 607; Digest Supp.	311, 313
Inland Revenue Comrs. v. Westminster (Duke), [1936] A.C. 1; Digest Supp.; 104 L.J.K.B. 383; 153 L.T. 223; 19 Tax Cas. 490	527, 530
Isitt v. Railway Passengers Assurance Co. (1889), 22 Q.B.D. 504; 29 Digest 400, 3172; sub nom. Re Isitt & Railway Passengers Assurance Co., 58 L.J.Q.B. 191; 60 L.T. 297	146, 153
Jackson v. Jackson, [1924] P. 19; 27 Digest 308, 2852	722, 730
Jackson v. Union Marine Insurance Co., Ltd. (1874), L.R. 10 C.P. 125; 12 Digest 386, 3175; 44 L.J.C.P. 27; 31 L.T. 789; affg. (1873), L.R. 8 C.P. 572	136, 142, 250, 257, 258
Joachimson v. Swiss Bank Corp'n., [1921] 3 K.B. 110; 21 Digest 639, 2188; 90 L.J.K.B. 973; 125 L.T. 338	491, 492, 493
Jones v. Newtown & Llandiloes Guardians, [1920] 3 K.B. 381; 27 Digest 76, 601; 89 L.J.K.B. 1161; 124 L.T. 23	723, 730
Jones' Settlement, Re, Stunt v. Jones, [1915] 1 Ch. 378; 29 Digest 385, 3082; 84 L.J.Ch. 406; 112 L.T. 1067	610, 612
Jones v. Scullard, [1898] 2 Q.B. 565; 34 Digest 22, 25; 67 L.J.Q.B. 895; 79 L.T. 386	779, 784
Kattenbach v. Mackenzie (1878), 3 C.P.D. 467; 29 Digest 280, 2273; 48 L.J.Q.B. 9; 39 L.T. 215	250, 251
Keats v. Keats & Montezuma (1859), 1 Sw. & Tr. 334; 27 Digest 336, 3166; 28 L.J.P. & M. 57; 32 L.T.O.S. 321	65, 70
Kiellay v. Carson (1842), 4 Moo. P.C.C. 63; 17 Digest 416, 15	694, 695
King v. King (1864), 15 L.Ch.R. 479; 20 Digest 429, case 1590 i	221, 222
Koch v. Mineral Ore Syndicate (London & South Western Bank, Ltd., Garnishees) (1910), 54 Sol. Jo. 600; 3 Digest 177, 321	491, 492
Koosen v. Rose (1897), 76 L.T. 145; Digest, Practice, 849, 3952	403, 404, 405
Krell v. Henry, [1903] 2 K.B. 740; 12 Digest 385, 3168; 72 L.J.K.B. 794; 89 L.T. 328; affg. (1902), 18 T.L.R. 823	136, 142
Kulukundis v. Norwich Union Fire Insurance Society, [1937] 1 K.B. 1; [1936] 2 All E.R. 242; Digest Supp.; 105 L.J.K.B. 703; 155 L.T. 114	250, 251
L. v. L., [1931] P. 63; Digest Supp.; 100 L.J.P. 76; 144 L.T. 723	416, 420, 421
Lambert Bros., Ltd. v. Inland Revenue Commissioners (1927), 12 Tax Cas. 1053	296, 302, 305
Lancashire & Yorkshire Ry. Co. v. Bury Corp'n. (1889), 14 App. Cas. 417; 26 Digest 586, 2776; 59 L.J.Q.B. 85; 61 L.T. 417; affg. (1888), 20 Q.B.D. 485	707, 708
Langston Monotype Corp'n., Ltd. v. Anderson, [1911] 2 K.B. 1019; 28 Digest 51, 261; 80 L.J.K.B. 1351; 105 L.T. 398; 5 Tax Cas. 675	284, 288

Lanyon, Re, Lanyon v. Lanyon , [1927] 2 Ch. 264; 44 Digest 456, 2782; 96 L.J.Ch. 487; 137 L.T. 806	436, 437, 438, 442
Lariviere v. Morgan (1872), 7 Ch. App. 550; 8 Digest 449, 237; <i>reversé</i> . (1875), L.R. 7 H.L. 423; 44 L.J.Ch. 457; 32 L.T. 41	384, 387
Larrinaga & Co., Ltd. v. Société Franco-Américaine des Phosphates de Médulla , Paris (1923), 39 T.L.R. 316; 12 Digest 389, 3189	136, 137, 142, 143
Lassence v. Tierney (1849), 1 Mac. & G. 551; 43 Digest 643, 790; 15 L.T.O.S. 557	341, 345
Leadbetter v. Marylebone Corp. , [1904] 2 K.B. 893; 7 Digest 306, 284; 73 L.J.K.B. 1013; 91 L.T. 639; <i>subsequent proceedings</i> , [1905] 1 K.B. 661	470, 473
Leggett (G. W.) & Son v. Normanton (C. H.) & Son (1928), 98 L.J.K.B. 145; Digest Supp.; 140 L.T. 224	779, 780
Leigh's Settled Estates, Re , [1926] Ch. 852; 40 Digest 739, 2678; 95 L.J.Ch. 511; 136 L.T. 395	451, 456, 457
Leslie, Re, Leslie v. French (1883), 23 Ch.D. 552; 29 Digest 383, 3066; 52 L.J.Ch. 762; 48 L.T. 564	610, 611, 612
Levene v. Inland Revenue Comrs. , [1928] A.C. 217; Digest Supp.; 97 L.J.K.B. 377; 139 L.T. 1; 13 Tax Cas. 486	436, 438
Lever Bros., Ltd. v. Kneale & Bagnall , [1937] 2 K.B. 87; [1937] 2 All E.R. 477; Digest Supp.; 106 L.J.K.B. 465; 157 L.T. 30	187
Limmer Asphalt Paving Co. v. Inland Revenue Comrs. (1872), L.R. 7 Exch. 211; 39 Digest 259, 433; 41 L.J.Ex. 106; 26 L.T. 633	527, 530, 531
Lindsey County Council v. Marshall , [1937] A.C. 97; [1936] 2 All E.R. 1076; Digest Supp.; 105 L.J.K.B. 614; 155 L.T. 297	474, 476, 480
Linlithgow (Marquis) v. North British Ry. Co. , [1912] S.C. 1327; 11 Digest 151, case t	263, 267
Lister v. Lister (1889), 15 P.D. 4; 27 Digest 507, 5440; 62 L.T. 90	117, 119
London & North Eastern Ry. Co. v. North Riding of Yorkshire County Council , [1936] A.C. 365; [1936] 1 All E.R. 692; Digest Supp.; 105 L.J.Ch. 133; 154 L.T. 409	707, 708
London County Council v. A.-G. , [1901] A.C. 26; 28 Digest 73, 392; 70 L.J.Q.B. 77; 83 L.T. 605; 4 Tax Cas. 265; <i>reversé</i> , [1900] 1 Q.B. 192	6, 15
Lord Advocate v. Jamieson (1886), 13 R. (Ct. of Sess.) 737; 21 Digest 85, case f	605, 608
Lucas, Re, Rhys v. A.-G. , [1922] 2 Ch. 52; Digest Supp.; 91 L.J.Ch. 480; 127 L.T. 272	787, 769
Luke v. South Kensington Hotel Co. (1879), 11 Ch.D. 121; 17 Digest 222, 370; 48 L.J.Ch. 361; 40 L.T. 638	653, 660, 663
Lyne's Settlement Trusts, Re, Re Gibbs, Lyne v. Gibbs , [1919] 1 Ch. 80; 20 Digest 378, 1152; 88 L.J.Ch. 1; 120 L.T. 81	391, 392
Lysons v. Knowles (Andrew) & Sons, Ltd., Stuart v. Nixon & Bruce , [1901] A.C. 79; 34 Digest 423, 3433; 70 L.J.K.B. 170; 84 L.T. 65; 3 W.C.C. 1; <i>reversé</i> , [1900] 1 Q.B. 780; <i>and reversé</i> , [1900] 2 Q.B. 95	626, 636, 637
M'Cowan v. Baine & Johnson, The Niobe , [1891] A.C. 401; 29 Digest 213, 1702; 65 L.T. 502; <i>previous proceedings</i> (1888), 13 P.D. 55	235
Macdonald v. Tacquah Gold Mines Co. (1884), 13 Q.B.D. 535; 21 Digest 630, 2134; 53 L.J.Q.B. 376; 51 L.T. 210	491, 492, 495, 496
McGregor v. Telford , [1915] 3 K.B. 237; 3 Digest 390, 285; 84 L.J.K.B. 1902; 113 L.T. 84	241, 244
McKenna v. Herlihy, Woodburn v. Herlihy (1920), 7 Tax Cas. 620; 28 Digest 81, case g	5, 14
MacKenzie v. MacKenzie , [1895] A.C. 384; 27 Digest 322, 3008	722, 726, 736, 737, 738, 739
Mackey v. Monks (Preston) , [1918] A.C. 59; 24 Digest 919, 135; 87 L.J.P.C. 28; 118 L.T. 65	53, 54, 59, 63
MacMahon v. MacMahon , [1913] 1 I.R. 154, 428; 27 Digest 224, case k	157, 158, 164, 165
Ma'ay Jam Plantations, Ltd. v. Clark (1935), 19 Tax Cas. 314; Digest Supp.	572, 573
Manuel v. Wilson , [1903] 2 Ch. 494; 17 Digest 233, 479; 72 L.J.Ch. 664; 89 L.T. 522	653, 658
Manchester Corp. v. Audenshaw Urban Council & Denton Urban Council , [1928] Ch. 763; Digest Supp.; 97 L.J.Ch. 276; 139 L.T. 509	707, 708
Mansell v. Griffin , [1908] 1 K.B. 947; 19 Digest 600, 273; 77 L.J.K.B. 676; 99 L.T. 132	518, 520, 521
Maple Flock Co., Ltd. v. Universal Furniture Products (Wembley), Ltd. , [1934] 1 K.B. 148; Digest Supp.; 103 L.J.K.B. 513; 150 L.T. 69	430
Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd. , [1935] A.C. 524; Digest Supp.; 104 L.J.P.C. 88; 153 L.T. 425	136, 137
Markham v. Derby Corp. , [1935] Ch. 320; Digest Supp.; 104 L.J.Ch. 108; 152 L.T. 416	712, 713, 719
Marlborough's (Duke) Settlement, Re, Marlborough (Duke) v. Marjoribanks (1886), 32 Ch.D. 1; 40 Digest 750, 2798; 55 L.J.Ch. 339; 54 L.T. 914	391, 393
Marriott v. Maltby Main Colliery Co. (1920), 90 L.J.K.B. 349; 34 Digest 352, 2833; 124 L.T. 489; 13 B.W.C.C. 353	146, 151
Marsden's Trust, Re (1859), 4 Drew. 594; 37 Digest 513, 1048; 28 L.J.Ch. 906; 33 L.T.O.S. 217	532, 535
Marshal v. Crutwell (1875), L.R. 20 Eq. 328; 27 Digest 164, 1336; 44 L.J.Ch. 504	491, 492, 494
May v. McAlpine (Sir Robert) & Sons (London), Ltd. , [1938] 3 All E.R. 85; Digest Supp.	483, 489
Mellish v. Andrews (1812), 15 East 13; 29 Digest 281, 2285	250, 251
Meyer (Montague L.), Ltd. v. Kivisto (1929), 142 L.T. 480; Digest Supp.	376, 379, 430, 434
Meyer (Montague L.), Ltd. v. Osakeyhtio Carelia Timber Co., Ltd. (1930), 36 Com. Cas. 17; Digest Supp.	430, 434
Meyer (Montague L.), Ltd. v. Travaru A/B H. Cornelius, of Gamleby (1930), 46 T.L.R. 553; Digest Supp.	430
Meyrick's Settlement, Re, Meyrick v. Meyrick , [1921] 1 Ch. 311; 27 Digest 224, 1944; 90 L.J.Ch. 152; 124 L.T. 531	157, 158, 164
Midgley, Re, Midgley v. Midgley , [1893] 3 Ch. 282; 23 Digest 356, 4248; 62 L.J.Ch. 905; 69 L.T. 241	108, 112
Midland Ry. Co. & Kettering, Thrapston & Huntingdon Ry. Co. v. Robinson (1889), 15 App. Cas. 19; 11 Digest 150, 328; 59 L.J.Ch. 442; 62 L.T. 194	263, 267
Miles v. Harford (1879), 12 Ch.D. 691; 37 Digest 104, 387; 41 L.T. 378	574, 575, 576
Millar's Karri & Jarrah Co. (1902) v. Weddel, Turner & Co. (1908), 100 L.T. 128; 39 Digest 572, 1769	430, 435
Mills v. Jones (1929), 142 L.T. 337; Digest Supp.; 14 Tax Cas. 769	284, 292
Milner, Re, Bray v. Milner , [1899] 1 Ch. 563; 37 Digest 453, 551; <i>sub nom. Re Milner, Milner v. Bray</i> , 68 L.J.Ch. 255; 80 L.T. 151	566, 567, 569, 571

	PAGES
Moir, <i>Re</i> , Warner <i>v.</i> Moir (1884), 25 Ch.D. 605; 44 Digest 468, 2881; 53 L.J.Ch. 474; 50 L.T. 10	436, 437
Monckton's Settlement, <i>Re</i> , Monckton <i>v.</i> Monckton, [1913] 2 Ch. 636; 20 Digest 338, 803; 83 L.J.Ch. 34; 109 L.T. 624	391, 392, 393
Monypenny <i>v.</i> Dering (1852), 2 De G. M. & G. 145; 37 Digest 123, 548; 22 L.J.Ch. 313; 19 L.T.O.S. 320	574, 575
Moorsom <i>v.</i> Kymer (1814), 2 M. & S. 303; 41 Digest 626, 4580	187, 190
Morgan <i>v.</i> Pike (1854), 14 C.B. 473; 17 Digest 223, 384; 23 L.J.C.P. 64; 22 L.T.O.S. 242	653, 657
Morgan <i>v.</i> Tareni Colliery Co., Ltd., [1938] 1 K.B. 433; [1937] 4 All E.R. 505; Digest Supp.; 107 L.J.K.B. 233; 158 L.T. 400; 30 B.W.C.C. 448	585, 586
Morrall <i>v.</i> Sutton (1842), 5 Beav. 100; 44 Digest 916, 7751; 14 L.J.Ch. 266; 5 L.T.O.S. 1	308
Mulherron <i>v.</i> Mulherron, [1923] S.C. 461; 27 Digest 308, case 2849 <i>iii</i>	723, 738
Murphy <i>v.</i> Hurly, [1922] 1 A.C. 369; 31 Digest 317, 4588; 91 L.J.P.C. 116; 127 L.T. 49	690, 691, 692
Murray <i>v.</i> Murray (1894), 21 R. (Ct. of Sess.) 723	723, 738
Murray <i>v.</i> Schwachman, [1937] 2 All E.R. 68; Digest Supp.; 106 L.J.K.B. 354; 156 L.T. 407	22
Murray <i>v.</i> Secretary of State for India in Council, [1931] W.N. 91; Digest Supp.	762, 763
Nash, <i>Re</i> , Cook <i>v.</i> Frederick, [1910] 1 Ch. 1; 37 Digest 123, 552; 79 L.J.Ch. 1; 101 L.T. 837	221, 222
Natal (Lord Bp.), <i>Re</i> (1865), 3 Moo.P.C.C.N.S. 115; 17 Digest 467, 325; 12 L.T. 188	694
Natbony <i>v.</i> Natbony, [1933] P. 1; Digest Supp.; 101 L.J.P. 58; 147 L.T. 252	349, 350
National Standard Life Assurance Corp., <i>Re</i> , [1917] 1 Ch. 193; 10 Digest 1072, 7500; 86 L.J.Ch. 172; 115 L.T. 751	749, 750
Neumann <i>v.</i> Inland Revenue Comrs., [1934] A.C. 215; Digest Supp.; 103 L.J.K.B. 210; 150 L.T. 481; 18 Tax Cas. 332	98, 103, 104
Nickoll & Knight <i>v.</i> Ashton, Edridge & Co., [1901] 2 K.B. 126; 12 Digest 382, 3153; 70 L.J.K.B. 600; 84 L.T. 804	136, 137
North British Ry. Co. <i>v.</i> Budhill Coal & Sandstone Co., [1910] A.C. 116; 34 Digest 607, 43; 79 L.J.P.C. 31; 101 L.T. 609	263, 267
North Stafford Steel, etc., Co. <i>v.</i> Ward (1868), L.R. 3 Exch. 172; 17 Digest 297, 1104	599, 601
Northumberland (Duke) <i>v.</i> A.-G., [1905] A.C. 406; 21 Digest 84, 602; 74 L.J.K.B. 734; 93 L.T. 88; <i>affg.</i> , [1904] 1 K.B. 762	606, 609
Norton, <i>Re</i> , Pinney <i>v.</i> Beauchamp, [1929] 1 Ch. 84; Digest Supp.; 98 L.J.Ch. 219; 140 L.T. 348	450, 451, 457
Norton <i>v.</i> Ellam (1837), 2 M. & W. 461; 32 Digest 329, 148; 6 L.J.Ex. 121	44, 50
Oldroyd <i>v.</i> Oldroyd, [1896] P. 175; 27 Digest 277, 2480; 65 L.J.P. 113; 75 L.T. 281	722, 728
Olds Discount Co., Ltd. <i>v.</i> Cohen (1937), Unreported; Oct. 22	275, 277, 279
Oliver's Settlement, <i>Re</i> , Evered <i>v.</i> Leigh, [1905] 1 Ch. 191; 37 Digest 68, 102; 74 L.J.Ch. 62	221, 222
O'Rourke <i>v.</i> Darbshire, [1920] A.C. 581; 18 Digest 84, 377; 89 L.J.Ch. 162; 123 L.T. 68; <i>affg.</i> S.C. <i>sub nom.</i> <i>Re</i> Whitworth, O'Rourke <i>v.</i> Darbshire, [1919] 1 Ch. 320	592, 595, 598
Otway <i>v.</i> Otway, Otway <i>v.</i> Otway & Höffer (1888), 13 P.D. 141; 27 Digest 368, 3539; 57 L.J.P. 81; 59 L.T. 153	723, 734, 735
Pailin <i>v.</i> Northern Employers' Mutual Indemnity Co., [1925] 2 K.B. 73; 29 Digest 407, 3210; 133 L.T. 77; 18 B.W.C.C. 32	626, 628, 629, 641, 645
Parker's Settled Estates, <i>Re</i> , Parker <i>v.</i> Parker, [1928] 1 Ch. 247; 40 Digest 774, 3047; 138 L.T. 360	450, 456, 457
Parlement Belge, The (1880), 5 P.D. 197; 11 Digest 537, 394; 42 L.T. 273	384, 385, 387
Pelton Brothers <i>v.</i> Harrison, [1891] 2 Q.B. 422; 27 Digest 121, 970; 60 L.J.Q.B. 742; 65 L.T. 514; <i>subsequent proceedings</i> , [1892] 1 Q.B. 118	200
Performing Right Society, Ltd. <i>v.</i> Mitchell & Booker (Palais de Danse), Ltd., [1924] 1 K.B. 762; Digest Supp.; 93 L.J.K.B. 306; 131 L.T. 243	245, 248
Perry <i>v.</i> Wright, Cain <i>v.</i> Leyland & Co. (1900), Ltd., Bailey <i>v.</i> Kenworthy, Ltd., Gough <i>v.</i> Crawshaw Brothers, Cyfartha, Ltd., [1908] 1 K.B. 441; 34 Digest 409, 3329; 77 L.J.K.B. 236; 98 L.T. 327; 1 B.W.C.C. 351	585, 586
Peru Republic <i>v.</i> Peruvian Guano Co. (1887), 36 Ch.D. 489; 1 Digest 46, 364; 56 L.J.Ch. 1081; 57 L.T. 337	762, 763
Peterborough Royal Foxhound Show Society <i>v.</i> Inland Revenue Comrs., [1936] 2 K.B. 497; [1936] 1 All E.R. 813; Digest Supp.; 105 L.J.K.B. 427; 155 L.T. 134; 20 Tax Cas. 249	311, 312, 313
Pictou Municipality <i>v.</i> Geldert, [1893] A.C. 524; 26 Digest 400, 1252; 63 L.J.P.C. 37; 69 L.T. 510	706, 708, 709
Pike <i>v.</i> Fitzgibbon, Martin <i>v.</i> Fitzgibbon (1881), 17 Ch.D. 454; 27 Digest 120, 968; 50 L.J.Ch. 394; 44 L.T. 562; <i>varying</i> (1880), 14 Ch.D. 837	200
Planche <i>v.</i> Colburn (1831), 8 Bing. 14; 12 Digest 350, 2906; 1 L.J.C.P. 7	203, 208
Plunkett <i>v.</i> Barclays Bank, Ltd., [1936] 2 K.B. 107; [1936] 1 All E.R. 653; Digest Supp.; 105 L.J.K.B. 379; 154 L.T. 465	491, 492
Policy No. 6402 of the Scottish Equitable Life Assurance Society, <i>Re</i> , [1902] 1 Ch. 282; 29 Digest 375, 3007; 71 L.J.Ch. 189; 85 L.T. 720	357, 359, 364
Pollurian S.S. Co., Ltd. <i>v.</i> Young, [1915] 1 K.B. 922; 29 Digest 273, 2213; 84 L.J.K.B. 1025; 112 L.T. 1053	250, 251
Portland (Duke) <i>v.</i> Topham (Lady) (1864), 11 H.L.Cas. 32; 37 Digest 503, 963; 34 L.J.Ch. 113; 10 L.T. 355; <i>reussg.</i> (1862), 31 Beav. 525	532, 533
Potts, <i>Re</i> , <i>Ex p.</i> Epstein <i>v.</i> Trustee & Bankrupt, [1935] Ch. 334; Digest Supp.; 104 L.J.Ch. 49; 152 L.T. 456	195, 196
Poulden <i>v.</i> Poulden & Alexander, [1938] P. 63; [1938] 1 All E.R. 508; Digest Supp.; 107 L.J.P. 27; 158 L.T. 231	65, 69
Pountney <i>v.</i> Clayton (1883), 11 Q.B.D. 820; 34 Digest 610, 86; 52 L.J.Q.B. 566; 49 L.T. 283	599, 600, 602
Powell <i>v.</i> Streatham Manor Nursing Home, [1935] A.C. 243; Digest Supp.; 104 L.J.K.B. 304; 152 L.T. 563	22, 474
Poyser, <i>Re</i> , Landon <i>v.</i> Poyser, [1910] 2 Ch. 444; 40 Digest 694, 2297; 79 L.J.Ch. 748; 103 L.T. 134	553, 554, 555, 559
Poyser <i>v.</i> Minors (1881), 7 Q.B.D. 329; 13 Digest 505, 562; 50 L.J.Q.B. 555; 45 L.T. 33	187, 188, 192

	PAGES
Price v. Phillips (1894), 11 T.L.R. 86; 32 Digest 468, 1328	762, 763, 764
Prickett v. Badger (1856), 1 C.B.N.S. 296; 1 Digest 509, 1754; 26 L.J.C.P. 33	203, 208
Proctor v. Bath & Wells (Bp.) (1794), 2 Hy.Bl. 358; 37 Digest 105, 393	574, 575
Prudential Insurance Co. v. Inland Revenue Comrs., [1904] 2 K.B. 658; 29 Digest 443, 3415; 73 L.J.K.B. 734; 91 L.T. 520	626, 630
Pryor v. Pryor (1864), 2 De G. J. & Sm. 205; 37 Digest 511, 1031; 33 L.J.Ch. 441; 10 L.T. 360	533
Pulford v. Pulford, [1923] P. 18; 27 Digest 307, 2846; 92 L.J.P. 14; 128 L.T. 156	722, 730
Puller v. Glover (1810), 12 East 124; 29 Digest 277, 2245	250, 251
Purser v. Purser, [1913] 1 I.R. 422, 428; 27 Digest 223, case h	157, 165
Putsman v. Taylor, [1927] 1 K.B. 637; Digest Supp.; 96 L.J.K.B. 315; 136 L.T. 285; <i>affd.</i> , [1927] 1 K.B. 741	157
Quarman v. Burnett (1840), 6 M. & W. 499; 34 Digest 23, 29; 9 L.J. Ex. 308	779, 780
Quinn v. Leatham, [1901] A.C. 495; 30 Digest 183, 504; 70 L.J.P.C. 76; 85 L.T. 289	678, 682
R. v. All Saints, Wigan (Churchwardens) (1876), 1 App. Cas. 611; 16 Digest 277, 899; 35 L.T. 381; <i>affg.</i> S.C. <i>sub nom.</i> R. v. Wigan (1874), L.R. 9 Q.B. 317	226, 229
R. v. Banks, [1916] 2 K.B. 621; 15 Digest 848, 9323; 85 L.J.K.B. 1657; 115 L.T. 457	134, 135
R. v. Benson, [1908] 2 K.B. 270; 14 Digest 235, 2218; 77 L.J.K.B. 644; 98 L.T. 933	399, 401
R. v. Ellis, [1910] 2 K.B. 746; 14 Digest 361, 3819; 79 L.J.K.B. 841; 102 L.T. 922	380, 382
R. v. Errington (1922), 16 Cr. App. Rep. 148; 14 Digest 234, 2201	399, 401
R. v. Gee, R. v. Bibby, R. v. Dunscombe, [1936] 2 K.B. 442; [1936] 2 All E.R. 89; Digest Supp.; 105 L.J.K.B. 739; 155 L.T. 31	674, 676
R. v. Glynn (1871), L.R. 7 Q.B. 16; 3 Digest 390, 287; 41 L.J.M.C. 58; 26 L.T. 61	241, 243, 244
R. v. Hampstead Borough Council, <i>Ex p.</i> Woodward (1917), 116 L.T. 213; 13 Digest 302, 341	226, 230
R. v. Harrington (1864), 3 New Rep. 468; 3 Digest 399, 334; <i>sub nom.</i> R. v. Harrington, 9 L.T. 721	241, 242, 243, 244
R. v. High Halden (Inhabitants) (1859), 1 F. & F. 678; 26 Digest 353, 789	707, 708
R. v. Hopley (1860), 2 F. & F. 202; 19 Digest 599, 271	518, 521
R. v. Peckham (1935), 154 L.T. 275; Digest Supp.; 25 Cr. App. Rep. 125	784, 786
R. v. Southerton (1805), 6 East, 126; 42 Digest 398, 4480	499, 503
R. v. Southwold Corp., <i>Ex p.</i> Wrighton (1907), 97 L.T. 431; 16 Digest 316, 1288	226, 230
R. v. Triffitt, [1938] 2 All E.R. 818; Digest Supp.	355, 356
R. v. Willshire (1881), 6 Q.B.D. 366; 15 Digest 740, 7991; 50 L.J.M.C. 57; 44 L.T. 222	787, 789
Raine v. Jobson & Co., [1901] A.C. 404; 24 Digest 916, 105; 70 L.J.K.B. 771; 85 L.T. 141	53, 56
Ramsden v. Dyson (1866), L.R. 1 H.L. 129; 32 Digest 259, 437; <i>reversg.</i> S.C. <i>sub nom.</i> Thornton v. Ramsden (1864), 4 Giff. 519	610, 612
Rankin v. Potter (1873), L.R. 6 H.L. 83; 29 Digest 278, 2259; 42 L.J.C.P. 169; 29 L.T. 142; <i>affg.</i> (1870), L.R. 5 C.P. 341	250, 251
Reade-Revell, <i>Re</i> , Crellin v. Mellington, [1930] 1 Ch. 52; Digest Supp.; 99 L.J.Ch. 136; 142 L.T. 177	181, 182
Reich, <i>Re</i> , Public Trustee v. Guthrie (1924), 40 T.L.R. 398	436, 437
Rhodes v. Forwood (1876), 1 App. Cas. 256; 1 Digest 540, 1944; 47 L.J.Q.B. 396; 34 L.T. 390	203, 208
Richardson, <i>Re</i> , Richardson v. Richardson, [1915] 1 Ch. 353; 23 Digest 420, 4914; 84 L.J.Ch. 438; 112 L.T. 554	270, 271
Ritter v. Godfrey, [1920] 2 K.B. 47; Digest, Practice, 854, 4002; 89 L.J.K.B. 467; 122 L.T. 396	403, 405
Roberts v. Oppenheim (1884), 26 Ch.D. 724; 18 Digest 87, 390; 53 L.J.Ch. 1148; 50 L.T. 729	592, 597
Rodoconachi v. Elliott (1874), L.R. 9 C.P. 518; 29 Digest 218, 1747; 43 L.J.C.P. 255; 31 L.T. 239	250, 251
Rogers v. Whiteley, [1892] A.C. 118; 21 Digest 627, 2121; 61 L.J.Q.B. 512; 66 L.T. 303	491, 493
Rose v. Ford, [1937] A.C. 826; [1937] 3 All E.R. 359; Digest Supp.; 106 L.J.K.B. 576; 157 L.T. 174	85, 86, 483, 487, 488, 489
Rose v. Rose (1883), 8 P.D. 98; 27 Digest 362, 3470; 52 L.J.P. 25; 48 L.T. 378	416, 418, 419, 420, 421, 422
Ross, <i>Re</i> (1904), 7 O.L.R. 493; 44 Digest 442, case q	436, 437
Roura & Forgas v. Townend, [1919] 1 K.B. 189; 29 Digest 273, 2214; 88 L.J.K.B. 393; 120 L.T. 116	250, 251
Roux v. Salvador (1836), 3 Bing. N.C. 266; 29 Digest 263, 2129; 7 L.J.Ex. 328	250, 251
Rowley v. Rowley (1866), L.R. 1 Sc. & Div. 63; 27 Digest 325, 3039; 35 L.J.P. & M. 110; <i>affg.</i> (1864), 3 Sw. & Tr. 338	416, 421
Rowson, <i>Re</i> , Field v. White (1885), 29 Ch.D. 358; 23 Digest 366, 4343; 54 L.J.Ch. 950; 52 L.T. 825	107, 108, 112
Royal Exchange Assurance v. Hope, [1928] Ch. 179; Digest Supp.; 97 L.J.Ch. 153; 138 L.T. 446	358, 359
Russell v. Men of Devon (1788), 2 Term Rep. 667; 26 Digest 587, 2780	93, 94
Russian Bank for Foreign Trade, <i>Re</i> , [1933] Ch. 745; Digest Supp.; 102 L.J.Ch. 309; 149 L.T. 65	384, 388
Rylands v. Fletcher (1868), L.R. 3 H.L. 330; 36 Digest 187, 311; 37 L.J.Ex. 161; 19 L.T. 220; <i>affg.</i> (1866), L.R. 1 Exch. 265; <i>reversg.</i> (1865), 3 H. & C. 774	321, 327
Samuel (P.) & Co. v. Dumas, [1924] A.C. 431; 29 Digest 112, 666; 93 L.J.K.B. 415; 130 L.T. 771; <i>affg.</i> , [1923] 1 K.B. 592	250, 251
Sandbrook, <i>Re</i> , Noel v. Sandbrook, [1912] 2 Ch. 471; 44 Digest 444, 2686; 81 L.J.Ch. 800; 107 L.T. 148	436, 437, 442
Sanderson, <i>Re</i> , Sanderson v. Sanderson (1912), 106 L.T. 26; 37 Digest 457, 585	566, 570, 571
Saunders v. Shafto, [1905] 1 Ch. 126; 40 Digest 593, 1274; 74 L.J.Ch. 110; 91 L.T. 789	532, 534
Saunderson v. Piper (1839), 5 Bing. N.C. 425; 6 Digest 25, 148; 8 L.J.C.P. 227	308
Scott v. Morley (1887), 20 Q.B.D. 120; 27 Digest 180, 1469; 57 L.J.Q.B. 43; 57 L.T. 919	200
Scott v. Scott (1908), S.C. 1124; 16 S.L.T. 272	723, 737
Scottish Marine Insurance Co. v. Turner (1853), 4 H.L.Cas. 312, n.; 29 Digest 209, 1678; 21 L.T.O.S. 10	250, 251
Sharpe (otherwise Morgan) v. Sharpe, [1909] P. 20; 27 Digest 528, 5710; 78 L.J.P. 21; 99 L.T. 884	116, 118

	PAGES
Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G., [1915] A.C. 654; 26 Digest 581, 2716; 84 L.J.K.B. 907; 112 L.T. 826; <i>reussg.</i> , [1914] 3 K.B. 1	706, 708, 710
Shipton, Anderson & Co. v. Weil Brothers & Co., [1912] 1 K.B. 574; 39 Digest 564, 1703; 81 L.J.K.B. 910; 106 L.T. 372	430, 433
Shoreditch Corpn. v. Bull (1904), 90 L.T. 210; 26 Digest 412, 1320; <i>affg.</i> (1902), 67 J.P. 37	93, 94, 95, 96, 97
Sidney v. Sidney (1865), 4 Sw. & Tr. 178; 27 Digest 503, 5383; 34 L.J.P. M. & A. 122; 12 L.T. 826; <i>on appeal</i> (1866), L.R. 1 P. & D. 78; (1867), 36 L.J.P. & M. 73	117, 118
Simbro Trading Co. v. Posograph (Parent) Corpn., [1929] 2 K.B. 266; Digest Supp.; 98 L.J.K.B. 631; 141 L.T. 395	187, 188
Simmons v. Heath Laundry Co., [1910] 1 K.B. 543; 34 Digest 21, 15; 79 L.J.K.B. 229; 101 L.T. 645; 3 B.W.C.C. 53	474, 481
Simmons v. Liberal Opinion, Ltd., <i>Re</i> Dunn, [1911] 1 K.B. 966; 42 Digest 343, 3874; 80 L.J.K.B. 617; 104 L.T. 264	499, 501
Simpson v. Charrington & Co., Ltd., [1934] 1 K.B. 64; Digest Supp.; 103 L.J.K.B. 49; 150 L.T. 103; <i>on appeal</i> , [1935] A.C. 325; Digest Supp.; 104 L.J.K.B. 226; 152 L.T. 469	121, 122
Simpson v. Westminster Palace Hotel Co. (1860), 8 H.L.Cas. 712; 9 Digest 664, 4423; 2 L.T. 707	740, 742
Sinclair's Life Policy, <i>Re</i> , [1938] 3 All E.R. 124; Digest Supp.	357, 358, 359, 363, 364, 365, 366
Skilton v. Epsom & Ewell Urban District Council, [1937] 1 K.B. 112; [1936] 2 All E.R. 50; Digest Supp.; 106 L.J.K.B. 41; 154 L.T. 700	93, 94, 96
Smith v. Smith, [1915] P. 288; 27 Digest 317, 2949; 85 L.J.P. 16; 113 L.T. 1166	771, 773
Smith v. Standard Steam Fishing Co., Burdon v. Greason & Co., [1906] 2 K.B. 275; 24 Digest 917, 124; 75 L.J.K.B. 640; 95 L.T. 42	53, 57
Smith v. Wilson (1832), 3 B. & Ad. 728; Digest Supp.; 1 L.J.K.B. 194	599, 600
Smith's Estate, <i>Re</i> , Bilham v. Smith, [1937] Ch. 636; [1937] 3 All E.R. 472; Digest Supp.; 106 L.J.Ch. 377; 157 L.T. 511	610, 612
South-East Lancashire Insurance Co., <i>Re</i> (1932), 102 L.J.Ch. 27; Digest Supp. . .	749, 750
Southern Rhodesia, <i>Re</i> , [1919] A.C. 211; 17 Digest 415, 7; 88 L.J.P.C. 1; 119 L.T. 689	694, 695
Spencer's Case (1583), 5 Co. Rep. 16 a; 31 Digest 144, 2798	166, 167
Stanes v. Stanes (1877), 3 P.D. 42; 27 Digest 325, 3040; 47 L.J.P. 19; 39 L.T. 46	416, 423
Stevens, <i>Re</i> , Cooke v. Stevens, [1898] 1 Ch. 162; 24 Digest 660, 6864; 67 L.J.Ch. 118; 77 L.T. 508; <i>affg.</i> , [1897] 1 Ch. 422	108, 113
Stevenson v. Stevenson, [1911] P. 191; 27 Digest 320, 2986; 80 L.J.P. 137; 105 L.T. 183	765, 766
Stile v. Finch (1634), Cro. Car. 381; 32 Digest 545, 1985	762, 763
Stirling v. Maitland (1864), 5 B. & S. 840; 1 Digest 541, 1961; 34 L.J.Q.B. 1; 11 L.T. 337	203, 208
Stokes, <i>Re</i> , <i>Ex p.</i> Mellish, [1919] 2 K.B. 256; 29 Digest 386, 3086; 88 L.J.K.B. 794; 121 L.T. 391	610, 612
Stoneham, <i>Re</i> , Stoneham v. Stoneham, [1919] 1 Ch. 149; 25 Digest 509, 59; 88 L.J.Ch. 77; 120 L.T. 341	358, 359
Story v. Sheard, [1892] 2 Q.B. 515; 24 Digest 648, 6745; 61 L.J.M.C. 178; 67 L.T. 423	330, 331
Strangways-Lesmere v. Clayton, [1936] 2 K.B. 11; [1936] 1 All E.R. 484; Digest Supp.; 105 L.J.K.B. 385; 154 L.T. 463	474, 480
Stray, <i>Re</i> , <i>Ex p.</i> Stray (1867), 2 Ch. App. 374; 4 Digest 128, 1178; 36 L.J.Bey. 7; 16 L.T. 250	745, 746, 748
Strutt v. Tippet (1889), 62 L.T. 475; 29 Digest 384, 3078	610, 612
Stuart, <i>Re</i> , Smith v. Stuart (1896), 74 L.T. 546; 24 Digest 786, 3175	108, 108
Stukeley v. Butler (1614), Hob. 168; 17 Digest 299, 1116	599, 600, 604
Sturt, <i>Re</i> , De Bunsen v. Hardinge, [1922] 1 Ch. 416; Digest Supp.; 91 L.J.Ch. 289; 126 L.T. 460	391, 393
Swan v. Pure Ice Co., Ltd., [1935] 2 K.B. 265; Digest Supp.; 104 L.J.K.B. 583; 152 L.T. 407; 28 B.W.C.C. 9	250, 251
Swinburne, <i>Re</i> , Swinburne v. Pitt (1884), 27 Ch.D. 696; 37 Digest 453, 550; 54 L.J.Ch. 229	566, 567, 571
Sydney Municipal Council v. Bourke, [1895] A.C. 433; 26 Digest 400, 1254; 64 L.J.P.C. 140; 72 L.T. 605	707, 708
Symons v. Symons, [1897] P. 167; 27 Digest 364, 3490; 66 L.J.P. 81; 77 L.T. 142	723, 733, 735, 737, 739
Synge v. Synge, [1901] P. 317; 27 Digest 375, 3631; 70 L.J.P. 97; 85 L.T. 83	722, 728
Talbot-Ponsonby's Estate, <i>Re</i> , Talbot-Ponsonby v. Talbot-Ponsonby, [1937] 4 All E.R. 309; Digest Supp.	436, 438
Tamplin (F. A.) S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd., [1916] 2 A.C. 397; 12 Digest 390, 3194; 85 L.J.K.B. 1389; <i>sub nom.</i> <i>Re</i> F. A. Tamplin S.S. Co., Ltd., & Anglo-Mexican Petroleum Products Co., Ltd., 115 L.T. 315; <i>affg.</i> , [1916] 1 K.B. 485; [1915] 3 K.B. 668	136, 137, 142, 144, 416, 426
Tamvaco v. Lucas (1862), 3 B. & S. 89; 39 Digest 577, 1808; 31 L.J.Q.B. 296; 6 L.T. 697	430, 433
Tasmania, The (1888), 13 P.D. 110; 41 Digest 684, 5137; 57 L.J.P. 49; 59 L.T. 263	22
Tasmania (Ship Owners & Freight Owners) v. Smith, etc., City of Corinth (Owners), The Tasmania (1890), 15 App. Cas. 223; 41 Digest 708, 5446; 63 L.T. 1; <i>reussg.</i> (1889), 14 P.D. 53	52, 55, 61
Tatham, Bromage & Co. v. Burr, The Engineer, [1898] A.C. 382; 29 Digest 215, 1713; 67 L.J.P. 61; 78 L.T. 473	235
Taxes Commissioner v. Melbourne Trust, Ltd., [1914] A.C. 1001; 28 Digest 18, case 92 i; 84 L.J.P.C. 21	297, 307
Taylor v. Caldwell (1863), 3 B. & S. 826; 12 Digest 371, 3093; 32 L.J.Q.B. 164; 8 L.T. 356	136, 137, 142
Taylor v. Dewar (1864), 5 B. & S. 58; 29 Digest 214, 1709; 33 L.J.Q.B. 141; 10 L.T. 267	235
Teag, <i>Re</i> , Public Trustee v. Bryant, [1936] 2 All E.R. 878; Digest Supp.	436, 437
Thames Conservators v. Kent, [1918] 2 K.B. 272; 44 Digest 114, 914; 88 L.J.K.B. 537; 120 L.T. 16	367, 368, 369
Thelluson v. Cosling (1803), 4 Esp. 266; 22 Digest 319, 3127	80
Thomas v. Thomas, [1924] P. 194; 27 Digest 315, 2925; 93 L.J.P. 61; 130 L.T. 716	723, 730, 731, 738

Thompson v. London, Midland & Scottish Ry. Co., [1930] 1 K.B. 41; Digest Supp.; 98 L.J.K.B. 615; 141 L.T. 382 ..	548, 549
Thomson (W.) & Co. v. Anderson (or Scrimgeour) (1921), 91 L.J.P.C. 87; 34 Digest 318, 2602; 126 L.T. 386; 15 B.W.C.C. 77 ..	73, 79
Thomson (W.) & Co. v. Mackay (1921), 90 L.J.K.B. 1337; 34 Digest 255, 2181; 126 L.T. 33; 14 B.W.C.C. 143; <i>affg.</i> S.C. <i>sub nom.</i> Mackay v. Cramond (Owners) (1920), 89 L.J.K.B. 1036 ..	585, 589
Tierney v. Smith (1936), Unreported, Feb. 20 ..	537, 545
Tillett v. Nixon (1883), 25 Ch.D. 238; 35 Digest 521, 2506; 53 L.J.Ch. 199; 49 L.T. 598 ..	231, 233
Tootal's Estate, <i>Re</i> , Hankin v. Kilburn (1876), 2 Ch.D. 628; 39 Digest 159, 518 ..	270, 271
Topham v. Portland (Duke) (1869), 5 Ch.App. 40; 37 Digest 503, 965; 39 L.J.Ch. 259; 22 L.T. 847 ..	532, 533, 535
Tredway v. Machin (1904), 91 L.T. 310; 31 Digest 346, 4890 ..	690, 691, 692
Trego v. Hunt, [1896] A.C. 7; 43 Digest 9, 44; 65 L.J.Ch. 1; 73 L.T. 514; <i>revers.</i> , [1895] 1 Ch. 462 ..	527, 530
Tress v. Tress (1887), 12 P.D. 128; 27 Digest 280, 2501; 56 L.J.P. 93; 57 L.T. 501 ..	771, 772
Tunno v. Edwards (1810), 12 East 488; 29 Digest 300, 2462 ..	250, 251
Turk v. Turk, Duffy v. Duffy, [1931] P. 116; Digest Supp.; 100 L.J.P. 90; 145 L.T. 331; <i>subsequent proceedings</i> (1932), 147 L.T. 18 ..	116, 118
Twopeny's Settlement, <i>Re</i> , Monro v. Twopeny, [1924] 1 Ch. 522; 20 Digest 341, 827; 93 L.J.Ch. 323; 130 L.T. 816 ..	391, 393, 396, 397
Tyler, <i>Re</i> , <i>Ex p.</i> Official Receiver, [1907] 1 K.B. 865; 29 Digest 385, 3083; 76 L.J.K.B. 541; 97 L.T. 30 ..	610, 611, 614
Tyrer & Co. & Hessler & Co., <i>Re</i> (1902), 86 L.T. 697; 41 Digest 363, 2112 ..	690, 691
United Kingdom Mutual Steamship Assurance Assocn., Ltd. v. Boulton (1898), 3 Com. Cas. 330; 29 Digest 209, 1679 ..	250, 251
U.S.A. v. McRae (1869), L.R. 8 Eq. 69; 20 Digest 271, 303; 38 L.J.Ch. 406; 20 L.T. 476 ..	678, 681, 682
U.S.A. v. Wagner (1867), 2 Ch. App. 582; 1 Digest 45, 357; 36 L.J.Ch. 624; 16 L.T. 646 ..	678, 685
Vandergucht v. De Blaquiére (1839), 3 My. & Cr. 229; 27 Digest 223, 1942 ..	157, 158
Vatcher v. Paull, [1915] A.C. 372; 37 Digest 492, 865; 84 L.J.P.C. 86; 112 L.T. 737 ..	532, 533
Vickers-Armstrong, Ltd. v. Regan, [1933] 1 K.B. 232; Digest Supp.; 101 L.J.K.B. 657; 147 L.T. 298; 25 B.W.C.C. 211 ..	411, 412, 413
Vigers Brothers v. Sanderson Brothers, [1901] 1 K.B. 608; 39 Digest 466, 919; 70 L.J.K.B. 383; 84 L.T. 464 ..	430, 434
Vinall v. De Pass, [1892] A.C. 90; 21 Digest 636, 2163; 61 L.J.Q.B. 507; 66 L.T. 422; <i>affg.</i> S.C. <i>sub nom.</i> De Pass v. Capital & Industries Corpn., [1891] 1 Q.B. 216 ..	491, 492
Von Brockdorff v. Malcolm (1885), 30 Ch.D. 172; 37 Digest 480, 771; 55 L.J.Ch. 121; 53 L.T. 263 ..	566, 569
Wade v. Simeon (1846), 2 C.B. 548; 12 Digest 195, 1542; 15 L.J.C.P. 114; 6 L.T.O.S. 346 ..	686, 687, 689
Wakelee v. Davis (1876), 25 W.R. 60; 32 Digest 545, 1987 ..	762, 763
Walcot v. Botfield (1854), Kay, 534; 44 Digest 468, 2380; 23 L.T.O.S. 127 ..	436, 437, 438
Walker, <i>Re</i> , Macintosh-Walker v. Walker, [1908] 2 Ch. 705; 20 Digest 340, 826; 77 L.J.Ch. 755; 99 L.T. 469 ..	391, 393
Walker v. Crystal Palace Football Club, Ltd., [1910] 1 K.B. 87; 34 Digest 239, 2045; 79 L.J.K.B. 229; 101 L.T. 645; 3 B.W.C.C. 53 ..	474, 481
Wallis, Son & Wells v. Pratt & Haynes, [1910] 2 K.B. 1003; 12 Digest 413, 3328; 79 L.J.K.B. 1013; 103 L.T. 118; <i>on appeal</i> , [1911] A.C. 394 ..	250, 251
Ware, <i>Re</i> , <i>Ex p.</i> Drake (1877), 5 Ch.D. 866; 43 Digest 530, 664; 46 L.J.Bcy. 105; 36 L.T. 677 ..	580, 581, 584
Watson Bros. v. Inland Revenue (1902), 4 F. (Ct. of Sess.) 795; 28 Digest 41, case i; 4 Tax Cas. 441 ..	572, 573
Weavings v. Kirk & Randall, [1904] 1 K.B. 213; 24 Digest 920, 145; 73 L.J.K.B. 77; 89 L.T. 577 ..	53, 56, 60
Webb v. Stenton (1883), 11 Q.B.D. 518; 21 Digest 625, 2107; 52 L.J.Q.B. 584; <i>sub nom.</i> <i>Re</i> Hatton, Webb v. Stenton, 49 L.T. 432 ..	491, 495
Weld-Blundell v. Stephens, [1920] A.C. 956; 36 Digest 126, 837; 89 L.J.K.B. 705; 123 L.T. 593 ..	722, 728
Wellesley (Lady) v. Mornington (Earl) (1855), 2 K. & J. 143; 37 Digest 505, 983 ..	533
Wells v. Ody (1836), 1 M. & W. 452; 19 Digest 135, 914; 5 L.J.Ex. 199; <i>previous proceedings</i> (1835), 2 Cr. M. & R. 128 ..	470, 471
Wemyss v. Wemyss's Trustees, [1921] S.C. 30; 44 Digest 443, case b ..	436, 438
Wentworth v. Cock (1839), 10 Ad. & El. 42; 24 Digest 618, 6433; 8 L.J.Q.B. 230 ..	108
Wesleyan & General Assurance Society v. A.-G., [1933] Ch. 591; Digest Supp.; 102 L.J.Ch. 145; 148 L.T. 403 ..	749, 750
Westminster Corpn. v. Southern Ry. Co. and Smith & Son, Ltd., Westminster Corpn. and Kent Valuation Committee v. Southern Ry. Co. and Pullman Car Co., Ltd., [1936] A.C. 511; [1936] 2 All E.R. 322; Digest Supp.; 105 L.J.K.B. 537; <i>sub nom.</i> <i>Re</i> Southern Ry. Co.'s Appeals, 155 L.T. 33 ..	6, 15
Weston's Settlement, <i>Re</i> , Neeves v. Weston, [1906] 2 Ch. 620; 37 Digest 451, 540; 76 L.J.Ch. 54; 95 L.T. 581 ..	566, 567, 570, 571
Wheeldon v. Burrows (1879), 12 Ch.D. 31; 19 Digest 45, 253; 48 L.J.Ch. 853; 41 L.T. 327 ..	599, 600
White v. Bijou Mansions, Ltd., [1937] Ch. 610; [1937] 3 All E.R. 269; Digest Supp.; 157 L.T. 105; <i>affd. on app.</i> , [1938] Ch. 351; [1938] 1 All E.R. 546 ..	125, 129, 357, 358, 359, 365
White Sea Timber Trust, Ltd. v. North (W. W.), Ltd. (1932), 44 L.L.R. 390; Digest Supp.; 148 L.T. 263 ..	376, 379
Wigglesworth v. Dallison (1779), 1 Doug. K.B. 201; 17 Digest 40, 444 ..	599, 600
Wilkinson, <i>Re</i> , Page v. Public Trustee, [1926] Ch. 842; 44 Digest 442, 2678; 95 L.J.Ch. 528; 135 L.T. 736 ..	436, 437
Willson v. Love, [1896] 1 Q.B. 626; 2 Digest 24, 143; 65 L.J.Q.B. 474; 74 L.T. 580 ..	166, 167
Winspear v. Accident Insurance Co. (1880), 6 Q.B.D. 42; 29 Digest 399, 3168; 50 L.J.Q.B. 292; 43 L.T. 459 ..	146, 150

	PAGES
Withers & Co., <i>Re</i> , [1930] 2 K.B. 192; Digest Supp.; 99 L.J.K.B. 565; 143 L.T. 347	187, 188, 189, 192
Wollaston v. King (1869), L.R. 8 Eq. 165; 37 Digest 109, 419; 38 L.J.Ch. 61; 20 L.T. 1003	221, 222
Wood v. Wood, [1891] P. 272; 27 Digest 506, 5424; 60 L.J.P. 66; 64 L.T. 586	117, 119
Woodhouse v. Woodhouse, [1936] S.C. 523; [1936] S.L.T. 184	723, 738
Woodside v. Globe Marine Insurance Co., [1896] 1 Q.B. 105; 29 Digest 246, 1985; 65 L.J.Q.B. 117; 73 L.T. 626	250, 251
Worthington v. Curtis (1875), 1 Ch.D. 419; 29 Digest 382, 3058; 45 L.J.Ch. 259; 33 L.T. 828	357, 358, 359, 363, 364
Wright, <i>Re</i> , Hegan v. Bloor, [1920] 1 Ch. 108; 37 Digest 453, 555; 88 L.J.Ch. 452; 121 L.T. 549	532, 533, 536
Wright, <i>Re</i> , Mott v. Issott, [1907] 1 Ch. 231; 44 Digest 468, 2883; 76 L.J.Ch. 89; 95 L.T. 697	437, 438
Wright v. Callender (1852), 2 De G.M. & G. 652; 23 Digest 421, 4922; 21 L.J.Ch. 787; 19 L.T.O.S. 308	270, 271
Wroughton v. Colquhoun (1847), 1 De G. & Sm. 357; 23 Digest 420, 4920	270, 271
Wyatt v. Guildhall Insurance Co., Ltd., [1937] 1 K.B. 653; [1937] 1 All E.R. 792; Digest Supp.; 106 L.J.K.B. 421; 156 L.T. 292	1, 4
Wynne v. Fletcher (1857), 24 Beav. 430; 44 Digest 442, 2677	436, 437, 438
Wynne-Finch v. Chaytor, [1903] 2 Ch. 475; Digest, Practice, 825, 3821; 72 L.J.Ch. 723; 89 L.T. 123	187, 190
Xenos v. Fox (1869), L.R. 4 C.P. 665; 29 Digest 214, 1710; 38 L.J.C.P. 351	235
Xenos v. Wickham (1866), L.R. 2 H.L. 296; 17 Digest 204, 149; 36 L.J.C.P. 313; 16 L.T. 800; <i>reusg.</i> (1863), 14 C.B.N.S. 435	653, 658
Ydun, The, [1899] P. 236; 38 Digest 101, 727; 68 L.J.P. 101; 81 L.T. 10	706, 708, 710
Yonge v. Toynbee, [1910] 1 K.B. 215; Digest, Practice, 706, 3012; 79 L.J.K.B. 208; 102 L.T. 57	187, 188, 192
Young v. Davis (1863), 2 H. & C. 197; 26 Digest 398, 1241; 9 L.T. 145	707

CORRIGENDA.

- P. 187. *Re AN INTENDED ACTION, SHOESMITH v. LANCASHIRE MENTAL HOSPITALS BOARD.* Counsel for the respondent was *C. N. Shawcross*.
- P. 270. *Re NICHOLSON, CHADWYCK-HEALEY v. CRAWFORD.* Substitute in headnote as follows: "HELD: the proper method of abatement was to ascertain the amount of the appropriated fund if the annuity could be paid in full, and the figure thus obtained should abate proportionately with the legacies. The sum, being the amount of the appropriated fund, . . ."
- P. 377. *VSESOJWZOJE OBJEDINENIJE EXPORTELS v. ALLEN & SONS, LTD.* Line D.2, for "protracted but ingenious argument" read "attractive and interesting argument."
- P. 577. *SCAMMELL & NEPHEW, LTD. v. ROWLES.* Line F.1, for "in that action" read "in respect of that action."
- P. 600. *Re WILSON SYNDICATE CONVEYANCE.* Lines G.1 to G.3, read as follows: "The conveyance excepts the minerals with power to work them by underground working only. The express reference to underground working is inconsistent with the implied common law power of entry upon the surface. The power claimed by the plaintiff would admittedly destroy the surface."
- P. 653. *WESTMINSTER BANK, LTD. v. WILSON.* The *HALSBURY* reference is Vol. 10, p. 216, para. 270.
- P. 687. *POTELIAKHOFF v. TEAKLE.* Line D.2, for "allowing" read "disallowing."

INDEX

	PAGE
Abandonment, children left in children's court	777
—, notice of, not given, constructive total loss	249
—, of previous proceedings for judicial separation, petition for divorce on ground of desertion, whether petition barred	765
Abatement, annuity, direction to appropriate fund, gift of so much of the appropriated fund as may not be required for annuity, rights of annuitant	270
—, of nuisance, creation unknown to occupier, stranger's right	321
Abortion, by surgeon, danger to life, pregnancy of young girl due to rape	615
Accident, due to subsidence of roadway three years after completion of drainage works executed by sanitary authority, non-feasance	93
Accident insurance, car accident causing concussion, insured found in river, independency between accident and death	145
Accumulations, liability to estate duty on death of settlor, aggregation	341
Acquiescence, petitioning creditors, deed of assignment for benefit of creditors	744

ACTION.

<i>Parties—Foreign sovereign—De jure sovereign—Right of action accrued when also de facto sovereign—Action commenced after another sovereign recognised as de facto sovereign</i> [HAILE SELLASSIE v. CABLE & WIRELESS, LTD.]	677
Action, cause of, accruing before statutory period, whether statement of claim struck out, possibility of plaintiff pleading exceptions to statute	762
—, survival of, action for penalties, whether action in tort	329
—, whether to be stayed pending hearing of one test action	670
Additions, structural, to mansion house, necessity for additions to adjoin house	406
Adultery, constructive desertion founded on, necessity to prove intention to persist in adultery	349
—, limitation of time, whether running from date of adultery or discovery thereof	349
—, petitioner's, effect on deserting spouse's mind, continuance of desertion, discretion	722
Advancement, gifts between husband and wife, husband joining as surety in mortgage, required by mortgagees to pay as surety, proof in wife's estate	459
Advances, unauthorised, income taken to replace capital, forfeiture of life tenant's interest	259
Affiliation order, finality of decision of quarter sessions	241
Agreement, conditional, transfer of business, stamp duty	526
—, planning, development or user of land, alleged to be more favourable to landowner than draft scheme, delegation to committee	711
—, separation, five years after commencement of desertion, husband's failure to pay thereunder, whether continuing desertion	770
—, treated as nullity, continuance of desertion	773
—, to pay gaming debt by instalments after cheque in payment dishonoured, undertaking not to give publicity by suing for debt, whether good consideration for a fresh promise to pay	686

	PAGE
Agriculture, employment, unemployment insurance	311
Amendment, indictment, amendment alleging new offence, no application to quash at hearing, appeal	398
Annuitant, rights of, gift of so much of appropriated fund as may not be required for annuity, abatement	270
Appointment, under special power, one object only, fraudulent exercise of power	532
Apportionment as between capital and income, tithe redemption annuities, tenant for life and remainderman	553
Arbitration, articles of association requiring, when member bound	214
Architect, remuneration, abandonment by building owner	203
Auction, purchase of three lots, no authority to combine purchases, memorandum of one contract	447
Avoidance, of income tax, income transferred to persons abroad, transaction also necessary for protection of settlor, burden of proof	560
Balances, unclaimed, carried into partners' current accounts, trade receipt, income tax	296
Banking account, in joint names, garnishee order in respect of one only	491

BANKRUPTCY.

<i>Deed of assignment for benefit of creditors—Petitioning creditors' conduct at meeting—Acquiescence—Bankruptcy Act, 1914 (c. 59), s. 5 (3) [Re A DEBTOR (No. 382 OF 1938), THE DEBTOR v. PETITIONING CREDITORS AND OFFICIAL RECEIVER]</i>	744
Bankruptcy, interest in settlement determinable on, breach of trust, income taken to replace capital, forfeiture	259

BASTARDY.

<i>Affiliation order—Second application—First order appealed to quarter sessions and quashed—Finality of order of quarter sessions</i> [R. v. HOWARD, Ex parte DA COSTA]	241
Belief as to age of girl under 16, reasonable grounds, actual belief	134
Benefit to public, posts erected on tow-path, nuisance, injunction	367
Bet, totalisator, overpayment, recovery of amount overpaid	547
Betterment, provision of open space, land adjoining land acquired by local authority for open space, allowance for in assessment of compensation	781
Bigamy, invalid first marriage, subsistence of prior marriage, direction to jury	787
Books, company's, order to produce in voluntary winding up, discretion of court to order production	621

BOUNDARIES.

<i>Party wall—Appellants entitled to half of wall and to use of entire wall for support—Wall rebuilt as an arcade by respondents—Whether appellants' rights infringed—London Building Act, 1930 (c. clviii), s. 117 [BURLINGTON PROPERTY CO., LTD. v. ODEON CINEMAS, LTD.]</i>	469
Bridge carrying road over railway, repair, liability of railway company for non-feasance, extent of liability to repair	705

BUILDING CONTRACTS.	
<i>Architect—Remuneration—Erection of a town hall—Scale of charges of Royal Institute of British Architects—Stages of construction of building—Abandonment by building owner before the completion of a stage already begun</i> [THOMAS v. HAMMERSMITH BOROUGH COUNCIL] ..	203
Business, bequest of, whether confined to goodwill or including all assets of business, solicitor's practice ..	314
Canvasser, whether employment within the National Health Insurance Act, 1936 ..	244
Capital and income, apportionment as between, tenant for life and remainderman, tithe redemption annuities ..	553
Capital or income payment, disposition for more than 6 years, payment to company in annual sums of decreasing amount, "valuable and sufficient consideration" ..	463
Carnal knowledge, girl under 16, reasonable grounds for belief as to age, actual belief as to age ..	134
Ceded territories, cession by general consent of inhabitants, right to legislate, royal prerogative ..	693

CHARITY.

<i>Gift to provide stipend for a third curate—Insufficiency of gift due to increase in stipends—Variation of trust—Augmentation of stipends of two curates</i> [Re BARON BURTON'S CHARITY, QUEEN ANNE'S BOUNTY v. ATTORNEY-GENERAL] ..	90
<i>Relief of poverty—Religious purposes—Advancement of religion—Relief of infirm, sick and aged priests</i> [Re FORSTER, GELLATLY v. PALMER] ..	767
Charterparty, exception, meaning of war —, frustration, seizure of ship by forces not recognised as belligerents ..	135
—, time charter, hire, payment in advance, hire calculated on deadweight, no hire due until deadweight communicated to charterers ..	690
Children, abandonment, children left in children's court ..	777
Child's endowment policy, godchild of assured, right of assured's estate ..	124
Claim to money by foreign government, whether impleading, possession ..	384
Clerk, liability of solicitor for misconduct of ..	498
Co-defendant, statement to police, verdict of jury only possible if statement acted upon, validity of conviction ..	793
Cohabitation, prior, between spouses, whether necessary to found suit for restitution of conjugal rights ..	389
Collision clause, "payable by way of damages," meaning of ..	234
Colonies, right to legislate, settlements, ceded territories, cession by general consent of inhabitants, royal prerogative ..	693

COMPANIES.

<i>Articles of association—Contract between company and member—Action by member in representative capacity against director and company—Article providing for arbitration—Whether submission in writing for purposes of stay of action—Arbitration Act, 1889 (c. 49), ss. 4, 27</i> [BEATTIE v. E. & F. BEATTIE, LTD.] ..	214
<i>Scheme or arrangement—Transfer of undertaking to realisation company—No power to sell in memorandum—Ultra vires—Benefit to creditors without any benefit to shareholders—Jurisdiction of court under Companies Act, 1929 (c. 23), ss. 153, 154</i> [Re OCEANIC STEAM NAVIGATION CO., LTD.] ..	740

	PAGE
<i>Winding up—Insurance company carrying on different classes of insurance business—Priority of life assurance creditors over other creditors—Assurance Companies Act, 1909 (c. 49), ss. 2, 3, 4, 5 [Re LONDON GENERAL INSURANCE CO., LTD.]</i> ..	748
<i>—, Voluntary winding up—Examination of persons—Order to produce books—Procedure to contest validity of order—Discretion of court to order production—Oppressive exercise of discretion—Companies Act, 1929 (c. 23), s. 214 [Re MAVILLE ROSE, LTD.]</i> ..	621
<i>Compound settlement, trustees of, documents forming</i> ..	449
<i>Compromise of action, payments made, deduction against profits</i> ..	577

COMPULSORY PURCHASE.

<i>Local authority—Land acquired for open space—Assessment of compensation—Land acquired partly developed for building purposes—Damage to adjoining land by severance—Betterment of land by provision of open space—Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), s. 2</i> [GEORGE WIMPEY & CO., LTD. v. MIDDLESEX COUNTY COUNCIL] ..	781
Condition subsequent in will, void for uncertainty ..	435
Condonation, return to the home ..	64

CONFLICT OF LAWS.

<i>Impleading foreign government—Possession—Mere claim to money by foreign government</i> [HAILE SELLASSIE v. CABLE & WIRELESS, LTD.] ..	384
Consideration, whether agreement not to bring an action which cannot succeed is good consideration for a fresh promise to pay a gaming debt ..	686
Constructive total loss, repaired value greater than insured value ..	249
Contingent interest in income of residuary estate, maintenance out of intermediate income ..	181

CONTRACT.

<i>Impossibility of performance—Frustration —Charterparty—Seizure of ship by forces not recognised as belligerents</i> [W. J. TATEM, LTD. v. GAMBOA] ..	135
<i>Memorandum or note—Purchase of three lots at auction—No authority to combine purchases—Memorandum of one contract—Law of Property Act, 1925 (c. 20), s. 40</i> [SMITH v. MACGOWAN] ..	447
Contract, determination, contract to supply electric power for the mining life of a property, assignable only with consent of power company, consumer company selling mine and being dissolved ..	755
—, permitting certain variation in goods sold, variation greater than that so permitted, restrictions on rejection ..	429
Contracts of deceased, probate subsequently revoked, right of executor who had acted reasonably to set off payments made in estate accounts ..	106
Contribution, as between schoolmistress and school managers ..	517
—, joint tortfeasors, jurisdiction of master to allow one defendant to offer to pay a proportion of any liability ..	87

COPYRIGHT.

<i>Musical work—Assignment of the copyright by the composer on Mar. 11, 1912, subsequent to the passing of the Copyright Act, 1911, but prior to the time when the Act came into operation—Whether copyright passed for the whole term of its existence —Copyright Act, 1911 (c. 46), ss. 5 (2), 24</i> [COLERIDGE-TAYLOR v. NOVELLO & CO., LTD.] ..	506
--	-----

	PAGE
Corporal punishment, box on ear, school-mistress ..	517
Costs, remitted action, costs up to remission costs in cause, whether on High Court scale, jurisdiction of county court judge to vary order ..	403
—, two counsel on appeal, when allowed ..	194
Counsel, two, when allowed on appeal ..	194
Course of employment, schoolmistress, excessive punishment, liability of managers ..	517
Creditors, deed of assignment for benefit of, petitioning creditors' conduct at meeting, acquiescence, assent ..	744

CRIMINAL LAW.

<i>Abortion—By surgeon—Danger to life—Pregnancy of young girl due to rape—Offences against the Person Act, 1861 (c. 100), s. 58 [R. v. BOURNE] ..</i>	615
<i>Bigamy—Invalid first marriage—Subsistence of prior marriage—Direction to jury—Non-production of statement to police by witness [R. v. MORRISON] ..</i>	787
<i>Children—Abandonment—Children left in children's court—Children and Young Persons Act, 1933 (c. 12), s. 1 [R. v. WHIBLEY] ..</i>	777
<i>Evidence—Prisoner giving evidence on own behalf—Cross-examination—Character—Question suggesting dishonesty—Criminal Evidence Act, 1898 (c. 36), s. 1 (f) [R. v. COHEN] ..</i>	380
<i>—, Statement to police by co-defendant—Verdict of jury only possible if statement acted upon—Validity of conviction [R. v. ORAM] ..</i>	793
<i>—, Prejudicial to accused—Police evidence of other pending charges—Necessity to discharge jury [R. v. FIRTH] ..</i>	783
<i>Habitual criminal—Procedure at trial—Trial of charges by same court [R. v. VALE] ..</i>	355
<i>Indictable offence—Plea of guilty before justices—Witnesses bound over conditionally—Plea of not guilty at trial—Depositions read as only evidence for prosecution—No reference in summing up to plea of not guilty—Criminal Justice Act, 1925 (c. 86), s. 13 [R. v. COLLINS] ..</i>	130
<i>Indictments—Amendment—Amendment alleging new offence—No application to quash at hearing—Appeal—Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 2 [R. v. CLEGHORN] ..</i>	398
<i>Preliminary hearing by justices—Commitment for trial—Evidence—Co-defendant added after evidence given—Depositions read to witnesses and approved—Irregularity—Indictable Offences Act, 1848 (c. 42), s. 17—Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 2 (2) [R. v. PHILIPS, R. v. QUAYLE] ..</i>	674
<i>Unlawful carnal knowledge—Girl under 16—Reasonable grounds for belief as to age—Actual belief as to age—Criminal Law Amendment Act, 1922 (c. 56), s. 2—Criminal Law Amendment Act, 1928 (c. 42), s. 1 [R. v. HARRISON, R. v. WALLIS, R. v. WARD, R. v. GOODING] ..</i>	134
<i>Crown, rights to minerals, flag, slate and stone, whether shale included in the rights reserved ..</i>	263

CROWN PRACTICE.

<i>Information of debt—Writ of subpoena—Party out of the jurisdiction—Applicability of R.S.C., Ord. 11—Crown Suits, etc., Act, 1865 (c. 104), s. 37—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 99 (1) (a), (g) [ATTORNEY-GENERAL v. PROSSER] ..</i>	32
--	----

	PAGE
Cruelty, ground for divorce, compromise of judicial separation suit, all charges withdrawn, petition for divorce based on same charges, absolute release, frustration ..	415
Curate, gift to provide stipend for a third, insufficiency, variation of trust ..	90
Damages, for personal injuries, assessment, shortened expectation of life, overlapping of damages ..	483
Danger to life, abortion by surgeon, pregnancy of young girl due to rape ..	615
Dangerous machinery, coal mine, impracticability of preventing statutory breach ..	21
<i>De jure sovereign, right of action accrued when also de facto sovereign ..</i>	677
<i>Death of taxpayer before passing of legislation, transfer of income of persons abroad, liability of executors ..</i>	560
<i>Debts, deduction of, estate duty, gifts inter vivos, debts exceeding amount of free estate, whether deduction allowed against gifts inter vivos ..</i>	327
<i>Deduction against profits, payments made in compromise of action ..</i>	577

DEED.

<i>Settlement—Execution by one party—Settlement in satisfaction of covenant containing a release of the covenant—Sufficiency of execution by one party—Execution upon fulfil of execution by other parties [WESTMINSTER BANK, LTD. v. WILSON] ..</i>	652
<i>Deed of assignment for benefit of creditors, assent, petitioning creditors' conduct at meeting, acquiescence ..</i>	744
<i>Depositions, read as evidence at trial ..</i>	130
<i>Desertion, constructive, founded on adultery, necessity to prove intention to persist in adultery ..</i>	349
<i>—, continuance, separation agreement, treated as nullity ..</i>	773
<i>—, petitioner's adultery, effect on deserting spouse's mind, continuance of desertion, discretion ..</i>	722
<i>—, previous proceedings for judicial separation abandoned, whether petition barred ..</i>	765
<i>—, —, five years after commencement of desertion, husband's failure to pay thereunder, whether continuing desertion ..</i>	770
<i>—, separation deed, failure to make payments ..</i>	41
<i>Dining-room, hotel, open to non-residents, waiter, shop assistant, weekly half-holiday ..</i>	790
<i>Discovery, Chancery Division, privilege, inspection of documents by the court, necessity for inspection by, or report to, judge ..</i>	591
<i>—, privilege, reference to privileged matter in other proceedings, waiver ..</i>	591
<i>Discretion of court, desertion, petitioner's adultery, effect on deserting spouse's mind, continuance of desertion ..</i>	722
<i>Ditch inside fence of highway, presumption, onus of proof, statutory right to fill in ..</i>	647

DIVORCE.

<i>Condonation—Return to marital home—Modern social conditions—Burden of proof—Matrimonial Causes Act, 1937 (c. 57), s. 4 [GERMANY v. GERMANY] ..</i>	64
<i>Cruelty—Compromise of judicial separation suit—Deed of separation—All charges withdrawn—Petition for divorce based on same charges—Absolute release—Frustration—Matrimonial Causes Act, 1937 (c. 57), s. 2 [H— v. H—] ..</i>	415
<i>Desertion—Petitioner's adultery—Effect on deserting spouse's mind—Continuance of desertion—Discretion—Matrimonial Causes Act, 1937 (c. 57), ss. 2 (b), 4 [HEROD v. HEROD] ..</i>	722

	PAGE
—, <i>Previous proceedings for judicial separation abandoned—Whether petition barred—Matrimonial Causes Act, 1937 (c. 57), s. 6</i> [JOHNSON v. JOHNSON]	765
—, <i>Separation agreement—Treated as nullity—Continuance of desertion—Matrimonial Causes Act, 1937 (c. 57), s. 2 (d)</i> [STARKEY v. STARKEY]	773
—, <i>Separation agreement five years after commencement of desertion—Husband's failure to pay thereunder—Whether continuing desertion—Matrimonial Causes Act, 1937 (c. 57), s. 2 (b)</i> [WATSON v. WATSON]	770
—, <i>Separation deed—Husband's failure to perform covenant to pay—Special circumstances—Repudiation of deed—Matrimonial Causes Act, 1937 (c. 57), s. 2 (b)</i> [RATCLIFFE v. RATCLIFFE]	41
<i>Insanity—Distinction between recovery and cure—Certification as evidence—Conduct conducing—Decree nisi—Matrimonial Causes Act, 1937 (c. 57), ss. 2 (d), 3</i> [SWETTENHAM v. SWETTENHAM]	183
<i>Maintenance—Review—Application for reduction—Voluntary settlements by husband—Remarriage of wife</i> [PERKINS v. PERKINS]	116
<i>Wife's petition for restitution of conjugal rights—No cohabitation between spouses—Husband's refusal to provide home—Prior cohabitation unnecessary to found suit</i> [FASSBENDER v. FASSBENDER]	389
<i>Double taxation, relief, dividends of English company suffering tax, relief to preference shareholder in Indian company</i>	98

ECCLESIASTICAL LAW.

<i>Tithe rentcharge—Arrears—Limitation of time for recovery—Excluded period—Limitation period expiring before the commencement of excluded period—Tithe Act, 1936 (c. 43), ss. 1, 4 (1), 20</i> [GOVERNORS OF QUEEN ANNE'S BOUNTY v. TITHE REDEMPTION COMMISSION]	664
---	-----

EDUCATION.

<i>Corporal punishment—By assistant mistress—Box on the ear—Course of employment—Liability of managers of non-provided school—Contribution—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1), (2)</i> [RYAN v. FILDES AND OTHERS]	517
<i>Non-provided school—Repair—Liability—Managers—Public authority—Public Authorities Protection Act, 1893 (c. 61), s. 1</i> [GRIFFITHS AND OTHERS v. MANAGERS OF ST. CLEMENT'S SCHOOL, LIVERPOOL, AND TRUSTEES OF CHURCH OF ENGLAND SCHOOLS SOCIETY]	537
<i>Employer, insolvency of, liability of insurers to workman, mutual indemnity society, non-payment of calls</i>	625
<i>Employers and employees, contribution in respect of damages</i>	517
<i>Employment, by local authority for 9 weeks under scheme for relief of unemployment, whether casual employment</i>	585
—, <i>canvasser, whether within the meaning of the National Health Insurance Act, 1936</i>	244
<i>Endowment policy, child's, godchild of assured, right of assured's estate</i>	124

ESTATE AND OTHER DEATH DUTIES.

<i>Deduction of debts—Gifts inter vivos—Debts exceeding amount of free estate—Whether deduction allowed against gifts inter vivos</i> [Re BARNES]	327
---	-----

	PAGE
<i>Property deemed to pass—Accumulations—Life tenant's income during settlor's life if below stated amount to be made up to that amount out of accumulations—Income of accumulations to go to life tenant upon death of settlor—Liability to duty on death of settlor—Aggregation—Finance Act, 1894 (c. 30), ss. 2 (1) (d), 4</i> [Re HODSON'S SETTLEMENT, BROOKES v. ATTORNEY-GENERAL]	341
<i>Succession duty—Succession—Private Act of Parliament avoiding restraint upon alienation—Whether succession destroyed—Succession Duty Act, 1853 (c. 51), ss. 2, 12, 15</i> [ATTORNEY-GENERAL v. GLYN, MILLS & CO.]	605
<i>Evidence, preliminary hearing by justices, committal for trial, co-defendant added after evidence given, depositions read to witnesses and approved regularly</i>	674
—, <i>prejudicial to accused, police evidence of other pending charges, necessity to discharge jury</i>	783
—, <i>prisoner giving evidence on own behalf, question in cross-examination suggesting dishonesty</i>	380
—, <i>statement to police by co-defendant, verdict of jury only possible if statement acted upon, validity of conviction</i>	793
<i>Excavation of roadway for sanitary authority, non-feasance, excavation for drainage purposes, accident due to subsidence three years after work completed</i>	93
<i>Excessive exercise, power to appoint, condition that beneficiary shall settle his share</i>	220

EXECUTION.

<i>Garnishee order made against a customer—Whether joint account of husband and wife attachable in respect of debt owed by husband alone</i> [HIRSCHHORN v. EVANS]	491
<i>Execution, settlement, by one party upon faith of execution by other parties, sufficiency</i>	652

EXECUTORS.

<i>Legacies—Abatement—Annuity—Direction to appropriate fund—Gift of so much of the appropriated fund as may not be required for annuity—Rights of annuitant</i> [Re NICHOLSON, CHADWYCK-HEALEY v. CRAWFORD]	270
<i>Liability of representative—Survival of action—Action for penalties—Whether action in tort—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), ss. 1 (1), (3), 4 (2)</i> [ATTORNEY-GENERAL v. CANTER]	329
<i>Executors, liability of, avoidance of tax, transfer of income of persons abroad, death of taxpayer before passing of legislation</i>	560
—, <i>probate subsequently revoked, right of executor who had acted reasonably to set off payments made in estate accounts</i>	106
<i>Exercise, special power to appoint by will, residuary gift, direction to pay debts out of residue</i>	566
<i>Expectation of life shortened, assessment of damages for personal injuries, overlapping of damages</i>	483

FACTORIES AND WORKSHOPS.

<i>Shipbuilding yard—Vessel under construction—Defective staging—Occupation of part of a vessel—Factory and Workshop Act, 1901 (c. 22), ss. 79, 82, 104, 140, 141, 142, 149, 151—Shipbuilding Regulations, 1931 (S.R. & O., 1931, No. 133)</i> [SMITH v. CAMELL LAIRD & CO., LTD.]	52
<i>Shop—Hotel—Dining-room open to non-residents—Waiter—Shop assistant—Weekly half-holiday—Shops Act, 1912 (c. 3), ss. 1, 19 (1)</i> [GEORGE HOTEL (COLCHESTER), LTD. v. BALL]	790

	PAGE
Fatal Accidents Act, recovery under, right to bring further action for benefit of general estate	85
Financing agreement, hire purchase, whether moneylending	275
Foreign government, impleading, possession, mere claim to money	384
Forfeiture, breach of trust, unauthorised advances by trustee to tenant for life, income taken to replace capital	259
Fraudulent exercise, special power, one object only	532
Frustration, charterparty, seizure of ship by forces not recognised as belligerents	135
—, deed of separation withdrawing all charges in matrimonial suit, petition for divorce based on same charges, absolute release	415

GAMING AND WAGERING.

Gaming debt—Cheque in payment dishonoured—Agreement to pay by instalments—Undertaking not to give publicity by suing for debt—Only one instalment paid—Whether agreement not to bring an action which cannot succeed is good consideration for a fresh promise to pay a gaming debt [POTELIAKHOFF v. TEAKLE]	686
Garnishee, joint banking account, debt of one	491
Gift, to provide stipend for a third curate, insufficiency, due to increase in stipends, variation of trust	90

GIFTS.

Between husband and wife—Advancement—Husband joining as surety in mortgage—Required by mortgagees to pay as surety—Proof in wife's estate [Re SALISBURY-JONES, HAMMOND v. SALISBURY-JONES]	459
Gifts <i>inter vivos</i> , debts exceeding amount of free estate, whether deduction allowed against gifts <i>inter vivos</i>	327
Godchild of assured, policy moneys, child's endowment policy, right of assured's estate	124
Goodwill, agreement relating to transfer, stamp duty	526
—, whether bequest of business confined to, or including all assets of business, solicitor's practice	314
Government, foreign, impleading, claim for possession of requisitioned vessel by <i>de jure</i> and <i>de facto</i> governments	333

GUARANTEE.

Right of surety to exoneration from liability—Joint and several liability of surety and principal debtor—Both treated as principal debtors of the mortgagee—Supplemental agreement that each liable for one moiety of amount of mortgage—Provision against compulsion to repay by either if payment of interest not 30 days overdue—Whether right arises as soon as interest is 30 days overdue, although subsequently paid [TATE v. CREWDSON]	43
Habitual criminal, procedure at trial, trial of charges by same court	355
Half-holiday, weekly, shop assistant, waiter, hotel, dining-room open to non-residents	790

HIGHWAYS.

Boundary of highway—Ditch inside fence—Presumption—Onus of proof—Statutory right to fill in—Highways Act, 1835 (c. 50), s. 67—Highways Act, 1864 (c. 101), s. 48 [HANSCOMBE v. BEDFORDSHIRE COUNTY COUNCIL]	647
Excavation by sanitary authority—Non-feasance—Excavation for drainage purposes—Accident due to subsequent subsidence three years after work completed [NEWSOME v. DARTON URBAN DISTRICT COUNCIL]	93

	PAGE
Repair—Bridge carrying road over railway—Liability of railway company for non-feasance—Extent of liability to repair—Railway Clauses Consolidation Act, 1845 (c. 20), s. 46 [SWAIN v. SOUTHERN RAILWAY CO.]	705
Towpath—Erection of posts—Benefit to public—Nuisance—Injunction [ATTORNEY-GENERAL (AT THE RELATION OF ESHER URBAN DISTRICT COUNCIL) v. WILCOX]	367
Hire, motor car, passengers sharing expenses of journey	1
Hire of lorry and driver to defendant firm, accident to lorry while so hired, responsibility for negligence of driver	779

HIRE PURCHASE.

Action for instalments due—Judgment—Judgment unsatisfied—Further action to recover possession of goods hired—Whether second action barred [SOUTH BEDFORDSHIRE ELECTRICAL FINANCE, LTD. v. BRYANT]	580
Hire-purchase agreement, financing, sale of book debts, whether moneylending transaction	275
Hotel, whether a shop, dining-room open to non-residents, waiter, shop assistant, weekly half-holiday	790
Husband, joining as surety in mortgage, required by mortgagees to pay as surety, gifts between husband and wife, advancement, proof in wife's estate	459
—, voluntary settlements by, application for reduction of maintenance, remarriage of wife	116

HUSBAND AND WIFE.

Restraint on anticipation—Order for payment of costs—Order in form prescribed since passing of 1935 Act—Discovery after order—Appointment of receiver—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), ss. 1, 2 (1) [Re MEREDITH'S TRUSTS, MEREDITH v. CLARKE]	199
Separation—Reconciliation agreement—Provision for future separation of spouses—Validity—Proceeding "founded on" adultery with named woman [LURIE v. LURIE]	156
Summary jurisdiction—Non-cohabitation and maintenance orders—Adultery—Limitation of time—Whether running from date of adultery or discovery thereof—Constructive desertion founded on adultery—Necessity to prove intention to persist in adultery—Matrimonial Causes Act, 1937 (c. 57), s. 1 [TEALL v. TEALL]	349
Income from settled fund taken to replace capital following unauthorised advances by trustee to tenant for life, breach of trust, forfeiture	259

INCOME TAX.

Avoidance of tax—Transfer of income of persons abroad—Operation part of transaction also necessary for protection of settlor—Burden of proof of avoidance—Death of taxpayer before passing of legislation—Liability of executors—Finance Act, 1936 (c. 34), s. 18 [COTTINGHAM'S EXECUTORS v. INLAND REVENUE COMMISSIONERS]	560
Deduction against profits—Payments made in compromise of action—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 3 [G. SCAMMELL & NEPHEW, LTD. v. ROWLES (INSPECTOR OF TAXES)]	577

	PAGE
<i>Disposition for more than 6 years—Payment to company in annual sums—Capital or income payment—"Valuable and sufficient consideration"—Annual payments of decreasing amount—Finance Act, 1922 (c. 17), s. 20 (1) (b) [INLAND REVENUE COMMISSIONERS v. THE PERSONAL REPRESENTATIVES OF SIR HARRY MALLABY-DEELEY (BART.), THE PERSONAL REPRESENTATIVES OF SIR HARRY MALLABY-DEELEY (BART.) v. INLAND REVENUE COMMISSIONERS]</i>	463
<i>Double taxation relief—Payment of income tax and super-tax in both United Kingdom and Irish Free State—Admissibility of claim for relief in respect of double super-tax—Finance Act, 1920 (c. 18), s. 27—Relief in respect of Double Taxation (Irish Free State) Declaration, 1923 (S.R. & O., 1923, No. 406) [MCALMONT v. INLAND REVENUE COMMISSIONERS]</i>	174
<i>—, Shares in English company held by Indian company—Dividends of English company suffering tax—Relief to preference shareholder in Indian company [BARNES (INSPECTOR OF TAXES) v. HELY HUTCHINSON]</i>	98
<i>Penalties for inaccurate return—Liability of estate—Income Tax Act, 1918 (c. 40), s. 30 (1) [ATTORNEY-GENERAL v. CANTER]</i>	329
<i>Profits arising from occupation of land—Partnership—Brood mare—Some progeny sold as yearlings—Some sold after racing—Stud farm—One partner tenant—Income Tax Act, 1918 (c. 40), s. 20 (i), Sched. B [DAWSON v. COUNSELL (INSPECTOR OF TAXES)]</i>	5
<i>Repayment of tax—Rate of interest [G. SCAMMELL & NEPHEW, LTD. v. ROWLES (INSPECTOR OF TAXES)]</i>	577
<i>Royalties—Licence to construct and use—Consideration—Lump sum payable in instalments and further sum payable each year during continuance of licence—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 21 [INLAND REVENUE COMMISSIONERS v. BRITISH SALMON AERO ENGINES, LTD., BRITISH SALMON AERO ENGINES, LTD. v. INLAND REVENUE COMMISSIONERS]</i>	283
<i>Trade—Succession to trade—Wholesale manufacturing trade carried on by subsidiary company—Taken over by retail company—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 11 (2) [LAYCOCK (INSPECTOR OF TAXES) v. FREEMAN, HARDY & WILLIS, LTD.]</i>	571
<i>Unclaimed balances—Carried into partners' current accounts—Trade receipt—Subsequent payment—Deduction [MORLEY (INSPECTOR OF TAXES) v. TATTERSALL]</i>	296
<i>Inconsistency between words and figures in will, amount of legacy</i>	308
<i>Indemnity, whether 100 per cent. contribution can be ordered under 1935 Act</i>	517
<i>Independency of accident and death, accident insurance</i>	145
<i>Indictment, amendment alleging new offence, no application to quash at hearing, appeal</i>	398
<i>Information of debt, service out of jurisdiction</i>	32
<i>Injuries, personal, damages, assessment, shortened expectation of life, overlapping of damages</i>	483
<i>Insanity, incurable, divorce</i>	183
<i>Insolvency of employer, liability of insurers to workman, mutual indemnity society, non-payment of calls</i>	625
<i>Installation of documents, by councillor</i>	226
<i>Instalments, hire-purchase, action for instalments due, judgment unsatisfied, further action to recover possession of goods hired, whether second action barred</i>	580

	PAGE
INSURANCE.	
<i>Accident insurance—Accident whilst riding in, mounting into, or dismounting from car—Car accident causing concussion—Insured walking into river while in such state—Independency of accident and death [SMITH v. CORNHILL INSURANCE CO., LTD.]</i>	145
<i>Marine insurance—Collision clause—Sum payable by way of damages—Indemnity to French pilot boat [HALL BROTHERS S.S. CO., LTD. v. YOUNG, THE TRIDENT]</i>	234
<i>—, Freight—Agreement to pay if vessel a total loss—Cost of repairs greater than insured value of hull—Vessel worth more, when repaired, than insured value—No notice of abandonment—Whether constructive total loss—Marine Insurance Act, 1906 (c. 41), s. 60—Institute Time Clauses (Freight), cl. 5 [PETROS M. NOMIKOS, LTD. v. ROBERTSON]</i>	249
<i>Motor car insurance—Passenger in private car—Payment in respect of expenses—"Social, domestic and pleasure purposes"—Policy not covering use for hiring—Road Traffic Act, 1934 (c. 50), s. 10 (1) [MCCARTHY v. BRITISH OAK INSURANCE CO., LTD.]</i>	1
<i>Policy moneys—Child's endowment policy—Godchild of assured—Right of assured's estate—Law of Property Act, 1925 (c. 20), s. 56 [Re SINCLAIR'S LIFE POLICY]</i>	124
<i>—, Policy taken out by father on life of son—Whether father's estate or son's estate entitled—Law of Property Act, 1925 (c. 20), s. 56 [Re FOSTER, HUDSON v. FOSTER]</i>	357
<i>—, Proceeds held to belong to father's estate—Premiums after death of father paid by or on behalf of son—Premiums paid under common mistake as to right to policy moneys—Lien [Re FOSTER, HUDSON v. FOSTER (No. 2)]</i>	610
<i>Insurance company, carrying on different classes of insurance business, winding up, priority of life assurance creditors over other creditors</i>	748
<i>Interest, contingent, in income of residuary estate, maintenance out of intermediate income</i>	181
<i>—, proviso for payment within 30 days, when broken</i>	43
<i>—, rate of, repayment of income tax</i>	577
<i>Invitee, yard forming part of licensed premises, customer slipping in yard, standard of care owed by proprietor</i>	774
<i>Joint tortfeasors, jurisdiction of master to allow one defendant to offer to pay a proportion of any liability</i>	87
<i>Judgment, unsatisfied, in action for hire-purchase instalments due, further action to recover possession of goods hired, whether second action barred</i>	580
<i>Judicial separation, previous proceedings abandoned, petition for divorce on ground of desertion, whether petition barred</i>	765
<i>Jurisdiction, of county court judge to vary order that costs of remitted action up to remission be costs in cause, whether on High Court scale</i>	403
<i>—, of court, company, transferring undertaking to realisation company, no power to sell in memorandum, ultra vires, benefit to creditors without any benefit to shareholders</i>	740
<i>Land acquired by local authority for open space, assessment of compensation</i>	781
LAND IMPROVEMENT.	
<i>Structural additions to mansion house—Necessity for additions to adjoin house—Settled Land Act, 1925 (c. 18), Sched. III, Part II, para. 5 [Re INSOLE'S SETTLEMENT]</i>	406

	PAGE
LANDLORD AND TENANT.	
<i>Repairs—Covenant by lessee to spend £500 per annum on repairs or pay the difference between £500 and the amount actually spent—Whether failure to pay gives rise to action on the covenant or for breach of covenant—Damage to reversion—Landlord and Tenant Act, 1927 (c. 36), s. 18 (1) [OLYMPIA (LIVERPOOL), LTD. v. MOSS' EMPIRES, LTD.]</i>	166
<i>Legacies, abatement, annuity, direction to appropriate fund, gift of so much of the appropriated fund as may not be required for annuity, rights of annuitant</i>	270
<i>Legacy, amount of, inconsistency between words and figures</i>	308
<i>Liability of railway company for non-feasance, bridge carrying road over railway, repair, extent of liability to repair</i>	705
<i>Licensed premises, yard forming part of, invitee, customer slipping in yard, standard of care owed by proprietor</i>	774
LIMITATION OF ACTIONS.	
<i>Statement of claim showing cause of action accruing before statutory period—Whether defendant can have statement of claim struck out—Possibility of plaintiff pleading exceptions to statute—Limitation Act, 1923 (c. 16), s. 7—R.S.C., Ord. 25, r. 4 [DISMORE v. MILTON]</i>	762
<i>Limitation of actions, whether railway company a public authority</i>	705
<i>Local authority, employment by for 9 weeks under scheme for relief of unemployment, whether employment casual</i>	585
<i>—, land acquired for open space, assessment of compensation</i>	781
<i>—, power to delegate to committee</i>	711
LOCAL GOVERNMENT.	
<i>Production of documents to councillor—Documents relating to pending litigation—Sufficient production for proper discharge of duties—Prejudice of council's interest by production [R. v. BARNES BOROUGH COUNCIL, Ex parte CONLAN]</i>	226
<i>Lorry and driver hired to defendant firm, accident to lorry while so hired, responsibility for negligence of driver</i>	779
<i>Maintenance, out of intermediate income, contingent interest in income of residuary estate</i>	181
<i>—, reduction of, application for, voluntary settlements by husband, remarriage of wife</i>	116
<i>Malta, right to legislate, ceded colony</i>	693
<i>Managers, school, liability for excessive corporal punishment by schoolmistress</i>	517
<i>Manufacture, faulty, whether quality or condition, restrictions on rejection of goods</i>	375
<i>Married woman, judgment against, appointment of receiver</i>	199
MASTER AND SERVANT.	
<i>Lorry and driver hired to defendant firm—Accident to lorry while so hired—Responsibility for negligence of driver [WILLARD v. WHITELEY, LTD.]</i>	779
<i>Memorandum or note, contract, purchase of three lots at auction, no authority to combine purchases, memorandum of one contract</i>	447
MINES.	
<i>Coal mine—Dangerous machinery—Absolute duty to fence—Machinery only dangerous while moving—Duty on workman to see that fence was in position—Standard of care to be applied to workmen—Impracticability of preventing statutory breach—Coal Mines Act, 1911 (c. 50), ss. 55, 102 (8) [CASWELL v. POWELL DUFFRYN ASSOCIATED COLLIERIES, LTD.]</i>	21

	PAGE
<i>Surface working—Express reservation of underground working only—Whether implied right to enter upon surface excluded [Re WILSON SYNDICATE CONVEYANCE, WILSON v. SHORROCK]</i>	599
<i>Mines and minerals, Crown right to minerals, flagg, slate and stone, whether shale included in rights reserved</i>	263
MISTAKE.	
<i>Mistake of fact—Recovery of money paid under a mistake—Totalisator bet—Winnings paid partly in five-pound notes in mistake for one-pound notes—Whether excess recoverable—Racecourse Betting Act, 1928 (c. 4), ss. 2 (8), 3 (3), 4 [RACECOURSE BETTING CONTROL BOARD v. MOUNT]</i>	547
MONEYLENDING.	
<i>Financing hire-purchase agreement—Sale of book debts—Whether moneylending transaction—Moneylenders Act, 1927 (c. 21), s. 1 [OLDS DISCOUNT CO., LTD. v. JOHN PLAYFAIR, LTD.]</i>	275
MORTGAGE.	
<i>Receiver—Appointment—By mortgagee in possession—Law of Property Act, 1925 (c. 20), s. 101 (1) (iii) [REFUGEE ASSURANCE CO., LTD. v. PEARLBERG]</i>	231
<i>Mortgage, husband joining in as surety, required by mortgagees to pay as surety, gifts between husband and wife, advancement, proof in wife's estate</i>	459
<i>Mortgagors, two each receiving half the sum advanced, right of one to compel other to repay the moiety</i>	43
<i>Motor car, sharing expenses of journey, public service vehicle</i>	39
<i>National health insurance, canvasser, whether employment within the meaning of the National Health Insurance Act, 1936</i>	244
NEGLIGENCE.	
<i>Breach of statutory duty—Motorist—Pedestrian crossings—Defence of contributory negligence—Availability—Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, regs. 3, 4 [KNIGHT v. SAMPSON]</i>	309
<i>Fatal accident—Recovery of damages under Fatal Accidents Act—Further action under Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41)—Whether further award made and the amount thereof [MAX v. SIR ROBERT MCALPINE & SONS (LONDON), LTD.]</i>	85
<i>Invitee—Yard forming part of licensed premises—Customer slipping in yard—Standard of care owed by proprietor [SIMONS v. WINSLADE]</i>	774
<i>Personal injuries—Damages—Assessment—Shortened expectation of life—Overlapping of damages—Fatal Accidents Act, 1846 (c. 93)—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 [THE AIZKARAI MENDI]</i>	483
<i>Non-feasance, liability of railway company, bridge carrying road over railway, repair, extent of liability to repair</i>	705
<i>—, sanitary authority's excavation in roadway for drainage purposes, accident due to subsidence three years after work completed</i>	93
<i>Notice of abandonment not given, whether ship constructive total loss</i>	249
NUISANCE.	
<i>Creation unknown to occupier—Right of stranger to abate—Whether occupier liable for failure to abate before notice [SEDLIGH-DENFIELD v. ST. JOSEPH'S SOCIETY FOR FOREIGN MISSIONS AND HILLMAN]</i>	321
<i>Nuisance, erection of posts on towpath, benefit to public, injunction</i>	367

	PAGE
Nurse, whether workman within Workmen's Compensation Acts	473
Occupier, liability for failure to abate nuisance before notice of its creation . .	321
—, of factory, liability for accidents . .	52
Onus of proof, boundary of highway, ditch inside fence, presumption, statutory right to fill in	647
Open space, land acquired by local authority, assessment of compensation .	781
Parent, invited to display at school, invitee	537
Partnership, sole asset brood mare, assessment to tax	5
Party wall, enlargement of openings, rights of owner	469
Passenger in private car, sharing expenses, whether used for social, domestic and pleasure purposes	1
Penalties, action for, whether action in tort	329

PERPETUITIES.

<i>Alternative dispositions—Two distinct events—"Whichever shall last happen"</i> [Re CURRYER'S WILL TRUSTS, WYLY v. CURRYER]	574
Personal injuries, damages, assessment, shortened expectation of life, overlapping of damages	483
Personal representatives, rights in copyright, existing copyright at passing of 1911 Act	506
Personalty or realty, proceeds of sale of settled land	391
Police, statement to, by co-defendant, verdict of jury only possible if statement acted upon, validity of conviction . .	793
—, —, by witness, non-production . .	787
—, evidence of other pending charges, evidence prejudicial to accused, necessity to discharge jury	783
Policy, taken out by father on life of son, premiums paid by or on behalf of son, premiums paid under common mistake as to right to policy moneys, lien . .	610
Policy moneys, child's endowment policy, godchild of assured, right of assured's estate	124
—, policy taken out by father on life of son, whether father's estate or son's estate entitled	357
Posts, erection on towpath, benefit to public, nuisance, injunction	367
Poverty, relief of, charities, advancement of religion	767

POWERS.

<i>Fraudulent exercise—Power in favour of one object only—Necessity for proof of antecedent agreement with appointee to benefit stranger</i> [Re NICHOLSON'S SETTLEMENT, MOLONY v. NICHOLSON] .	532
<i>Special power to appoint among children—Excessive exercise—Appointment making appointees under doctrine of election bound to settle appointed shares—Validity</i> [Re NEAVE'S SETTLEMENT TRUSTS, NEAVE v. NEAVE]	220
<i>Special power to appoint by will—Exercise—Residuary gift—Direction to pay debts out of residue—"Appoint"—"Estate and effects of which I shall have power to dispose at my decease"</i> [Re BERESFORD'S WILL TRUSTS, STURGES v. BERESFORD] .	566

PRACTICE.

<i>Application for leave to bring an action against a hospital board—Leave granted by a judge—Jurisdiction of Court of Appeal to hear appeal—Mental Treatment Act, 1930 (c. 23), s. 16 (2)—R.S.C., Ord. 54, r. 23</i> [Re AN INTENDED ACTION, SHOESMITH v. LANCASHIRE MENTAL HOSPITAL BOARD]	186
--	-----

<i>Application to stay an action—Actions by several plaintiffs against one defendant—Present action based on negligence alone—Other actions based on negligence and breach of statutory duty—Whether present action should be stayed pending hearing of one test action—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 41 (a)—R.S.C., Ord. 49, r. 8</i> [PERRY v. CROYDON BOROUGH COUNCIL]	670
<i>Costs—Taxation—Allowance of two junior counsel—Discretion of taxing master—R.S.C., Ord. 65, r. 27 (47)</i> [BRITISH METAL CORPORATION, LTD. v. LUDLOW BROTHERS (1913), LTD.]	194
<i>Discovery—Chancery Division—Privilege—Right of parties to take matter before the judge—Inspection of documents by the court—Necessity for inspection by, or report to, judge—Reference to privileged matter in other proceedings—Waiver of privilege—R.S.C., Ord. 31, r. 19A (2)</i> [INFIELDS, LTD. v. P. ROSEN & SON] . .	591
<i>Joint tortfeasors—Jurisdiction of master to allow one defendant to offer to pay a proportion of any liability—Law Reform (Miscellaneous Provisions) Act, 1935 (c. 30), s. 6—R.S.C., Ord. 30, r. 2</i> [SIGLEY v. HALE]	87
<i>Reference to referee—Form of report—Landlord and Tenant Act, 1927 (c. 36)—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 88 (2)</i> [FREEMAN v. DARTFORD BREWERY CO., LTD.] .	120
<i>Remitted action—Costs up to remission costs in cause—Whether on High Court scale—Jurisdiction of county court judge to vary order—County Courts Act, 1934 (c. 53), s. 73</i> [SIMMONS & SON, LTD. v. WILTSHIRE]	403
<i>Practice and procedure, meaning of . .</i>	186
<i>Practice, statement of claim showing cause of action accruing before statutory period, whether defendant can have statement of claim struck out . .</i>	762
<i>Preliminary hearing by justices, committal for trial, evidence, co-defendant added after evidence given, depositions read to witnesses and approved, irregularity</i>	674
<i>Premiums, policy taken out by father on life of son, premiums paid by son under common mistake as to right to policy moneys, lien</i>	610
<i>Priests, infirm, sick and aged, relief, relief of poverty, advancement of religion, charities</i>	767
<i>Priority of life assurance creditors over other creditors, winding up of insurance company carrying on different classes of insurance business</i>	748
<i>Private Act of Parliament avoiding restraint upon alienation, whether succession destroyed, reservation of Crown rights</i>	605
<i>Privilege, right of parties to take matter before judge, necessity for inspection by, or report to, judge</i>	591

PRIVY COUNCIL.

<i>Canada—Ontario—Electricity—Power supply—Contract to supply for the mining life of a property—Assignable only with consent of power company—Consumer company selling mine and being dissolved—Whether contract determined</i> [NORTHERN ONTARIO POWER CO., LTD. v. LA ROCHE MINES, LTD., AND ANOTHER. LA ROCHE MINES, LTD., AND ANOTHER v. NORTHERN ONTARIO POWER CO., LTD.]	753
--	-----

	PAGE
Will—Direction by testator that payments be made to his daughter "only so long as she shall continue to reside in Canada"—Impossibility of determining what future conduct would fall within the terms of the will—Condition subsequent—Void for uncertainty (SIFTON v. SIFTON)	435
Isle of Man—Mines and minerals—Crown rights to minerals, flagg, slate and stone—Shale—Whether included in the rights reserved—Act of Settlement, 1703-04 [ATTORNEY-GENERAL FOR ISLE OF MAN v. MOORE]	263
Malta—Right to legislate in colonies—Settlements—Ceded territories—Cession by general consent of inhabitants—Royal prerogative—British Settlements Act, 1887 (c. 54), s. 6—Foreign Jurisdiction Act, 1890 (c. 37), s. 1 [SAMMUT AND ANOTHER v. STRICKLAND]	693
Straits Settlements—Executors—Contracts of deceased—Executor making payments in respect of contract—Probate subsequently revoked—Right of executor who had acted reasonably to set off payments made in estate accounts [AHMED ANGULLIA BIN HADJEE MOHAMED SALLEH ANGULLIA v. ESTATE & TRUST AGENCIES (1927), LTD.]	106
Production of documents to councillor	226

PUBLIC AUTHORITIES.

Limitation of actions—Whether railway company a public authority—Public Authorities Protection Act, 1893 (c. 61), s. 1 [SWAIN v. SOUTHERN RAILWAY CO.]	705
Public authority, managers of non-provided school, limitation of action	537
Public service vehicle, friends sharing expenses of journey	39
Quality and condition, whether faulty manufacture included, restrictions on rejection	375
Quarter sessions, order on affiliation appeal, finality	241
Railway, bridge carrying road over, repair, liability of railway company for non-feasance, extent of liability to repair	705
Railway company, whether a public authority, limitation of actions	705
Rape, resulting in pregnancy of young girl, danger to life, abortion by surgeon	615
Realty or personality, proceeds of sale of settled land	391
Receiver, appointment of, by mortgagee in possession	231
—, —, judgment against married woman	199
Reconciliation agreement, provision for future separation of spouses, validity	156
Reduction of maintenance, application for, voluntary settlements by husband, re-marriage of wife	116
Referee, reference to, form of report	120
Rejection of goods, marked goods, whether restrictions on rejection apply to unmarked goods	375
—, restrictions on, variation from specification greater than that permitted by contract, restriction on rejection of "the goods herein named nor any part of them"	429
Relief from double taxation, dividends of English company suffering tax, relief to preference shareholder in Indian company	98
Religion, advancement, relief of poverty, charities	767
Remarriage of wife, application for reduction of maintenance	116
Repairs, covenant to pay stated sum, legality	166
—, non-provided school, liability of managers	537
Report, form of, reference to referee	120

	PAGE
Representative, liability of, survival of action, action for penalties, whether action in tort	329
Requisitioning of foreign-owned vessel by both de jure and de facto governments, claim for possession, impleading a foreign government	333
Reservation, express, of underground working only, whether implied right to enter upon surface excluded	599
Residuary estate, contingent interest in income of, maintenance out of intermediate income	181
Residuary gift, exercise of special power to appoint by will, direction to pay debts out of residue	566
Restitution of conjugal rights, wife's petition for, prior cohabitation unnecessary to found suit	389
Restraint on anticipation, appointment of receiver	199
Restrictive covenants, benefit of, stamp duty	526

REVENUE.

Stamp duty—Conditional agreement—Agreement to pay a sum of money upon the transfer of licences relating to a motor coach business—Goodwill—Restrictive covenants—Stamp Act, 1891 (c. 39), s. 59 (1) [EASTERN NATIONAL OMNIBUS CO., LTD. v. INLAND REVENUE COMMISSIONERS]	526
Reversion, damage to, necessity for, action on repair covenant	166
Review of compensation, time within which application must be made	410
Royal prerogative, right to legislate in colonies, settlements, ceded territories, cession by general consent of inhabitants	693
Royalties, licence to construct and use, consideration, lump sum payable in instalments and further sum payable each year during continuance of licence, liability to income tax	283
Rules of statutory body, whether binding in all cases or only procedural	547
Sale, of book debts, financing hire-purchase agreement, whether moneylending transaction	275
—, of undertaking to realisation company, no power to sell in memorandum	740

SALE OF GOODS.

Rejection—Restrictions—Marked goods—Whether restrictions on rejection apply to unmarked goods—Faulty manufacture—Claims in respect of quality and condition—Timber not properly seasoned [VSESOJWZOJE OBJEDINENIJE "EXPORTLES" v. T. W. ALLEN & SONS, LTD.]	375
—, —, Variation from specification greater than that permitted by contract—Restriction on rejection of "the goods herein named nor any part of them" [WILENSKO SLASKI TOWARZYSTWO DREWNO v. FENWICK & CO. (WEST HARTLEPOOL), LTD.]	429
Sanitary authority, excavation by, non-feasance, excavation for drainage purposes, accident due to subsidence three years after work completed	93
Schoolmistress, box on ear, liability	517
Seizure of ship by forces not recognised as belligerents, frustration, charter-party	135
Separation, reconciliation agreement, provision for future separation of spouses, validity	156
Separation agreement, treated as nullity, continuance of desertion	773
—, five years after commencement of desertion, husband's failure to pay thereunder, whether continuing desertion	770

	PAGE
Separation deed, all charges withdrawn, petition for divorce based on same charges, absolute release, frustration	415
—, repudiation by failure to make payments	42
separation judicial, previous proceedings abandoned, petition for divorce on ground of desertion, whether petition barred	765
Service, out of jurisdiction, Crown debt	32
Settled land, land subject to equitable interests and then held on trust for sale	449
—, proceeds of sale of, whether realty or personality	391

SETTLEMENTS.

Interest determinable on bankruptcy—Breach of trust—Unauthorised advances by trustee to tenant for life—Income taken to replace capital—Forfeiture [Re BAIFOUR'S SETTLEMENT, PUBLIC TRUSTEE v. OFFICIAL RECEIVER]	259
Proceeds of sale of settled land—Whether realty or personality—Settled Land Act, 1925 (c. 18), s. 75 (5) [Re CARTWRIGHT, CARTWRIGHT v. SMITH]	391
Settled land—Land subject to equitable interests and then held on trust for sale—Legal estate vested in the persons who are the trustees for sale but not as such trustees—Compound settlement—Deeds forming compound settlement—Trustees of compound settlement—Settled Land Act, 1925 (c. 18), s. 1 (7)—Law of Property Amendment Act, 1926 (c. 11), Sched. [Re SHARPE'S DEED OF RELEASE, SHARPE v. FOX]	449
Tenant for life and remainderman—Apportionment as between capital and income—Tithe redemption annuities—Tithe Act, 1925 (c. 87)—Tithe Act, 1936 (c. 43) [Re LEICESTER'S SETTLED ESTATES, COKE v. LEICESTER]	553
Settlement, execution by one party, sufficiency of execution by one party, execution upon faith of execution by other parties	652
Shale, whether included in Crown rights to minerals, flagg, slate and stone	263

SHIPPING.

Charterparty—Exceptions—Liberty to cancel if "war breaks out involving Japan"—Meaning of "war" [KAWASAKI KISEN KABUSHIKI KAISHA OF KOBE v. BANTHAM S.S. Co., LTD.]	80
—, Time charter—Hire—Payment in advance—Hire calculated on deadweight—Hire not due until deadweight communicated to charterers [KAWASAKI KISEN KABUSHIKI KAISHA v. BANTHAM S.S. Co., LTD.]	690
Foreign-owned vessel—Requisition by both de jure and de facto governments—Claim for possession—Impleading a foreign government [THE ARANTZAZU MENDI]	333
Shop assistant, weekly half-holiday, waiter, hotel, dining-room open to non-residents	790

SOLICITOR.

Alleged unprofessional conduct—Conduct of case left to managing clerk—Inadequate affidavits of documents—False to the knowledge of the clerk—Whether solicitor can be made personally responsible for costs [MYERS v. ROTHFIELD]	498
Solicitor's practice, bequest of, whether confined to goodwill or including all assets of business	314
Sovereign, foreign, de jure sovereign, right of action accrued when also de facto sovereign	677
Specification, variation from, greater than that permitted by contract, restriction on rejection of "the goods herein named nor any part of them"	429
Stay of action, arbitration, when member of company bound by arbitration in articles	214

	PAGE
STREET AND AERIAL TRAFFIC.	
Motor car—Carrying friends of owner—driver—Payment for oil and petrol used—Necessity for licence as a public-service vehicle—Road Traffic Act, 1930 (c. 43), s. 61 [EAST MIDLAND TRAFFIC AREA TRAFFIC COMMISSIONERS v. TYLER]	39
Succession to trade, absorption of subsidiary company only carrying on manufacture	571
Summary jurisdiction, non-cohabitation and maintenance orders, adultery, limitation of time	349
Support, party wall, enlargement of openings	469
Surety, exoneration of, right to compel payment by principal debtor	43
Surface working, express reservation of underground working only, whether implied right to enter upon surface excluded	599
Surgeon performing abortion, danger to life, pregnancy of young girl due to rape	615
Tenant for life, unauthorised advances by trustee, breach of trust, income taken to replace capital, forfeiture	259
Tenant for life and remainderman, apportionment as between capital and income, tithe redemption annuities	553
Time, limitation of, adultery, whether running from date of adultery or discovery thereof	349
Time charter, hire based on deadweight, payment in advance, necessity for owners to communicate deadweight to charterers	690
Time within which application for review of compensation must be made	410
Tithe redemption annuities, apportionment as between capital and income, tenant for life and remainderman	553
Tithe rentcharge, arrears, limitation of time for recovery, excluded period, limitation period expiring before the commencement of excluded period	664
Tort, whether action for penalties action in	329
Tortfeasors, joint, jurisdiction of master to allow one defendant to offer to pay a proportion of any liability	87
Total loss, constructive, whether notice of abandonment necessary	249

TOWN AND COUNTRY PLANNING.

Agreement restricting planning in lieu of scheme—Agreement alleged to have been with a committee of local authority—Power of local authority to delegate to committee—Agreement relating to planning, development or user but alleged to be more favourable to landowner than draft scheme—Whether interim development order required—Town and Country Planning Act, 1932 (c.48), ss. 34, 48, 54—Local Government Act, 1933 (c. 51), s. 85 [ATTORNEY-GENERAL (AT THE RELATION OF THOMAS) v. BARNES BOROUGH COUNCIL AND RANELAGH CLUB, LTD.]	711
Towpath, erection of posts, benefit to public, nuisance, injunction	367
Trade receipt, unclaimed balances, carried into partners' current accounts	296
Trust, breach of, unauthorised advances by trustee to tenant for life, income taken to replace capital, forfeiture	259
Trust for sale, land subject to equitable interests and then held on, whether settled land	449
Uncertainty, condition subsequent in will void for	435
Unemployment, relief of, employment by local authority for 9 weeks under scheme for, whether employment casual	585
Waiter, whether shop assistant, weekly half-holiday, hotel, dining-room open to non-residents	790
War, meaning of, hostilities between China and Japan	80

	PAGE
—, —, <i>Will</i> — <i>Direction by testator that payments be made to his daughter "only so long as she shall continue to reside in Canada"</i> — <i>Impossibility of determining what future conduct would fall within the terms of the will</i> — <i>Condition subsequent</i> — <i>Void for uncertainty</i> [SIFTON v. SIFTON]	435
<i>Isle of Man</i> — <i>Mines and minerals</i> — <i>Crown rights to minerals, flagg, slate and stone</i> — <i>Shale</i> — <i>Whether included in the rights reserved</i> — <i>Act of Settlement, 1703-04</i> [ATTORNEY-GENERAL FOR ISLE OF MAN v. MOORE]	263
<i>Malta</i> — <i>Right to legislate in colonies</i> — <i>Settlements</i> — <i>Ceded territories</i> — <i>Cession by general consent of inhabitants</i> — <i>Royal prerogative</i> — <i>British Settlements Act, 1887 (c. 54), s. 6</i> — <i>Foreign Jurisdiction Act, 1890 (c. 37), s. 1</i> [SAMMUT AND ANOTHER v. STRICKLAND]	693
<i>Straits Settlements</i> — <i>Executors</i> — <i>Contracts of deceased</i> — <i>Executor making payments in respect of contract</i> — <i>Probate subsequently revoked</i> — <i>Right of executor who had acted reasonably to set off payments made in estate accounts</i> [AHMED ANGULLIA BIN HADJEE MOHAMED SALLEH ANGULLIA v. ESTATE & TRUST AGENCIES (1927), LTD.]	106
<i>Production of documents to councillor</i>	226

PUBLIC AUTHORITIES.

<i>Limitation of actions</i> — <i>Whether railway company a public authority</i> — <i>Public Authorities Protection Act, 1893 (c. 61), s. 1</i> [SWAIN v. SOUTHERN RAILWAY CO.]	705
<i>Public authority, managers of non-provided school, limitation of action</i>	537
<i>Public service vehicle, friends sharing expenses of journey</i>	39
<i>Quality and condition, whether faulty manufacture included, restrictions on rejection</i>	375
<i>Quarter sessions, order on affiliation appeal, finality</i>	241
<i>Railway, bridge carrying road over, repair, liability of railway company for non-feasance, extent of liability to repair</i>	705
<i>Railway company, whether a public authority, limitation of actions</i>	705
<i>Rape, resulting in pregnancy of young girl, danger to life, abortion by surgeon</i>	615
<i>Realty or personality, proceeds of sale of settled land</i>	391
<i>Receiver, appointment of, by mortgagee in possession</i>	231
—, —, <i>judgment against married woman</i>	199
<i>Reconciliation agreement, provision for future separation of spouses, validity</i>	156
<i>Reduction of maintenance, application for, voluntary settlements by husband, re-marriage of wife</i>	116
<i>Referee, reference to, form of report</i>	120
<i>Rejection of goods, marked goods, whether restrictions on rejection apply to unmarked goods</i>	375
—, —, <i>restrictions on, variation from specification greater than that permitted by contract, restriction on rejection of "the goods herein named nor any part of them"</i>	429
<i>Relief from double taxation, dividends of English company suffering tax, relief to preference shareholder in Indian company</i>	98
<i>Religion, advancement, relief of poverty, charities</i>	767
<i>Remarriage of wife, application for reduction of maintenance</i>	116
<i>Repairs, covenant to pay stated sum, legality</i>	166
—, —, <i>non-provided school, liability of managers</i>	537
<i>Report, form of, reference to referee</i>	120

	PAGE
<i>Representative, liability of, survival of action, action for penalties, whether action in tort</i>	329
<i>Requisitioning of foreign-owned vessel by both de jure and de facto governments, claim for possession, impleading a foreign government</i>	333
<i>Reservation, express, of underground working only, whether implied right to enter upon surface excluded</i>	599
<i>Residuary estate, contingent interest in income of, maintenance out of intermediate income</i>	181
<i>Residuary gift, exercise of special power to appoint by will, direction to pay debts out of residue</i>	566
<i>Restitution of conjugal rights, wife's petition for, prior cohabitation unnecessary to found suit</i>	389
<i>Restraint on anticipation, appointment of receiver</i>	199
<i>Restrictive covenants, benefit of, stamp duty</i>	526

REVENUE.

<i>Stamp duty</i> — <i>Conditional agreement</i> — <i>Agreement to pay a sum of money upon the transfer of licences relating to a motor coach business</i> — <i>Goodwill</i> — <i>Restrictive covenants</i> — <i>Stamp Act, 1891 (c. 39), s. 59 (1)</i> [EASTERN NATIONAL OMNIBUS CO., LTD. v. INLAND REVENUE COMMISSIONERS]	526
<i>Reversion, damage to, necessity for, action on repair covenant</i>	166
<i>Review of compensation, time within which application must be made</i>	410
<i>Royal prerogative, right to legislate in colonies, settlements, ceded territories, cession by general consent of inhabitants</i>	693
<i>Royalties, licence to construct and use, consideration, lump sum payable in instalments and further sum payable each year during continuance of licence, liability to income tax</i>	283
<i>Rules of statutory body, whether binding in all cases or only procedural</i>	547
<i>Sale, of book debts, financing hire-purchase agreement, whether moneylending transaction</i>	275
—, —, <i>of undertaking to realisation company, no power to sell in memorandum</i>	740

SALE OF GOODS.

<i>Rejection</i> — <i>Restrictions</i> — <i>Marked goods</i> — <i>Whether restrictions on rejection apply to unmarked goods</i> — <i>Faulty manufacture</i> — <i>Claims in respect of quality and condition</i> — <i>Timber not properly seasoned</i> [VSESOJWZOJE OBJEDINENIJE "EXPORTLES" v. T. W. ALLEN & SONS, LTD.]	375
—, —, <i>Variation from specification greater than that permitted by contract</i> — <i>Restriction on rejection of "the goods herein named nor any part of them"</i> [WILENSKO SLASKI TOWARZYSTWO DREWNO v. PENWICK & CO. (WEST HARTLEPOOL), LTD.]	429
<i>Sanitary authority, excavation by, non-feasance, excavation for drainage purposes, accident due to subsidence three years after work completed</i>	93
<i>Schoolmistress, box on ear, liability</i>	517
<i>Seizure of ship by forces not recognised as belligerents, frustration, charter-party</i>	135
<i>Separation, reconciliation agreement, provision for future separation of spouses, validity</i>	156
<i>Separation agreement, treated as nullity, continuance of desertion</i>	773
—, —, <i>five years after commencement of desertion, husband's failure to pay thereunder, whether continuing desertion</i>	770

	PAGE
Separation deed, all charges withdrawn, petition for divorce based on same charges, absolute release, frustration	415
—, repudiation by failure to make payments	42
separation judicial, previous proceedings abandoned, petition for divorce on ground of desertion, whether petition barred	765
Service, out of jurisdiction, Crown debt	32
Settled land, land subject to equitable interests and then held on trust for sale	449
—, proceeds of sale of, whether realty or personality	391

SETTLEMENTS.

<i>Interest determinable on bankruptcy—Breach of trust—Unauthorised advances by trustee to tenant for life—Income taken to replace capital—Forfeiture [Re BAIFOUR'S SETTLEMENT, PUBLIC TRUSTEE v. OFFICIAL RECEIVER]</i>	259
<i>Proceeds of sale of settled land—Whether realty or personality—Settled Land Act, 1925 (c. 18), s. 75 (5) [Re CARTWRIGHT, CARTWRIGHT v. SMITH]</i>	391
<i>Settled land—Land subject to equitable interests and then held on trust for sale—Legal estate vested in the persons who are the trustees for sale but not as such trustees—Compound settlement—Deeds forming compound settlement—Trustees of compound settlement—Settled Land Act, 1925 (c. 18), s. 1 (7)—Law of Property Amendment Act, 1926 (c. 11), Sched. [Re SHARPE'S DEED OF RELEASE, SHARPE v. FOX]</i>	449
<i>Tenant for life and remainderman—Apportionment as between capital and income—Tithe redemption annuities—Tithe Act, 1925 (c. 87)—Tithe Act, 1936 (c. 43) [Re LEICESTER'S SETTLED ESTATES, COKE v. LEICESTER]</i>	553
<i>Settlement, execution by one party, sufficiency of execution by one party, execution upon faith of execution by other parties</i>	652
<i>Shale, whether included in Crown rights to minerals, flag, slate and stone</i>	263

SHIPPING.

<i>Charterparty—Exceptions—Liberty to cancel if "war breaks out involving Japan"—Meaning of "war" [KAWASAKI KISEN KABUSHIKI KAISHA OF KOBE v. BANTHAM S.S. Co., LTD.]</i>	80
<i>—, Time charter—Hire—Payment in advance—Hire calculated on deadweight—Hire not due until deadweight communicated to charterers [KAWASAKI KISEN KABUSHIKI KAISHA v. BANTHAM S.S. Co., LTD.]</i>	690
<i>Foreign-owned vessel—Requisition by both de jure and de facto governments—Claim for possession—Impleading a foreign government [THE ARANTZU MENDI]</i>	333
<i>Shop assistant, weekly half-holiday, waiter, hotel, dining-room open to non-residents</i>	790

SOLICITOR.

<i>Alleged unprofessional conduct—Conduct of case left to managing clerk—Inadequate affidavits of documents—False to the knowledge of the clerk—Whether solicitor can be made personally responsible for costs [MYERS v. ROTHFIELD]</i>	498
<i>Solicitor's practice, bequest of, whether confined to goodwill or including all assets of business</i>	314
<i>Sovereign, foreign, de jure sovereign, right of action accrued when also de facto sovereign</i>	677
<i>Specification, variation from, greater than that permitted by contract, restriction on rejection of "the goods herein named nor any part of them"</i>	429
<i>Stay of action, arbitration, when member of company bound by arbitration in articles</i>	214

	PAGE
STREET AND AERIAL TRAFFIC.	
<i>Motor car—Carrying friends of owner—driver—Payment for oil and petrol used—Necessity for licence as a public-service vehicle—Road Traffic Act, 1930 (c. 43), s. 61 [EAST MIDLAND TRAFFIC AREA TRAFFIC COMMISSIONERS v. TYLER]</i>	39
<i>Succession to trade, absorption of subsidiary company only carrying on manufacture</i>	571
<i>Summary jurisdiction, non-cohabitation and maintenance orders, adultery, limitation of time</i>	349
<i>Support, party wall, enlargement of openings</i>	469
<i>Surety, exoneration of, right to compel payment by principal debtor</i>	43
<i>Surface working, express reservation of underground working only, whether implied right to enter upon surface excluded</i>	599
<i>Surgeon performing abortion, danger to life, pregnancy of young girl due to rape</i>	615
<i>Tenant for life, unauthorised advances by trustee, breach of trust, income taken to replace capital, forfeiture</i>	259
<i>Tenant for life and remainderman, apportionment as between capital and income, tithe redemption annuities</i>	553
<i>Time, limitation of, adultery, whether running from date of adultery or discovery thereof</i>	349
<i>Time charter, hire based on deadweight, payment in advance, necessity for owners to communicate deadweight to charterers</i>	690
<i>Time within which application for review of compensation must be made</i>	410
<i>Tithe redemption annuities, apportionment as between capital and income, tenant for life and remainderman</i>	553
<i>Tithe rentcharge, arrears, limitation of time for recovery, excluded period, limitation period expiring before the commencement of excluded period</i>	664
<i>Tort, whether action for penalties action in</i>	329
<i>Tortfeasors, joint, jurisdiction of master to allow one defendant to offer to pay a proportion of any liability</i>	87
<i>Total loss, constructive, whether notice of abandonment necessary</i>	249

TOWN AND COUNTRY PLANNING.

<i>Agreement restricting planning in lieu of scheme—Agreement alleged to have been with a committee of local authority—Power of local authority to delegate to committee—Agreement relating to planning, development or user but alleged to be more favourable to landowner than draft scheme—Whether interim development order required—Town and Country Planning Act, 1932 (c.48), ss. 34, 48, 54—Local Government Act, 1933 (c. 51), s. 85 [ATTORNEY-GENERAL (AT THE RELATION OF THOMAS) v. BARNES BOROUGH COUNCIL AND RANELAGH CLUB, LTD.]</i>	711
<i>Towpath, erection of posts, benefit to public, nuisance, injunction</i>	367
<i>Trade receipt, unclaimed balances, carried into partners' current accounts</i>	296
<i>Trust, breach of, unauthorised advances by trustee to tenant for life, income taken to replace capital, forfeiture</i>	259
<i>Trust for sale, land subject to equitable interests and then held on, whether settled land</i>	449
<i>Uncertainty, condition subsequent in will void for</i>	435
<i>Unemployment, relief of, employment by local authority for 9 weeks under scheme for, whether employment casual</i>	585
<i>Waiter, whether shop assistant, weekly half-holiday, hotel, dining-room open to non-residents</i>	790
<i>War, meaning of, hostilities between China and Japan</i>	80

	PAGE
Wife, remarriage of, application for reduction of maintenance, voluntary settlements by husband	116
Wife's estate, proof in, gifts between husband and wife, advancement, husband joining as surety in mortgage, required by mortgagees to pay as surety	459
Will, direction by testator that payments be made to his daughter "only so long as she shall continue to reside in Canada," condition subsequent, void for uncertainty	435

WILLS.

Construction—Amount of legacy—Inconsistency between words and figures [Re HAMMOND, HAMMOND v. TREHARNE]	308
—, Bequest—Business—Whether confined to goodwill or including all assets of business—Solicitor's practice [Re RHAGG, EASTEN v. BOYD]	314
Contingent interest in income of residuary estate—Maintenance out of intermediate income—Trustee Act, 1925 (c. 19), s. 31 [Re LENG, DODSWORTH v. LENG]	181
Will made abroad—Proceeds of sale of settled land—Whether personality—Wills Act, 1861 (c. 114), s. 1 [Re CARTWRIGHT, CARTWRIGHT v. SMITH]	391
Winding up, insurance company carrying on different classes of insurance business, priority of life assurance creditors over other creditors	748
—, voluntary, order to produce books, procedure to contest validity of order, discretion of court to order production, oppressive exercise of discretion	621

WORK AND LABOUR.

National health insurance—Employment—Canvasser—Payment of fixed sum weekly for expenses—Remuneration by payment of value of first order from new customers—Whether employment within the meaning of the National Health Insurance Act, 1936—National Health Insurance Act, 1936 (c. 32), Sched. I [APPEAL OF BELCHER, Re ESSEX FLOUR & GRAIN CO., LTD.]	244
---	-----

	PAGE
Unemployment insurance—Insured person—Employment in agriculture—Employee on fur farm—Unemployment Insurance (Agriculture) Act, 1936 (c. 13) [Re K. T. STEPHENS AND R. H. BRANTHWAITE (TRADING AS MORESDALE FUR FARM) AND E. OTWAY, Re HUME AND CROFT]	311

WORKMEN'S COMPENSATION.

Employment by local authority under scheme for relief of unemployment—Employment for 9 weeks—Whether employment casual—Workmen's Compensation Act, 1925 (c. 84), ss. 8 (2), 10 [SUMMERS v. RHONDDA URBAN DISTRICT COUNCIL]	585
Hospital nurse—Injury while preparing a poultice—Whether working under a contract of service—Workmen's Compensation Act, 1925 (c. 84), s. 3 [WARDELL v. KENT COUNTY COUNCIL]	473
Insolvency of employer—Liability of insurers to workman—Mutual indemnity society—Non-payment of calls—Workmen's Compensation Act, 1925 (c. 84), s. 7 [WOODING v. MONMOUTHSHIRE & SOUTH WALES MUTUAL INDEMNITY SOCIETY, LTD., JAMES v. SAME, HAWKINS v. SAME]	625
Partial incapacity—Claim as for total incapacity—Inability to obtain work—Whether "all reasonable steps" taken to obtain employment—Whether onus of proof on employer or on workman—Workmen's Compensation Act, 1925 (c. 84), s. 9 (4)—Workmen's Compensation Act, 1931 (c. 18), s. 1 (1) [McLAUGHLIN v. CALEDONIA STEVEDORING CO., LTD.]	72
Review of compensation—Infant workman—Time within which application must be made—Meaning of "review"—Change in probable earnings at a date later than application but prior to hearing—Workmen's Compensation Act, 1925 (c. 84), s. 11 (2) [BURTON v. DOBSON SHIP REPAIRING CO., LTD.]	410

STATUTES, ETC., REFERRED TO

	PAGE
Limitation Act, 1623 (c. 16), s. 7	762
Highways Act, 1835 (c. 50), s. 67	647
Railway Clauses Consolidation Act, 1845 (c. 20), s. 46	705
Fatal Accidents Act, 1846 (c. 93)	483
Indictable Offences Act, 1848 (c. 42), s. 17	674
Succession Duty Act, 1853 (c. 51), ss. 2, 12, 15	605
Offences against the Person Act, 1861 (c. 100), s. 58	615
Wills Act, 1861 (c. 114), s. 1	391
Highways Act, 1864 (c. 101), s. 48	647
Crown Suits, etc., Act, 1865 (c. 104), s. 37	32
British Settlements Act, 1887 (c. 54), s. 6	693
Arbitration Act, 1889 (c. 49), ss. 4, 27	214
Foreign Jurisdiction Act, 1890 (c. 37), s. 1	693
Stamp Act, 1891 (c. 39), s. 59 (1)	526
Public Authorities Protection Act, 1893 (c. 61), s. 1	537, 705
Finance Act, 1894 (c. 30), ss. 2 (1) (d), 4	341
Criminal Evidence Act, 1898 (c. 36), s. 1 (f)	380
Factory and Workshop Act, 1901 (c. 22), ss. 79, 82, 104 140, 141, 142, 149 151	52
Education Act, 1902 (c. 42), ss. 5, 6 (2), 7, 11	537
Marine Insurance Act, 1906 (c. 41), s. 60	249
Assurance Companies Act, 1909 (c. 49), ss. 2, 3, 4, 5	748
Copyright Act, 1911 (c. 46), ss. 5 (2), 24	506
Coal Mines Act, 1911 (c. 50), ss. 55, 102 (8)	21
Shops Act, 1912 (c. 3), ss. 1, 19 (1)	790
Bankruptcy Act, 1914 (c. 59), s. 5 (3)	744
Income Tax Act, 1918 (c. 40), s. 20 (1), Sched. B	5
—, s. 30 (1)	329
—, Sched. D, Cases I and II, r. 3	577
—, —, r. 11 (2)	571
—, All Schedules Rules, r. 21	283
Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), s. 2	781
Finance Act, 1920 (c. 18), s. 27	174
Education Act, 1921 (c. 51), ss. 29-35	537
Finance Act, 1922 (c. 17), s. 20 (1) (b)	463
Criminal Law Amendment Act, 1922 (c. 54), s. 2	134
Settled Land Act, 1925 (c. 18), s. 1 (1) (v), (7)	449
—, s. 75 (5)	391
—, Sched. III, Part II, para. 5	406
Trustee Act, 1925 (c. 19), s. 31	181
Law of Property Act, 1925 (c. 20), s. 40	447
—, s. 56	124, 357
—, s. 101 (1) (iii)	231
Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 41 (a)	670
—, s. 88 (2)	120
—, s. 99 (1) (a), (g)	32
Workmen's Compensation Act, 1925 (c. 84), s. 3	473
—, s. 7	625
—, ss. 3 (2), 10	585
—, s. 9 (4)	72
—, s. 11 (2)	410
Criminal Justice Act, 1925 (c. 86), s. 13	130
Tithe Act, 1925 (c. 87)	553
Law of Property (Amendment) Act, 1926 (c. 11), Sched.	449
Workmen's Compensation Act, 1926 (c. 42), s. 1	410
Moneylenders Act, 1927 (c. 21), s. 1	275
Landlord and Tenant Act, 1927 (c. 36)	120
—, s. 18 (1)	166
Racecourse Betting Act, 1928 (c. 41), ss. 2 (8), 3 (3), (4)	547
Criminal Law Amendment Act, 1928 (c. 42), s. 1	134
Companies Act, 1929 (c. 23), s. 20	214
—, ss. 153, 154	740
—, s. 214	621
Mental Treatment Act, 1930 (c. 23), s. 16 (2)	186
Road Traffic Act, 1930 (c. 43), s. 61	39
Workmen's Compensation Act, 1931 (c. 18), s. 1 (1)	72
Town and Country Planning Act, 1932 (c. 48), ss. 34, 48, 54	711
Children and Young Persons Act, 1933 (c. 12), s. 1	777
Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 2	398
—, s. 2 (2)	674
Local Government Act, 1933 (c. 51), s. 85	711
Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1	483
—, ss. 1 (1), (3), 4 (2)	329

	PAGE
Road Traffic Act, 1934 (c. 50), s. 10 (1)	1
County Courts Act, 1934 (c. 53), s. 73	403
Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), ss. 1, 2 (1)	199
—, s. 6	87
—, s. 6 (1) (2)	517
Unemployment Insurance (Agriculture) Act, 1936 (c. 13)	311
National Health Insurance Act, 1936 (c. 32), Sched. I	244
Finance Act, 1936 (c. 34), s. 18	560
Tithe Act, 1936 (c. 43)	553
—, ss. 1, 4 (1), 20	664
Matrimonial Causes Act, 1937 (c. 57), s. 2	415
—, s. 2 (b)	41, 722, 770
—, ss. 2 (d), 3	183
—, s. 4	64, 722, 773
—, s. 6	765
—, s. 11	349
Act of Settlement, 1703-04	263
London Building Act, 1930 (c. clviii), s. 117	469
R.S.C., Ord. 11	32
—, Ord. 25, r. 4	762
—, Ord. 30, r. 2	87
—, Ord. 31, r. 19A (2)	591
—, Ord. 49, r. 8	670
—, Ord. 54, r. 23	186
—, Ord. 65, r. 27 (47)	194
Relief in respect of Double Taxation (Irish Free State) Declaration, 1923 (S.R. & O., 1923, No. 406)	174
Shipbuilding Regulations, 1931 (S.R. & O., 1931, No. 133)	52
Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, regs. 3, 4	309
Institute Time Clauses (Freight), cl. 5	249

WORDS AND PHRASES

	PAGE
Appoint	566
Estate and effects of which I shall have power to dispose at my decease	566
Founded on	156
Only so long as she shall continue to reside in Canada	435
Social, domestic and pleasure purposes	1
The goods herein named nor any part of them	429
War	80

THE ALL ENGLAND LAW REPORTS ANNOTATED

McCARTHY v. BRITISH OAK INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Atkinson, J.), May 20, 1938.]

Insurance—Motor car insurance—Passenger in private car—Payment in respect of expenses—"Social, domestic and pleasure purposes"—Policy not covering use for hiring—Road Traffic Act, 1934 (c. 50), s. 10 (1).

The plaintiff, who had been involved in a motor accident and suffered personal injuries, recovered judgment for £1,401 19s. 6d. against the impecunious driver of the car in fault. The judgment being unsatisfied, he brought the present action against the insurers under the Road Traffic Act, 1934, s. 10 (1). The company pleaded that the car was not being used for social, domestic, or pleasure purposes, but was being used for hire, within the limitations as to use set out in the certificate of insurance and the descriptions of use in the policy. The car belonged to C., a garage proprietor, and was insured by him, with other cars. He had occasionally employed R. as a professional driver, but on this occasion R. had borrowed the car in question, without payment, to take a party of his friends to Southend. The trip had been arranged some time before the day of the accident. When R. fetched the car from the garage, he filled up with oil and petrol, for which he paid C. about 10s. This expenditure was subsequently reimbursed to R. by his friends :—

HELD : the car was being used for social and domestic purposes within the meaning of the policy, and there was no such arrangement as would amount to a hiring. The plaintiff was therefore entitled to recover the damages awarded in the previous accident.

[EDITORIAL NOTE.] The facts in this case are distinguished from those in *Wyatt v. Guildhall Insurance Co., Ltd.* (1), where a lump sum payment was made in respect of the journey. Here the arrangement was to share the out-of-pocket expenses of the journey.

AS TO INSURANCE COMPANY'S DUTY TO SATISFY JUDGMENTS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 563-566, paras. 913-917 ; and FOR CASES, see DIGEST, Supp., Insurance, Nos. 3217 ff-3217 ll.]

Case referred to :

(1) *Wyatt v. Guildhall Insurance Co., Ltd.*, [1937] 1 K.B. 653 ; [1937] 1 All E.R. 792 ; Digest Supp. ; 106 L.J.K.B. 421 ; 156 L.T. 292.

ACTION under the Road Traffic Act, 1934, s. 10 (1), against an insurance company claiming the amount awarded against the driver of a car in an action for personal injuries.

The certificate of insurance contained the following limitations as to use :

Use only for domestic, social and pleasure purposes and use by the policyholder in person in connection with his business or profession.

Policy does not cover use for hiring, racing, pace-making, speed testing, commercial travelling, the carriage of goods or samples in connection with any trade or business.

Alban Gordon for the plaintiff.

H. D. Samuels, K.C., and *Humfrey H. Edmunds* for the defendants.

Samuels, K.C.: There is a hiring within the meaning of the "limitations as to use" whenever a passenger pays for the journey, even if the sum paid amounts to no more than the out-of-pocket expenses incurred for oil and petrol.

ATKINSON, J.: This is an action under the Road Traffic Act, 1934, s. 10, in which the plaintiff seeks to recover from the British Oak Insurance Co. the sum of £1,300 damages and £101 19s. 6d. taxed costs, the subject-matter of a judgment which he obtained against John Philip Roskam in respect of injuries the plaintiff had suffered through the negligent driving by Roskam of a motor car on some date in Aug., 1936.

Roskam had no means, and he was unable to pay anything under that judgment, so McCarthy, having ascertained that he will not in fact recover the amount from Roskam, seeks to recover it from the defendant company under a policy issued by them to the owner of the car, Clark, under the Road Traffic Act, 1934, s. 10.

The facts are quite shortly these. The owner of the car was Laurence Vivian Clark. He had a garage, and, among other cars which he possessed, and which he had insured with the defendant company, was an Essex saloon, numbered VB 8040. Under that policy, Clark is covered, and also anybody who is driving the car with his consent. The policy, which has been produced, has got certain words limiting the circumstances in which the insurance company undertakes to indemnify Clark, and, of course, any borrower of the car, any person using it with Clark's consent, can be in no better position than is Clark. The car was insured under the policy while it was being used for social, domestic and pleasure purposes. The policy excluded use for hiring. The question in this case is whether, at the time of the accident, the use was a use for social, domestic and pleasure purposes, either by Clark or by somebody who was driving the car with his consent, or whether it was being used for hiring.

Clark had known Roskam, against whom the judgment had been obtained, for twenty years. He was a friend of his, and at times Roskam had been employed by Clark on odd jobs driving cars and the like. Roskam had got as next-door neighbours Mr. and Mrs. Sandbrook. Sandbrook and his wife have been called. They and their daughter were friends of Roskam. There were also a Mr. and Mrs. Evans and their daughter, who were friends of the Sandbrooks. I do not know whether the Evans

were friends of Roskam, but they were certainly friends of the Sandbrooks and the Sandbrooks and the Evans had for some weeks been discussing with their neighbour, Roskam, a sort of picnic, a drive to Southend one night to see the illuminations. They all wanted to go, Mr. and Mrs. Sandbrook and their daughter, and Mr. and Mrs. Evans and Miss Evans.

- A** Roskam also wanted to go, and they were all looking forward to a friendly party of that sort, if it could be arranged. Unfortunately, though Roskam had a car, which he was buying under the hire-purchase system, and for which he was taking out insurance by way of fortnightly cover notes, something had gone wrong with the car a few weeks before, and
- B** it was laid up in a garage. Then an arrangement something of this sort was made. Roskam said that he thought that he could borrow a car from Clark, and they said: "If you can borrow the car, we will pay for the petrol and the oil, and we will all go and have an evening together." As the result of that, Roskam went to see his friend Clark, and said:
- C** "Will you lend me a car, for me and my friends to go to Southend?" Clark said: "Certainly. Here it is." Then Roskam filled up the tank with petrol, and put in a quart of oil, and drove to the houses of his friends and took them into the car. The first time they stopped for a drink, Roskam told them the cost of the petrol and oil, and Sandbrook paid him
- D** the amount—some 10s. or 12s. He could not recollect the exact amount. Sandbrook also told Roskam that he would be coming straight from work and would not be able to have a meal at home, and asked Roskam to buy some sandwiches. Roskam did what he was asked to do. He bought some ham sandwiches, twopenny sandwiches, and Sandbrook gave him
- E** the money for them. Sandbrook also gave him the money for a couple of quarts of beer for the party as a whole. They were not a present to Roskam, but they were for the party as a whole, and those bottles were bought by Roskam and put in the car. Unfortunately, soon after, there was this accident, and the car was smashed up, and they all had to get
- F** back home as best they could. The accident apparently took place through Roskam's negligent driving. That has been established, I suppose, by the judgment. Naturally, he felt that he was responsible for seeing them all back home again, and they eventually got part of the way home by private cars and had to hire taxis, when they got to London, to
- G** get home. Roskam paid away all the money in his pocket towards the expense of getting the party home.

The question is whether or not this car was used for social purposes under this policy at the time of the accident. Was he using that car for social, domestic and pleasure purposes? I should have thought that it

H was obvious that he was. I should have thought that no one would doubt that it was being used for pleasure purposes. As far as I can see, the mere fact that Roskam borrowed the car from somebody else for that purpose cannot take it out of the description of social and pleasure purposes. It is said for the defendants that the real truth is that this car was being hired from Roskam by Sandbrook, or by Sandbrook and

his friends, because of this arrangement made jointly between them, and that, because Roskam said that he had been paid for the petrol and oil, this was a hiring of the car. I do not think that it was. I think that what is intended to be excluded by this policy is something which is a genuine business contract for hiring, something which is a real hiring, a doing something for a stipulated reward, a stipulated *quid pro quo*. I do not think that there was any hiring here. I think that one must look at all the circumstances.

Reference was made to *Wyatt v. Guildhall Insurance Co., Ltd.* (1), but in that case there was no question of pleasure or of social purposes about it. In that case, a man was driving back to London, and two perfect strangers asked him if he would drive them to London, agreeing to pay him 25s. each for being taken to London. There was no evidence in that case upon which it could have been held, as far as I can see, that they were being driven for pleasure purposes. It was a genuine business of hiring in that case. They were paying 25s. each for being driven to London. There was no expense to the driver. He would have had to pay the expense of the journey anyhow, if he had travelled alone, and it was a perfectly good business arrangement, the money being paid in that case for the hire. In this case before me, there is no such business arrangement at all. It was a joint pleasure party, and there was no hiring of the car. Roskam did not make a penny out of it. He was to effect the borrowing of the car for his friends, and they were to pay the cost of the petrol and oil.

If Mr. Samuels is right about this, it seems to me that a great many users of cars almost every day of their lives must be stepping out of the cover of their insurance policies. Supposing I want to go to a certain place, and I say to my son, who has his car conveniently at hand: "Will you let us use your car? Will you drive your mother and me to so-and-so? I will pay for the petrol. We are going on a picnic." If Mr. Samuels is right, the mere fact that I agree to pay for the petrol takes that drive out of the cover of the policy, and the insurance company can say: "You, the insured [that is, my son], were using this for hiring, because you drove your father and mother, they paying for the petrol." The whole suggestion is preposterous, and I think that, regarding the circumstances as a whole, and trying to take a common-sense, as well as a legal, view of it, I am satisfied that they were covered by the policy, and that the plaintiff is entitled to succeed.

Judgment for the plaintiff for £1,401 19s. 6d., with interest at 4 per cent., from July 8, 1937, and costs.

Solicitors: *Musson & Co.* (for the plaintiff); *Hewitt, Woollacott & Chown* (for the defendants).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

DAWSON v. COUNSELL (INSPECTOR OF TAXES).

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
April 28, 29, May 2, 19, 1938.]

Income Tax—Profits arising from occupation of land—Partnership—Brood mare—Some progeny sold as yearlings—Some sold after racing—Stud farm—One partner tenant—Income Tax Act, 1918 (c. 40), s. 20 (i), Sched. B.

The appellant carried on business in partnership, the partnership's sole asset being a thoroughbred brood mare and her progeny. The mare was kept on a stud farm of which one of the partners was the tenant. A number of other animals was kept on the same farm, and no specific acreage was allotted to the mare and her progeny, nor to any other animals on the farm, which was used indifferently for all animals upon it. No part of the farm was ever assigned in writing to the partnership in connection with its activities. The mare's progeny were, as a rule, sent to yearling sales, but in some cases they were put into training to prove their merit on the race-course with a view to sale :—

HELD : the profits of the partnership must be divided into two parts, one being those derived from the thoroughbred brood mare as a brood mare, and the other those derived from racing and selling the progeny of the mare. The second class of profits was wholly assessable under Sched. D. The first class of profits was also assessable under Sched. D, but, in so far as they were profits of the partner who was the occupier of the farm, they would be included in his assessment under Sched. B, and to this extent they should be excluded from the assessment under Sched. D in order to avoid double taxation.

Order of LAWRENCE, J. ([1937] 3 All E.R. 248) *varied*.

[EDITORIAL NOTE. In *Back v. Daniels* (2), certain potato-growers were assessed under Sched. B, although they occupied land under very special agreements with neighbouring farmers. In the present case, a brood mare was kept by the partnership upon the farm of one of the partners, and, though the partners as such would seem to have no exclusive right to the occupation of any part of the land, yet the profits from the brood mare as such sufficiently arise from the occupation of land to be brought into the assessment under Sched. B. Therefore the occupier's share of the profits from the brood mare as such would be included in his assessment under Sched. B, and, to avoid double taxation, it is necessary to exclude such profits from the assessment under Sched. D.

As to OCCUPATION FOR PURPOSES OF SCHED. B, see HALSBURY, Hailsham Edn., Vol. 17, p. 65, para. 125; and FOR CASES, see DIGEST, Vol. 28, pp. 15, 16, Nos. 75-83.]

Cases referred to :

- (1) *Glanely (Lord) v. Wightman*, [1933] A.C. 618; Digest Supp.; 102 L.J.K.B. 456; 149 L.T. 121; 17 Tax Cas. 634.
- (2) *Back v. Daniels*, [1925] 1 K.B. 526; 28 Digest 15, 74; 94 L.J.K.B. 304; 132 L.T. 455; 9 Tax Cas. 183.
- (3) *Heastie v. Veitch & Co.*, [1934] 1 K.B. 535; Digest Supp.; 103 L.J.K.B. 492; 150 L.T. 228; 18 Tax Cas. 305.
- (4) *Fry v. Salisbury House Estate, Ltd., Jones v. City of London Real Property Co., Ltd.*, [1930] A.C. 432; Digest Supp.; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; *affg.*, [1930] 1 K.B. 304.
- (5) *Donald v. Thomson*, [1922] S.C. 237; 28 Digest 20, case g.
- (6) *McKenna v. Herlihy, Woodburn v. Herlihy* (1920), 7 Tax Cas. 620; 28 Digest 81, case r.

- (7) *London County Council v. A.-G.*, [1901] A.C. 26; 28 Digest 73, 392; 70 L.J.Q.B. 77; 83 L.T. 605; 4 Tax Cas. 265; *revsg.*, [1900] 1 Q.B. 192.
- (8) *Westminster Corpn. v. Southern Ry. Co. and Smith & Son, Ltd., Westminster Corpn. and Kent Valuation Committee v. Southern Ry. Co. and Pullman Car Co., Ltd.*, [1936] A.C. 511; [1936] 2 All E.R. 322; Digest Supp.; 105 L.J.K.B. 537; *sub nom. Re Southern Ry. Co.'s Appeals*, 155 L.T. 33.

APPEAL by the Crown from an order of LAWRENCE, J., dated May 11, 1937, and reported in [1937] 3 All E.R. 248, where the facts are fully stated.

The Solicitor-General (Sir Terence O'Connor, K.C.) and Reginald P. Hills for the inspector of taxes.

J. Millard Tucker, K.C., and *Cyril King, K.C.*, for J. A. and J. Dawson.

SIR WILFRID GREENE, M.R. : The facts which give rise to this appeal are set out in the stated case, and I need give only a concise summary of the matters which are necessary to make this judgment intelligible. J. A. and J. Dawson during the years of assessment carried on in partnership the business of breeding from the brood mare "Nice" and selling her progeny. The mare and her progeny were the sole assets of the partnership. Save during the periods when the mare was away for service by a stallion, amounting to about four months in each year of service, the mare, with her progeny, if any, was kept and cared for at Marsh Stud Farm at Exning, of which the partner J. A. Dawson was lessee. J. A. Dawson was the person assessed as occupier of the farm under Scheds. A and B. On the farm various other brood mares with their progeny belonging to J. A. Dawson were similarly kept and cared for, and occasionally there were animals belonging to other owners. The terms of the partnership agreement are not stated in the case, nor is there any statement as to the terms, if any, on which "Nice" and her progeny were kept and cared for on the farm. For the purposes of the Sched. D assessments on the partners, assuming them to be chargeable under that schedule, figures were agreed, and what are described in the case as "the accounts of the partnership" are annexed to the case. In these accounts, the partnership is charged with, among other items of expenditure, keep for "Nice" and her foals, and from this it would appear that the sums so charged were the sums paid to J. A. Dawson for their keep. Upon this basis, J. A. Dawson would have been receiving these sums, not in his capacity as a partner, but as a third person performing services and providing facilities for the partners for reward. We were told, however, that this view is based upon a misapprehension as to the meaning of the accounts. It was said that the sums charged for keep did not represent any payments to J. A. Dawson, but were merely brought in as a proper charge in ascertaining the profits for income tax purposes, being the sums which would have been payable to a third person. The true position, we were told, was that no such charges were made by J. A. Dawson, and that "Nice" and the foals were merely allowed to run on the farm along with the other animals. At one stage during the argument it appeared that

it might be necessary to send the case back to the special commissioners for the purpose of having the true position ascertained, but I have come to the conclusion that this course is not necessary, and that, even if the facts were as stated, the result would be the same.

The special commissioners upheld assessments under Sched. D made upon the partners. LAWRENCE, J., on appeal, affirmed their decision with regard to a matter which does not now arise, as there is no cross-appeal, but he reversed their decision in so far as it related to the profits derived from "Nice" as a brood mare other than profits derived from racing and thereafter selling her progeny. The effect of this decision is that the profits of the partnership derived from selling the progeny as yearlings are exempt from taxation. The ground of the decision is that those profits, being profits derived from what is referred to as a Sched. B activity, are not assessable under Sched. D. In coming to this conclusion, LAWRENCE, J., if I understand his judgment rightly, held that the partners were "occupiers" of the farm, who, apart from the Income Tax Act, 1918, s. 20 (1), would have been separately assessable in respect of their occupation under Sched. B, an occupation which he appears to have regarded as concurrent with, but distinct from, the occupation of J. A. Dawson independently of the partnership.

The case presented on behalf of the partners falls under two heads. First, they say that the profits in question are not assessable to tax under Sched. D at all. Secondly, they say that, if an assessment can be made under that schedule, the share of J. A. Dawson in the profits must be excluded.

Two alternative reasons were given for the first of these propositions, and I will deal with them in their logical order, which is not, however, the order in which they were presented. Mr. King argued that the question whether or not the partnership were occupiers was immaterial, that, once it was established that profits were derived from the occupation of land, they were exhaustively dealt with by an assessment under Sched. B properly made upon the occupier, irrespective of the question by whom the profits were actually derived, and that, such an assessment having been made upon J. A. Dawson, it franked the profits derived by the partnership from Sched. B activities carried on upon the land in question, whether or not the partners were occupiers, and whether those activities were to be considered as being carried on by the partnership or by J. A. Dawson as, so to speak, an independent contractor performing services and providing facilities for the partnership for reward. The argument does not depend upon the existence of a partnership one member of which is the occupier. The same result would have followed if "Nice" had belonged to a third person, and if J. A. Dawson had had no interest in her.

The argument is based upon what is admittedly a novel view of the effect of Sched. B. It has an appearance of producing a just result, and that constitutes its main attraction. Nevertheless, in my judgment

it is unsound. Income tax assessable under Sched. B is, as in the case of the other schedules, a tax on profits. The measure for determining the amount of the profits is, of course, an artificial one, as in the case of Sched. A. The argument involves the proposition that the profits which are charged under Sched. B are, so to speak, profits at large—that the “occupation” “in respect of” which the tax is charged (to A use the language of Sched. B itself) is occupation at large—with the result that profits derived from occupation must be taxed once for all under Sched. B by whomsoever they are derived. However, in my opinion this argument is ill-founded, for the reason that the profits which are taxed are not profits at large, but the profits derived by the B occupier from his occupation. Once a person who is not the occupier derives a profit from a Sched. B activity—that is to say, a profit which, if it had been earned by the occupier, would have been franked by his Sched. B assessment—a new and different class of profit comes into existence. This profit is not a profit derived from occupation enjoyed C by the person making the profit, but is a profit made for that person by means of the activities of, or the facilities provided by, the occupier, which is a different thing altogether. I may take an example from the blood-stock industry itself. Many owners of stallions do not themselves occupy any land at all, but put their stallions to stand upon land occupied D by stud-farmers, who take in stallions and keep the visiting mares for reward. In such a case, if the argument be sound, the owner of the stallion could claim that he was not assessable under Sched. D, on the ground that the profits derived by him from his stallion—which are unquestionably profits derived from a Sched. B activity : see *Glanely (Lord) v. Wightman* E (1)—were exhaustively covered by the Sched. B assessment on the stud-farmer. I should be surprised to hear such a claim put forward. My view derives some support, I think, from the fact that, if the argument were correct, it would have been sufficient to decide *Back v. Daniels* (2) F in favour of the subject, and the elaborate reasoning of the Court of Appeal directed to establishing that Messrs. Daniels were occupiers would have been unnecessary. No such argument was, however, put forward in that case.

The other argument on this branch of the case was to the effect that the partners were occupiers, and that the profits made by them were G derived from their occupation. On this basis, there would be two occupations—one the occupation of J. A. Dawson in his individual capacity, the other the occupation of the partners, which would be either the occupation of both partners by means of their animal “Nice” and her progeny, or an occupation by J. A. Dawson as one partner acting H for himself and as agent for his co-partner for the purposes of the partnership business. The question whether or not, if this argument were correct, there ought to be two assessments or (as the judge thought) only one in view of sect. 20 (1) of the Act, I need not examine, for, in my opinion, the argument is not a sound one.

Sched. B, r. 4, imports (among others) Sched. A, No. VII, rr. 1, 2, which provide as follow :

1. Save as in this Act provided in any particular case, tax under this schedule shall be charged on and paid by the occupier for the time being. 2. Every person having the use of any lands or tenements shall be deemed to be the occupier thereof.

- A It was said on behalf of the partners that the partnership had the use of the farm, that they were in fact using it under a gratuitous licence from J. A. Dawson, and that everything done by him in relation to the mare and her progeny was done on behalf of the partnership. In my opinion, to say that the partnership had the use of the farm within the
- B meaning of r. 2 involves a wrong view of the facts, and that whether or not the true relations of the partners were as stated. The phrase used in r. 2 is "every person having *the* use of any lands." It appears to me to be a misuse of language to say that, where A. is the occupier of a field, and B., under a gratuitous licence from him, places an animal
- C in a field, where it lives and grazes, B. has "the use" of the field within the meaning of these words. In one sense, he is using the field, but he has not the use of it in the statutory sense. The word that is being defined is "occupier"—i.e., the person liable to assessment—and this circumstance must, I think, be taken into account in construing the words
- D "the use." To say that a privilege such as I have described constitutes the person to whom it is granted a person having "the use" of the land would mean that, by reason of the privilege, he had incurred a liability to be assessed under Sched. B, a result which would be surprising to the farming community. To do the partners justice, they did not go so
- E far as to say that, where the person to whom the licence is granted is a third person, and not (as in the present case) the partner of the occupier, he could be said to have "the use" of the land. They said that the fact that J. A. Dawson was one of the partners made all the difference, and converted into occupation by the partnership something
- F which would not have been occupation if the mare had belonged to a third person. The argument would, I think, in any case fail if the relationship between the two partners were that which (as I have pointed out) it would appear to have been from the facts stated in the case and the accounts. For, if that were so, J. A. Dawson would, as regards
- G "Nice" and her progeny, have been in the position of an independent contractor, and his occupation in relation to the animals would not, on any view, have been occupation by or on behalf of the partnership. In this connection, I may refer to the observations of ROMER, L.J., in *Heastie v. Veitch & Co.* (3).
- H Would the position be altered if the relationship of the parties had been what the partners assert it to have been? I do not think so. The correct view of the facts, even on that assumption, would, to my mind, still be that J. A. Dawson remained the occupier, and the only occupier, notwithstanding that he had allowed a mare belonging to himself and his partner to use the land. Here again, in permitting his partner to

have this privilege, he must, I think, be treated as an independent person, and not as a partner. Moreover, the use of the land by the partnership animals under such a licence as is assumed, and in the other circumstances of the case, is not, in my opinion, such as to convert J. Dawson into a person having "the use" of the land jointly with J. A. Dawson as a partner, as regards the mare and her progeny, leaving J. A. Dawson as the occupier in all other respects. A

The alternative argument presented on behalf of the partners is, in my view, well-founded. If J. A. Dawson had been the owner of the mare, the profits derived from her would have been franked by the Sched. B assessment. If, then, while remaining the occupier of the farm, he transfers an interest in the mare to a partner who thereby becomes entitled to share in the profits, I can see no justification for saying that the share of profits which J. A. Dawson derives is not similarly franked. The partnership is not in law a separate entity. J. A. Dawson's share is a profit derived by him from his own occupation, and the circumstance that the remaining share belongs to his partner cannot alter this fact. The principles laid down with reference to Sched. A in the *Salisbury House* case (4) appear to me to be applicable so as to prohibit an assessment under Sched. D in respect of J. A. Dawson's share of the profits of the partnership. B C D

The question then arises : What is the proper method of assessment ? Sched. D, Cases I and II, r. 10, provides for a joint assessment on the partners where a trade or profession is carried on by two or more persons jointly, and "the tax in respect thereof shall be computed and stated jointly in one sum." Upon the view which I have expressed, the share of J. A. Dawson in the profits must be excluded on the assessment for the purpose of calculating the "tax in respect of" the partnership business, since that share has already been struck with tax under Sched. B. However, the tax chargeable in respect of the remaining profits of the partnership remains a "tax in respect of" the partnership business, and must be assessed by means of a joint assessment, as the rule directs. E F This will, of course, leave J. A. Dawson liable to the Crown for this tax. There is nothing anomalous in this, since each partner is always liable for the whole tax assessed on the partners. In the result, therefore, the second paragraph in the order of the judge must be varied by declaring G that the determination of the commissioners therein referred to was correct so far as regards the share of the profits belonging to J. Dawson, but was erroneous so far as regards the share belonging to J. A. Dawson. The matter must be remitted to the commissioners to amend the assessments by excluding from the assessable profits the share of J. A. Dawson H therein. The order as to costs below remains, and there will be no costs of the appeal.

SCOTT, L.J. : This appeal raises some questions of principle as to the proper interpretation of the Income Tax Acts in the borderland between

Scheds. B and D, which are not altogether easy to answer in the rather unusual facts of the case. Before and since 1920, J. A. Dawson had occupied Marsh Stud Farm, near Newmarket. The farm contained some 50 acres of grass and woodland, and was equipped in the way usual in a stud farm for the purpose of breeding, rearing and selling bloodstock.

A He there owned and kept blood mares which he sent away to foal and be served again, and made profits out of selling their progeny—as yearlings if possible, but, if not so sold, then after racing them, and so establishing their form. It is necessary to note the two methods of realisation, as the judge has drawn a legal distinction between them, treating the former as

B a farmer's profit covered by a Sched. B assessment, but the latter as a separate business not so covered, and therefore taxable under Sched. D, Case I. I believe that the distinction thus drawn between the two ways of realising profits out of the progeny of blood mares conforms to existing practice as between the revenue and bloodstock breeders, and, as there

C is no cross-appeal as regards the second head of profits, I say no more about it. Occasionally J. A. Dawson had on his farm mares belonging to other owners, who paid him to keep them, but normally he had only his own stock. For many years he also carried on at Newmarket a separate profession and business of a trainer of racehorses, but he gave

D this up on June 30, 1930. Till that date, he had trained the progeny of his mares himself, but thereafter he sent them to another trainer in Newmarket, though he raced them in his own name. Up to the tax year 1924-25, he had been taxed under Sched. D in one common assessment of his profits, both as a trainer and as a breeder, but in that year

E the revenue authorities agreed that his profits as a breeder were properly covered by an assessment upon him, as occupier of the farm, of its annual value under Sched. B. His Sched. D assessment was thenceforth limited to his income as a trainer. The correctness of the assessment under Sched. B was not challenged thereafter, and in the present proceedings

F was accepted as correct.

What gave rise to the taxation disputes which culminated in the present appeal was that in 1920 he had given his son, J. Dawson, a half-share in the ownership of a particularly valuable mare which he owned, called "Nice," and had made him an equal partner in the business

G of breeding from her and making profits out of her progeny by one or other of the methods of sale which I have mentioned, the partnership paying him inclusive rates for the expenses he incurred for keep, transport, and the like.

Had J. A. Dawson continued to retain the whole ownership of "Nice"

H and her progeny, the whole profits so derived from them would, in my view, have been covered by a Sched. B assessment upon him. Whether the discharge of his own obligations under Sched. B, which gave him personal freedom from any other taxation on the profits derived from the occupation of the farm, could give protection to a partnership, not in the farm, but in one mare kept on the farm, is a very different question.

It was not raised till 1933, when, the fact of the partnership having been established by a decision of the special commissioners in certain Sched. D proceedings against him, the revenue authorities caused assessments under Sched. D to be made on the partnership for the years from Apr. 6, 1927, to Apr. 5, 1931, and for the year 1933/34 in respect of all the "profits made from the sale of horses"—i.e., of the progeny of the mare "Nice." The partnership appealed from these assessments to the special commissioners, who held that the partnership were not occupiers of the farm, and were liable under Sched. D. Figures were, however, agreed between the parties for the profits of the business on the hypothesis of liability under Sched. D. A

The appeal was dismissed by LAWRENCE, J., on the second category of profits, but allowed on the first, LAWRENCE, J., holding that there was no legal obstacle to more than one occupier in occupation of the same land at the same time, and that the partnership was the occupier of Marsh Stud Farm, as well as J. A. Dawson, although it was the latter who was assessed as occupier under Sched. B. He held further that all profits of the class which were capable of being covered by a Sched. B assessment, although partly earned by a partner not so assessed, were in law franked by the payment of tax upon annual value made by J. A. Dawson under his Sched. B assessment. From this decision, the commissioners of inland revenue appealed to us. B

The analysis of the legal position resulting from the facts will be assisted if we first eliminate two positions which might have obtained, but did not in fact arise. Had J. A. Dawson never taken in his son as a partner in the mare, but retained for himself the whole profits of the business of breeding from her, it is clear, as I think, that he would have been protected against any Sched. D assessment upon those profits. They would have been merely an item in the profits of the bloodstock farm, and covered by the Sched. B tax paid upon its annual value. That all profits in fact made out of the occupation of a farm, whatever be the kind of husbandry there practised, are covered by the Sched. B assessment is beyond question, however much they may be of a kind identical in nature with Sched. D profits. This principle is made evident by the free and absolute choice which Sched. B, r. 5, gives the farmer as to whether he will be charged upon his profits under that schedule or under Sched. D, the old word "husbandry" in that rule being identical in meaning with the word "farming," which is the more usual word to-day. That breeding of racehorses is one kind of livestock farming for the purposes of Sched. B was decided by the House of Lords in *Glanely (Lord) v. Wightman* (1). However, just as J. A. Dawson's Sched. B assessment would have appropriately covered the "Nice" profits if he, being the person assessed to tax under Sched. B as the occupier of the farm, had never parted with any share in the mare, so, conversely, if his son, J. Dawson, had acquired, either by purchase or by gift, the whole interest in the mare and her progeny, and as a third party merely made a C

contract with J. A. Dawson to keep them and look after them on his farm for reward, it is, in my opinion, equally plain that any profits made by J. Dawson would have been separately assessable under Sched. D.

A It is in these legal circumstances that the problem of the liability to tax of the partnership has to be solved. The arguments of the partners recorded in the special case are all, except the last, in my opinion, wholly or partly erroneous. The chief one was that the partnership was in occupation of the farm—not, it is true, of the whole farm, a contention which was obviously untenable, but “to the extent and for the purposes of the user of the farm for the partnership animals.” This statement B of the contention suggests an attempt to get within the facts of *Back v. Daniels* (2). The argument was supported by the contentions that the business carried on by the partnership was the occupation of land, and that the profits earned had the same “quality” as J. A. Dawson’s profits, which were in fact taxed under Sched. B. From these premises, C the conclusion was invited that the partnership profits were assessable only under Sched. B, and that, as J. A. Dawson had paid that assessment, the partnership were wholly free.

The answer of the inspector of taxes was in substance that the partnership did not occupy the farm or any part of it, and did carry on a business D assessable under Sched. D, Case I, or at any rate made profits assessable under Sched. D, Case VI. He also alternatively contended that the portion of the profits attributable to horses not sold as yearlings, but trained and raced before sale, were similar to J. A. Dawson’s Sched. D profits as a trainer, and therefore equally taxable under Sched. D. The E commissioners found that the partnership were not occupiers of the farm, and that the whole of the profits fell to be assessed under Sched. D, Case I, thus treating J. A. Dawson’s payment of his Sched. B tax as legally irrelevant.

F The judge at the outset of his judgment divides the profits into the two categories I have mentioned by saying that there are two questions in the case. He says, at p. 250 :

G . . . first, whether the profits of the partnership between Mr. J. A. Dawson and Mr. J. Dawson derived from a thoroughbred brood mare named “Nice,” as a brood mare, are assessable under Sched. B, and, secondly, whether the profits of the partnership derived from racing and selling her progeny after or in the course of racing are assessable under the same schedule.

H In regard to what he calls the second question, he says that it is a question of fact upon which the findings of the commissioners are final. In regard to his first question, which alone is before us in the appeal, he holds that there is nothing in law to prevent two separate persons from occupying the same land at the same time, and that “the quality of the income” cannot depend upon who receives it, since, as he says, at p. 250 :

The Income Tax Acts tax land in its occupation quality under Sched. B on the notional basis of its annual value, and the whole income which is in reality derivable from the land in that quality is covered by tax under that schedule.

He holds, at p. 251, that the farm was let to the partnership without the lessor, J. A. Dawson,

relinquishing possession, and without the lessees, the partnership, being in exclusive possession and occupation, and, therefore, the profits are not to be separately charged.

He then makes reference to the Income Tax Act, 1918, s. 20, meaning its A proviso (i), which is as follows :

Profits arising from the occupation of lands shall not be separately charged if the lands are let or underlet without the lessor relinquishing the possession thereof or if the lessee is not exclusively in the possession and occupation of the lands.

He expresses the view that, but for that provision, the partnership would B have been separately chargeable—that is, as occupiers under Sched. B. He adds, however, that the rule forbidding double taxation would also have prevented their being taxed, as Sched. B is a tax on the land, and J. A. Dawson had already discharged the obligation of the land by paying tax under Sched. B. He rejects the contention of the Crown that C the decisions in *Donald v. Thomson* (5) and *McKenna v. Herlihy* (6) apply, as he thinks that *Back v. Daniels* (2) overrules them and governs the present case. As a result of that decision, and of sect. 20 of the Act, he holds that the profits from selling the progeny of the mare are covered by J. A. Dawson's taxation under Sched. B, but he sends the D case back to the commissioners to dissect the accounts and assess the partnership on "the profits derived from racing and selling the mare's progeny after or in the course of racing" under Sched. D, Case I.

The first thing in considering this judgment is to clear the ground. No legal conclusion follows from the premise that "the quality of the E partnership profits" was the same as that of J. A. Dawson's profits. The "quality" of both left each of them suitable for assessment under Sched. D, although in J. A. Dawson's case his statutory right to insist on being assessed under Sched. B in respect of those very profits gave him an absolute right to refuse to be assessed under Sched. D. F The partnership, on the other hand, could not, even on the reasoning of the judge, call in aid any such protection in respect of their profits unless they were in occupation of the land, and for that finding the facts, in my opinion, afford no warranty.

The argument addressed to and accepted by the judge for the partners G—that Sched. B is a tax, not on the occupier, but on the land, and that the assessment of the partnership meant taxing the land twice—is, I think, mistaken. Income tax is, in its essence, and throughout the whole legislation, a tax on the person, natural or juridical, in respect of his income. Each person within the scope of the Acts is under a statutory H duty to return his income, and is assessed at a certain figure. Even Sched. A is not a tax on the land, but upon the owner in respect of his notional income arising from his property, measured by its annual value, although the tax is collected through the occupier, who, in the normal case, reimburses himself out of the rent paid to the owner.

The provisions of the Income Tax Act, 1918, are absolutely clear on this fundamental question. Sect. 1 is the charging section for all schedules. The amendment of it in 1926 is irrelevant on this point. Sched. A imposes the charge "in respect of the property in all lands . . . for every 20s. of the annual value thereof." That charge is a tax on income just as much as is the charge under Sched. D, only that it is in the income value actual or potential of the property, as LORD MACNAGHTEN pointed out in *London County Council v. A.-G.* (7), at pp. 35, 36. Sched. A, No. VII, puts the charge directly and solely on persons, although, to facilitate collection, the person chosen to bear the burden in the first instance is the person most readily accessible—namely, the occupier of the land, whether he is the owner or a person occupying under a legal title from the owner. Rule 2 adds, in order still further to facilitate collection, "the person having the use of the land shall be deemed to be the occupier thereof." The owner pays in the end, however, as the occupier incurring the initial burden of payment is given by Sched. A, No. VIII, the right of reimbursement out of the rent (if any) which he may have to pay to the owner as his landlord. These are the bare bones of the statute, but they are conclusive that the tax under Sched. A, although imposed in respect of ownership of land, is, in the normal case, a charge on the owner through the occupier.

Sched. B follows similar lines. The tax is put upon the same occupier as it is under Sched. A, defined by Sched. A, No. VII, and upon the same valuation (originally on double, but, since 1922, on single, value). If the owner occupies, he pays tax twice, once in each capacity. The administrative machinery conforms to the basic structure of liability. Sect. 100 (1) provides :

every person chargeable under this Act . . . shall . . . prepare and deliver to the assessor a true . . . statement containing (a) the annual value of all lands . . . in his occupation This reference to "every person chargeable" compendiously recalls the statutory position as to charge. The above analysis shows that there is nothing in the statute to warrant the view that Sched. B puts a tax "on the land."

However, with respect to the judge, I doubt his next proposition—namely, that under the Act there may be more than one occupier of the same land at the same time. The occupier for tax purposes is, I think, broadly the same kind of occupier as is the occupier for rates. SCRUTTON, L.J., expressed this latter view in *Back v. Daniels* (2), at p. 541, and I respectfully agree with him. The nature of the occupation in rating law is explained very fully in *Westminster Corpn. v. Southern Ry. Co. and Smith & Son, Ltd.* (8), and especially by LORD RUSSELL OF KILLOWEN, at pp. 529, 530. The provision of Sched. A, No. VII, r. 2, that "the person having the use of the land is to be deemed to be the occupier," in my view must be read as meaning the person who has the use to the exclusion of others, who possesses the legal right to use, a right which no one else can claim to share. The definite article in the phrase "having

the use " is demonstrative, and is, I think, inconsistent with any other construction. These considerations necessarily lead to the conclusion that the partnership were never occupiers in the sense of the Income Tax Act, and could never have established a right to be assessed under Sched. B.

The judge seems to have thought that in *Back v. Daniels* (2) the Court of Appeal gave a decision to the contrary and held that there could be two independent occupiers of the same land at the same time within the meaning of Sched. A, No. VII, rr. 1, 2. He had, it is true, a *dictum* of SIR ERNEST POLLOCK, M.R., in his favour, at p. 538 :

I do not shrink from the result that there may be two persons who may be chargeable as occupiers under Sched. B.

This *dictum*, however, finds no support in the other two judgments, and I think that the view of the facts taken by SCRUTTON, L.J., was that the two parties occupied different portions of the farm. The facts of the case were peculiar, especially the terms of the agreement, and may call for close scrutiny on some future occasion, but for present purposes it is enough to say that there was evidence of a sub-tenancy for more than a year of an important and defined area carved out of the larger area of land demised to the head-lessees, which carried with it the right to exclude everyone else, including the head-lessees themselves, except when present in performance of their covenants contained in the agreement. The decision of the court proceeded upon this basis of fact. Whether the court were right or wrong in thinking that the evidence justified that view of the facts does not affect the legal import of their decision, which was based on that assumption : see *per* WARRINGTON, L.J., at p. 539. As at present advised, I cannot assent to the view expressed *obiter* by SIR ERNEST POLLOCK, M.R., that there can be two simultaneous occupiers of the same area of land. It was not relevant in that case to consider whether the head-lessees, who were assessed to and paid tax under Sched. B, might have escaped tax liability in respect of the land let to the sub-tenants. The decision, however, for the reasons which I have given, has, in my opinion, no bearing on the present appeal.

I do not follow the thought in the judge's mind that the first proviso in the Income Tax Act, 1918, s. 20, which I have quoted, affords ground for holding that the partnership were in occupation of the land. Whatever may be the correct or the full interpretation of that rather obscure enactment—which does not seem to be a proviso at all on what precedes it in the section—it can be of no assistance in the present case, and it is better, therefore, to say nothing about it. Equally, though for different reasons, the decision of the House of Lords cited by the judge in the Sched. A case of *Fry v. Salisbury House Estates, Ltd.* (4) has no bearing on the present appeal, except in the one point mentioned by SIR WILFRID GREENE, M.R.

It follows from what I have said that the partnership, as such, were not

entitled to protection from Sched. B, either in their own right or in the right of J. A. Dawson. If the whole partnership could not obtain suitable shelter from Sched. D by trying to stand under the umbrella of J. A. Dawson's Sched. B assessment, what of the position of J. A. Dawson himself? *Ex hypothesi*, if he had not generously presented a half share in "Nice" to his son, but had kept it to himself, he would never have fallen under the charge to Sched. D, except upon his own election. Is there any law to force him under that charge, merely because he gave his son a half-share in the mare, when, if he had kept the whole, he could not have been so forced? I cannot see any legal ground why he should lose the cover of Sched. B, or his absolute right of election between Sched. B and Sched. D, merely because he has parted with the half-share of a particular animal out of which he was making a part of the profits of his livestock farm.

Conversely, let me consider J. Dawson's position. Had he been a complete stranger, and bought a half-share in the mare for a sum of money on similar partnership terms, I cannot see any ground of substantive law on which he could escape liability under Sched. D. The result as regards substantive liability is that J. Dawson must pay on half the profits earned by the partnership of the type covered by a Sched. B assessment, whilst J. A. Dawson goes free.

It is true that the administrative provisions of the Act are not readily applicable to such a case. The existence of the partnership *prima facie* calls for an assessment under Sched. D, Cases I and II, r. 10, which requires that a partnership shall be treated as a separate entity. To such an assessment J. A. Dawson would be entitled to object, on the ground that r. 10 could not put upon him a substantive liability from which the law left him free. Sect. 20 (c) of the Act of 1918 (as amended in 1920), which allows an individual partner submitted to charge by an assessment upon the partnership to claim the minor relief of any "allowance or deduction," does not cover the point. However, whether or not there is any suitable procedure provided, a partner entitled to complete immunity cannot be deprived of his fundamental right merely because his case has been forgotten in the procedural provisions of the law.

On the whole, I agree with SIR WILFRID GREENE, M.R., that an assessment should be made on the partnership in respect of the profits of the type covered by the present appeal, with a direction to the commissioners in the words of the judgment of SIR WILFRID GREENE, M.R.

CLAUSON, L.J.: This is an appeal by the inspector of taxes against an order of LAWRENCE, J. At the relevant times, Mr. Dawson senior occupied Marsh Stud Farm as a stud farm, and in respect of his occupation he made profits by breeding, rearing and selling bloodstock, the progeny of mares belonging to him and forming part of his farming stock. He also carried on at Newmarket a business of a trainer of racehorses, and, in the course of that business, he dealt with bloodstock which had

been reared at Marsh Farm, and turned that bloodstock to account by training it, racing it, and subsequently selling it. In respect of his occupation of Marsh Farm, he was assessed to, and paid, Sched. B tax, and it is admitted that no further tax could be exacted from him in respect of the profits of his occupation. He also paid Sched. D tax in respect of his business of a trainer. A

It appears that occasionally an outside owner of bloodstock would send his stock to be kept by Mr. Dawson senior at his farm. Any profits coming to Mr. Dawson senior in respect of such an arrangement would obviously be profits of his occupation of the farm, and would be "franked," to use the expression conveniently used in argument, by Mr. Dawson's payment of Sched. B tax. The profits made by the outside owner of the stock in question would (if made as part of a trade or business of turning bloodstock to profitable account) be charged with Sched. D tax in the hands of the outside owner. B

The present case turns on the fact that at Mr. Dawson's farm there was a blood mare "Nice," which was not exclusively the property of Mr. Dawson senior, nor was it exclusively the property of an outside owner. Mr. Dawson senior and Mr. Dawson junior were both interested in some way in the animal. The blood mare "Nice" was turned to account partly by breeding, rearing and selling her progeny, and partly by sending her progeny to be trained, raced and sold after racing. The judge has held that the profits resulting to Mr. Dawson senior and Mr. Dawson junior from the latter method of turning the mare to account are taxable under Sched. D as profits of a business carried on in partnership by father and son. There is no appeal from that finding, and its correctness was not questioned before us. The question before us is as to the profits resulting to Mr. Dawson senior and Mr. Dawson junior from the former method of turning the mare to account—that is, by breeding, raising and selling her progeny. The commissioners, treating Mr. Dawson senior and Mr. Dawson junior as carrying on this method of turning the mare to account in partnership, carrying on a trade or business, have assessed them as a partnership to Sched. D tax in respect of the profits so arising. The judge, taking the view that those profits are "franked" by the Sched. B tax paid by Mr. Dawson senior in respect of his occupation of the farm has reversed the decision of the commissioners. Before us, it was contended, on behalf of the Crown, first, that the decision of the commissioners was correct, and, ultimately, that, if the payment by Mr. Dawson senior of the Sched. B tax had any "franking" effect at all, this effect was confined to franking Mr. Dawson senior's share in the profits in question, and that in some shape or form Mr. Dawson junior's share of the profits cannot escape Sched. D tax. C
D
E
F
G
H

As has already been said, the commissioners have found that Mr. Dawson senior and Mr. Dawson junior were in partnership in respect of the mare, but nothing is disclosed in the stated case as to the terms of the partnership. It may, however, be useful to consider what the

position would have been had the commissioners held Mr. Dawson senior and Mr. Dawson junior to be co-owners of the mare, whether in equal or in unequal shares. In that case, the share of Mr. Dawson senior in the profits in question, proportionate to his share in the mare, would be "franked" by the Sched. B tax, while the balance of the profits, A belonging to Mr. Dawson junior, would be taxable on the same footing as would those of an outside owner who had sent his stock to be kept by Mr. Dawson senior at his farm. They would (if arising as part of a trade or business of turning his interest in bloodstock to profitable account) be charged with Sched. D tax in the hands of Mr. Dawson B junior.

The case, however, finds that Mr. Dawson senior and Mr. Dawson junior were in partnership in a business the sole asset of which was the mare in question, and her progeny, and that at all relevant times Mr. Dawson senior was the occupier, and (so far as can be gathered from the case) C the sole occupier, of the farm. The commissioners found—and, indeed, on the facts stated, were bound to find—that the partnership were not occupiers of the farm. On this ground, they appear to have refused to apply Sched. B to the case, and they proceeded—and it is here that the difficulty arises—to hold that the partnership, consisting as it did of D Mr. Dawson senior and Mr. Dawson junior, were assessable in respect of the profits now in question under Sched. D.

As regards the profits now in question, the judge held that they arose from the occupation of the farm, and were not taxable under Sched. D at all. He appears to base his view on a finding that, as between Mr. E Dawson senior and the partnership, the farm must be taken to have been let to the partnership without Mr. Dawson senior relinquishing possession, and, if I understand him aright, he finds that the partnership in some way shared the possession with Mr. Dawson. He thus reaches, as I understand it, the conclusion that all the profits in question are the F profits of occupation. On this footing, he holds—and indeed, if this footing be correct, he properly holds—that the profits are franked by the Sched. B tax already paid by Mr. Dawson senior.

I regret that I find myself in disagreement with the grounds on which the judge reaches this result, because it does not appear to me to be G open to the judge or to this court on the case stated to treat the partnership as being occupiers of the farm. If one only of the two partners was the occupier, as is found in the case, I feel a difficulty in appreciating how the profits of the partnership, made by operations carried on by the two partners, one of whom was not in possession, can be treated as H exclusively profits of occupation. It was sought in argument to suggest that the occupation of Mr. Dawson senior could be treated as held by him in trust for, or as agent of, the partnership, to the extent that such occupation was utilised for the purpose of turning the mare to profitable account. I cannot find in the case as stated any facts upon which such a suggestion can be soundly based.

I am, however, in agreement with the result at which the judge has arrived—namely, that the assessment cannot stand as at present. In my view, the assessment is erroneous in so far as it assesses the partnership under Sched. D in respect of the profits in question, without qualification; for, as regards one of the two partners, Mr. Dawson senior, the profits accruing to him in respect of the mare “Nice,” on the facts stated, must, as it seems to me, necessarily be profits arising from his occupation of the farm, and the proposed assessment of the partners in respect of a mass of profits which comprise in part profits arising to the occupier of the farm from the occupation of the farm cannot be correct, since it would involve double taxation, so far as those last-mentioned profits are concerned. A B

It must, however, be assumed, on the statements in the case, that the partnership is carrying on a business of turning the mare “Nice” and her progeny to profitable account. The solution of the puzzle seems to me to be that the partnership is assessable upon the profits of that business other than and except such part of those profits as arises to Mr. Dawson senior in respect of the occupation by him of the farm. There are not, of course, sufficient materials before this court to work out the results of this view of the matter. It may be useful, however, to make the following observations, which are suggested by a perusal of the accounts which form part of the stated case. If it be the fact that, as between the partners, Mr. Dawson senior is allowed certain sums for the provision made on the farm for the mare and her progeny, and that, subject to such allowance and to necessary expenses (such as stud fees, and so on), the profits are shared equally between the partners, the partnership will, on the view of the matter which I have stated, be assessed only on the half-share of the ultimate profits falling to Mr. Dawson junior. How the tax so assessed will be borne between the partners is, of course, a matter with which the court is not concerned. The profits (if any) arising to Mr. Dawson senior from the allowance to him for the provision made on the farm for the mare and her progeny and his half-share of the profits of the breeding, rearing and selling of the progeny, will not be assessable to Sched. D tax, having been already franked by his payment of Sched. B tax. The share of profits coming to Mr. Dawson junior does not arise from the occupation of the farm. It arises from the turning to account of his interest in what is described in the stated case as the sole asset of the partnership—namely, the mare and her progeny—and I can see no ground for holding this part of the profits of the partnership to be “franked” by the Sched. B payment. C D E F G

The order of LAWRENCE, J., will, of course, stand, in so far as it affirms the determination of the commissioners that the partners are assessable under Sched. D of the Income Tax Acts in respect of the profits derived from racing, and thereafter selling, progeny of the mare “Nice.” However, in my judgment, the order of LAWRENCE, J., should be varied in so far as he reversed the determination of the commissioners that the H

partners were assessable under Sched. D in respect of other profits derived from the mare "Nice" as a brood mare, and it should be declared that the partners are assessable in respect of other profits derived from the mare "Nice" as a brood mare, but excluding from assessment such part of the said profits as arise to Mr. Dawson senior in respect of the occupation by him of Marsh Stud Farm. The matter will be remitted to the commissioners for them to amend the assessment accordingly.

Order of LAWRENCE, J., varied.

Solicitors: *Solicitor of Inland Revenue* (for the inspector of taxes); *Gibson & Weldon*, agents for *Rustons & Lloyd*, Newmarket (for Messrs. Dawson).

[Reported by REGINALD TOWNSEND, Esq., Barrister-at-Law.]

CASWELL v. POWELL DUFFRYN ASSOCIATED COLLIERIES, LTD.

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), May 10, 11, 12, 1938.]

D Mines—Coal mine—Dangerous machinery—Absolute duty to fence—Machinery only dangerous while moving—Duty on workman to see that fence was in position—Standard of care to be applied to workmen—Impracticability of preventing statutory breach—Coal Mines Act, 1911 (c. 50), ss. 55, 102 (8).

The defendants were the proprietors of a coal mine in which there was a conveyer belt. This was originally totally enclosed, but, in order that some rollers might be cleaned, it was found necessary to make a portion of the fencing removable. The correct method of cleaning was to have the engine stopped and to scrape one half of each roller with a scraper, and then, having moved the belt slightly by restarting the machinery, to scrape the remainder. A workman was found dead with his head inside the machinery. On the day in question, the machinery had been stopped only in order to allow full trucks to be removed from under the end of the conveyer and empty ones substituted:—

HELD (SLESSER, L.J., dissenting): (i) the accident could not have happened without some wrongful act on the part of the workman, who had therefore been guilty of contributory negligence.

(ii) if there had been a temporary breach of the statutory duty to fence dangerous machinery, it was a breach which it was impracticable to prevent. The defendants had therefore a second defence under sect. 102 (8) of the Act.

[EDITORIAL NOTE. The duty to fence dangerous machinery is in general an absolute one, but the Coal Mines Act, 1911, s. 102 (8), relieves the employer from an action for damages in respect of a contravention which it is not reasonably practicable to prevent. In the present case, nothing was known of the origin of the accident. The only evidence was that the man's body was found drawn into the machinery through a hole that gave access for the purpose of cleaning. The main discussion is, therefore, as to the proper inference in law to be drawn from this fact. Incidentally there arises again the question of the standard of care to be exercised by a workman in dealing with dangerous machinery, which was the subject of the much-discussed dictum of LORD WRIGHT in *Flower v. Ebbw Vale Steel, Iron & Coal Co.* (2).

AS TO DANGEROUS MACHINERY IN MINES, see HALSBURY, Hailsham Edn., Vol. 22, pp. 821-824, para. 1689; and FOR CASES, see DIGEST, Vol. 34, pp. 746, 747, Nos. 1211-1213.]

Cases referred to :

- (1) *Craze v. Meyer-Dumore Bottlers' Equipment Co., Ltd.*, [1936] 2 All E.R. 1150; Digest Supp. A
- (2) *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; Digest Supp.; 103 L.J.K.B. 465; 151 L.T. 87; *revsd. on other grounds*, [1936] A.C. 206.
- (3) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 34 Digest 218, 1815; 67 L.J.Q.B. 862; 79 L.T. 284.
- (4) *Hindle v. Birtwistle*, [1897] 1 Q.B. 192; 24 Digest 909, 71; 66 L.J.Q.B. 173; B
76 L.T. 159.
- (5) *Carey v. Ocean Coal Co., Ltd.*, *Carey v. Richards*, *Carey v. Rees*, [1938] 1 K.B. 365; [1937] 4 All E.R. 219; Digest Supp.; 157 L.T. 516.
- (6) *Powell v. Streatham Manor Nursing Home*, [1935] A.C. 243; Digest Supp.; 104 L.J.K.B. 304; 152 L.T. 563.
- (7) *The Tasmania* (1888), 13 P.D. 110; 41 Digest 684, 5137; 57 L.J.P. 49; C
59 L.T. 263.
- (8) *Murray v. Schwachman, Ltd.*, [1937] 2 All E.R. 68; Digest Supp.; 106 L.J.K.B. 354; 156 L.T. 407.

APPEAL from a decision of HUMPHREYS, J., at the Cardiff Assizes, D
dated Dec. 14, 1937. The facts of the case are fully set out in the judgments.

D. P. Maxwell Fyfe, K.C., and *Joshua Davies* for the appellant.

Trevor H. Hunter, K.C., and *Godfrey Parsons* for the respondents.

Fyfe, K.C.: Under the Coal Mines Act, 1911, there is an absolute E
statutory duty to fence dangerous machinery all the time, even when the machine is stationary. Once the breach of statutory duty is established, the onus passes to the defendants, and they must show that the workman was guilty of the very high standard of contributory negligence that is demanded. There is no evidence here that this workman caused F
his own death. [Counsel referred to *Powell v. Streatham Manor Nursing Home* (6), *Carey v. Ocean Coal Co., Ltd.* (5), *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (2), and *The Tasmania* (7).]

Hunter, K.C.: The test of contributory negligence was laid down in *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (2) and *Craze v. Meyer-
Dumore Bottlers' Equipment Co., Ltd.* (1). There must be a breach of G
statutory duty, and the accident must have been caused by it. [Counsel referred to *Carey v. Ocean Coal Co., Ltd.* (5).] The plaintiff's case below was quite different. There it was said that the guard was never used at all. If the deceased inserted his hand when the machinery was going, H
he was doing an obviously dangerous thing, and was within *Flower's* case (2). [Counsel referred to *Murray v. Schwachman, Ltd.*, (8).] As the workman did not replace the guard, although he had time to do so, he cannot recover.

Fyfe, K.C., in reply.

GREER, L.J. : This is a difficult case, and one not very easy to decide, by reason of the fact that, when it was argued in the court below, the main case that was then made was not the main case that was made here—it was not the difficult question that we have to determine here. The main case made at the trial of the action was this. It was said

A that the manager had admitted, at certain interviews he had with witnesses for the plaintiff, that it was his custom to permit the rollers in the machine in which the accident happened to be cleaned while the machinery was in motion. The judge considered the evidence of the witnesses for the plaintiff, and, having regard to the position of the

B defendants' manager, his knowledge of what his duties were, and the incredibility—which I think is the word used by the judge—of the suggestion that he should have been guilty of approving such a negligent and improper system as that which was alleged, he disbelieved, as he was entitled to do, the evidence given by the plaintiff's witnesses, and

C believed the evidence of the manager. That seemed to the judge, having regard to the way in which the case had been argued before him, to dispose of the case.

Unfortunately, there is another matter which was raised in this court which was not raised in the court below. There can be no question but

D that the Coal Mines Act, 1911, s. 55, imposes an absolute duty on employers in a mine to see that all exposed and dangerous parts of the machinery used in or about the mine shall be kept securely fenced. That means that they shall be provided with a secure fence, and that that fence shall be kept in operation so long as the machinery used in

E and about the mine remains in a dangerous state. Of course, it is quite impossible for a mining company or a mining manager to be in every portion of the mine at every minute of the day in order to see that those whose duty it is to see that the fence is on when the machinery is moving and is dangerous do their duty. That cannot be done, and is quite

F impracticable. What the defendants say in this case is that there was sufficient evidence to entitle this court to say that the accident could not have happened without negligence on the part of the deceased man. That was a point which, I gather, was never taken at the hearing in the court below. Still, it can be taken here, and it was taken here.

G In my judgment, it is quite clear, upon the evidence given at the trial, that the duty of seeing that no operation in the nature of cleaning was performed while the machinery was in motion was, in fact, a duty which was just as much upon the injured man as it was upon the company's manager, and that either the manager or the man himself could have

H been prosecuted for penalties under the provisions of the statute.

What did the deceased man do? Unfortunately, there is not any detailed evidence to enable us to decide exactly what happened. We do know, however, that somehow or other the deceased man, while the guard was off—and the only man who could put it on was the deceased man—met with an accident which resulted in his head and part of his

body getting inside the moving machinery, with the result that he was unfortunately killed. I cannot escape the conclusion that, in those circumstances, he was guilty of some negligence—that is to say, a want of exercise of reasonable care. Notwithstanding what has been said by LORD WRIGHT in a case in the House of Lords, I think that we ought to follow the expression of opinion which we ventured to give in this court in *Craze v. Meyer-Dumore Bottlers' Equipment Co., Ltd.* (1), that the standard of negligence in the case of a workman is exactly the same as it is in the case of anybody else—namely, that he is guilty of negligence if he does something which a reasonably prudent workman in his position would not do, or omits to do something which a reasonably prudent workman would do. There is some such indication in the judgment in the House of Lords in *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (2) by LORD WRIGHT. LORD WRIGHT alone, of all the Lords who decided that case, expressed an opinion which, I think, was not necessary for the decision in that case—namely, that there must be a higher standard of care applied to a workman where contributory negligence is put forward as a defence to a breach of statutory duty. If there is to be any such change of the law, as was decided in a case in Australia, that must be done by the House of Lords, and it cannot be done by this court.

The question arises: Ought we to decide that here there was no evidence of any negligence upon the part of the deceased man? Obviously he must have been standing quite close to the unguarded machinery. He must have been standing there at a time when he knew that he ought not in any way to commence the operation of cleaning the machinery until the machinery was stopped, because he had been so told. He knew the machinery had not been stopped, and, standing there, his duty was either to put the guard back, or, if he was not going to put the guard back, to shout to the man who had charge of the engine to stop the engine, so that he could begin the operation of cleaning the machinery. In my judgment, that is sufficient to justify the conclusion that, without negligence on the part of the deceased, this accident would not, and could not, have happened.

I also think, however, that the respondents to this appeal are entitled to rely upon the provisions of the Coal Mines Act, 1911, s. 102 (8), which is in these words:

The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach.

How it could be reasonably practicable to prevent a breach of the statute by the man whose duty it was, and to whom the duty was delegated, I cannot see, except by doing that which was wholly and absolutely impracticable—namely, having the manager himself or some overseer or under-manager present at every moment of the day when the machinery

was moving, and when it may have become quite unexpectedly and quite suddenly necessary to clean the rollers of the machinery, having regard to the fact of their becoming suddenly and unexpectedly clogged. The only practical way in which they could have prevented an accident of this sort would have been by having a manager or an under-manager

A present every moment of the day at any time when it became necessary to clean the rollers, and that, I think, was impracticable within the meaning of the subsection. For those reasons, I think that the judge's conclusion was right, and that we ought not to interfere with his decision.

B SLESSER, L.J. : In this case I regret that I have come to a different conclusion from that stated by GREER, L.J. In my view, when the facts of this case are all considered, the result is that here there has been a breach of the Coal Mines Act, 1911, s. 55, by the employers, whereby the deceased was killed, and his dependants are entitled to bring actions

C in accordance with the principles laid down in *Groves v. Lord Wimborne* (3) and similar cases.

In the first place, however, in order that the grounds for my decision may be quite clear, I would say that I accept to the full the judgment which was given by the judge when, having to choose between two con-

D flicting stories about the method permitted to men to clean these particular conveyers, and the circumstances in which they were entitled to take off the fence which was there to guard the machinery, he accepted the evidence given on behalf of the employers, and in particular the evidence of a Mr. Widdicombe, the manager of the pit, and also the

E evidence of the under-manager of the pit, Mr. Evans. That evidence is to the effect that it is necessary from time to time, in order to prevent the belt from getting out of alignment, that the dirt which has collected upon the rollers should be scraped off, and that that should be done by

F means of a scraper, and that for that purpose the exposed part of the roller is scraped, the roller having been previously stopped, and that, when the exposed part of the roller is cleaned with the scraper (I am quoting from the evidence of Mr. Widdicombe), the belt is then moved, so that the other part of the roller can be exposed and cleaned. Mr. Widdicombe said :

G The exposed part of the roller is cleaned with the scraper and then the belt is moved so that the other part of the roller can be exposed, and that is cleaned. The scraper must be used, because that which is deposited on the roller becomes very hard.

The evidence of Mr. D. S. Evans is to the same effect. He said that he

H gave to this man on the day when he was first employed on the job definite instructions as to how to proceed with the cleaning of these rollers when necessary. In this case, there emerges one certain fact, and perhaps one only, and that is that, on the day when this unfortunate man met with his death, this method of cleaning the rollers by stopping them, after shouting to the engine-man, who would be a distance of

some 10 to 15 yds. from the rollers, that he should rotate half of the roller and then clean the other half, was not employed. The engine-man is quite clear on that point, and he was not cross-examined about it. He was asked whether, up to the time of the accident, "the belt had stopped at all for any reason, and, if so, for what reason," and his answer was: "Nothing, only for the changing of journeys." By "the changing of journeys" he means that, the full trams having been filled from the conveyer, empty trams are brought there to replace them, and during that interval the rollers are stopped. I understand that that interval lasts normally some fifteen minutes. That stoppage, he says, is the only stoppage which took place before the accident on the day in question. Therefore, we can exclude from our consideration in this case what I might call the normally permitted method of cleaning the rollers. In my judgment, where it is a case where the evidence showed that this method spoken to by Mr. Widdicombe had been employed, it would have been very arguable to say that there would have been no breach of the statute at all, because the obligation is to see that dangerous parts of the machinery shall be kept securely fenced. In *Hindle v. Birtwistle* (4), where the question arose under a similar provision under the Factory and Workshop Act, 1878, WILLS, J., said, at p. 195:

It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated. . . . I think it might well be said that, while this machinery had been stopped, and could be moved again only by the cleaner, the person subjected to danger, authorising the engine-man once more to start the rollers into motion, that danger could not reasonably be anticipated, and that the operation of the Act would be temporarily suspended, and that it would be no offence for the man or his employers to authorise the man to take the fence off the machine in those circumstances, not because it was a permitted act by the employers, but because in such a case it could be said that the machine was not dangerous, being stationary at the time, and that, as it was entirely under the control of the man cleaning the machine, he was not subjected to danger himself, as the engineman would not start the engine again, but would only rotate it half-way. But that did not happen. What did happen? Excluding that matter, there are two possibilities: (i) that this man did another kind of permitted act, or (ii) that he did not. We have the evidence of Mr. D. S. Evans, the under-manager, to the effect that there was another method permitted, which, in my opinion, would be, if it involved the taking down of the fence, a breach of sect. 55 of the Act. Mr. Evans says that it would be an excellent opportunity for cleaning one half of the roller if it were done during the quarter-of-an-hour that they were changing the trams and that during the quarter-of-an-hour one could clean that half of the roller and move it half-way round and clean the other half, and the man in charge could do that. That seems to me quite different from the method first spoken to by him

- and Mr. Widdicombe, because in such a case the control of the rollers would not necessarily be in the man subjected to danger. He would properly, according to that permitted act, when the rollers were stopped, begin his cleansing operation, but, at any moment between that time and the time when he wanted the roller half-turned for the purpose of
- A cleaning the other half of the roller, the engine-man might have made the engine start again. In such a case, one would have, in my opinion a dangerous machine not securely fenced, and, once it started again, being such a dangerous machine, and once it started otherwise than under the control of the workman, I think that there would be no obligation
- B on the workman to re-fence that dangerous machine, which, in those circumstances, ought never to have been exposed. That may have been the position in this case. Whether it was the position or not, it was a permitted manner in which this act could be done. The other possible view is that this man improperly, as GREER, L.J., has said,
- C in breach of the statute, whilst the machinery was in motion, took off the fence without any permission and without any justification, and so himself really caused the breach which certainly the employer could not by any practical method have avoided, because the sole person in control of the fence was the man himself.
- D I think that, if those were the facts, and if this man himself removed the fence whilst the machine was in motion, either because there was originally no breach by the employers, and certainly because they were protected under sect. 102 (8), they could have said that it was not reasonably practicable to avoid the breach, because the breach would have been
- E committed by a man who was temporarily out of their immediate control, and was himself in charge of the machine. The whole question therefore resolves itself, to my mind, into whether one has here to assume that that wrongful act was done, or whether we should rather assume in favour of the workman that the permitted act, the avowedly permitted
- F act—to which Mr. Evans speaks, which, for the reasons I have stated, I believe to be in breach of the statute—was carried out. In my view, I think it would be wrong to assume in this case that the man did not do that which Mr. Evans says was permitted. We exclude the first possibility of this man having been himself in complete control of this
- G machine, and that it had been stopped while he was doing the cleaning. That was excluded by the evidence of Mr. Williams. Therefore, it might have been that he did avail himself of that excellent opportunity of which Mr. D. S. Evans speaks, and which he apparently commends, of cleaning the machine whilst it was stopped during the 15 minutes' interval between the journeys. The only reason that I can see against
- H that possible conclusion is this. It is said that, on certain calculations—which do not very much impress me, on account of the many uncertain factors in this case—at least four minutes must have elapsed between the end of the last interval between the journeys and the accident, because three trams had had time to be filled and the fourth then was in process

of being filled. From this calculation an assumption was made of the speed at which the trams were being filled on that day. On those assumptions, it is said that a period of four to five minutes elapsed between the re-starting of the machinery and the happening of the accident. That, however, in my view, is all speculation. It is sufficient ground, however, for ruling out the possibility that this man had done what, on the evidence of Mr. Evans, he might have done—namely, that he had done his cleaning while the machine was stopped between the journeys. Then there is another thing. The evidence is that these machines were constantly being clogged. The evidence is that that day he did not, as I have already stated more than once, use the method of having the machine stopped in order to do the cleaning of the rollers. If the machine had been running all day without a hitch, the probability is that the cleaning, if it did take place, took place in one of the intervals between the journeys. If that was so, I think that there was a breach of the statute, and I think that the machine was dangerous. I think it was something in the nature of a trap, because, on that principle, which the employers permitted, at any moment the machine might start again, and produce a state of danger for the workman. If that is the right view, I think that it would be wrong not to start off with the assumption that there was here a breach of the statute, the machinery being admittedly in motion at the time of this man's death, and, that being so, there is an absolute and unqualified obligation to fence the machinery. The duty to fence machinery, as RIGBY, L.J., said in *Groves v. Lord Wimborne* (3), at p. 411, is unqualified and absolute, and, as was pointed out by LORD WRIGHT in *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (2), once it is established that there is a breach of the statute, it must be found, in order that the employer may escape, that the proximate cause of the accident was the man's own disobedience to orders without any good reason. LORD WRIGHT continues that the onus of establishing the responsibility affirmatively is on the respondents. The respondents are unable to account for this unfortunate man's death, except by saying that in some way he inserted his hand into the moving machinery in order to clean it. The fact must not be overlooked that the scraper which he would normally use for the purpose of cleaning the roller was not being used by the man at the time of the accident. It was not found in his hand, or anywhere near it, after the accident, and the probability is that, whatever the man was doing, he was doing with his hand. I decline to assume, without any evidence to substantiate it, that this man was doing so foolhardy or so wrong a thing as deliberately to place his hand inside this dangerous moving machinery. I think that it is right to draw the inference that he did what his employers said was an excellent thing for him to do—namely, cleaned this machine whilst it was stopped and before it became dangerous, and removed the fence whilst it was in that condition. However, whilst it was in that condition there was one more danger,

and that was that the machine might be restarted, and, when it was restarted, it at once became a dangerous machine. The mere fact that the man, as well as the employers, may have rendered himself liable to a prosecution for breach of the statute will not, as has been decided in more than one case—and in particular in *Carey v. Ocean Coal Co., Ltd.* (5)—by itself prevent an action from being founded or the employer from being prosecuted. That is not directly stated in that case, but I think that it is a necessary inference to be drawn from the observations of LORD HEWART, L.C.J. There are other earlier authorities to the same effect. For these reasons, I have come to the conclusion that there has been established a breach of statutory duty here, and that the employers have failed affirmatively to show that what was done by the workman was the cause of his death. I think that the plea of contributory negligence therefore fails, and, had the matter rested with me, I should have said, on that ground, that the appeal should have been allowed.

I would add that, with regard to the defence under the Coal Mines Act, 1911, s. 102 (8), once it is established that this is dangerous machinery, in the circumstances, I think that the reasonably practicable method of avoiding the breach would have been, not to have permitted the machinery to be cleaned without the fence at a time when it could have been, for the reasons I have stated, a trap, but to have limited the permission to cases where the complete control of the starting or stopping of the machine rested exclusively with the man subjected to the danger, so that he could always have replaced the fence on the machine before it restarted, without any danger, and in that case it would not be a dangerous machine.

MACKINNON, L.J.: I do not think that I can remember a case where the position is so unsatisfactory as it is in this one. It was fought in the court below upon an issue totally different from that which has really engaged our attention. The plaintiff's case was supported, first, by the evidence of a witness whom the judge found to be such an unmitigated liar that he could not believe a single word he said, and, secondly, upon supposed admissions of facts by representatives of the defendant company, which turned out to have arisen from a complete misunderstanding, the result of which was that the judge, from the evidence before him, or from the absence of the evidence before him, found for the defendants, and there has hardly been a serious contention before us that he was wrong in so doing. At any rate, we were quite satisfied, in the early stages of the case, that that was so. Before us, however, the case has been put forward on a totally different line of argument. The other very unsatisfactory aspect of the case is that we are investigating a disastrous accident. We really have before us no evidence whatever as to how the accident happened. All we know is that the unfortunate man's body was found drawn into certain machinery

through a hole which gave access to that machinery. In those circumstances, Mr. Maxwell Fyfe says—and I think that he is right in saying it—that *prima facie* those facts unexplained would establish a breach of a statutory duty on the part of the defendants, a breach of the statutory duty imposed upon them by the Coal Mines Act, 1911, s. 55, which provides that all exposed and dangerous parts of machinery used in and about the mine shall be securely fenced. It is said that, by reason of the fact that there was this opening through which the man in some mysterious way got into the machinery at the time when the accident happened, there were exposed dangerous parts of the machinery, and those parts were not fenced. If that *prima facie* case is established, as it seems to me, the defendants would not be liable, or they can escape liability on one of two grounds: (i) by establishing that the accident happened owing to the victim's own action, to use a neutral term, or (ii) because, within the provisions of sect. 102 (8) of the same Act, they escape, that subsection providing that the owner of a mine shall not be liable to an action for damages as for breach of statutory duty if it is shown that it was not reasonably practicable to avoid or prevent the breach, the breach being the fact that this machinery was at that moment unfenced. I think that those two aspects of the case to a very large extent depend upon the same considerations, and rather overlap one another. This machinery originally was entirely encased, and it was therefore at all times securely fenced. It was found, however, in the working of it, that dirt collected on the rollers, and that the band got clogged, and so forth, and it was found necessary to have some form of access to it, so that the rollers could be cleaned. It therefore became necessary to make part of the fence removable, and that was done by cutting the plate in two, thus making the top part of it removable. When it was necessary to remove it, it was slid out for the purpose of cleaning the machine, and, when that was done, it could be slid back again. When it was slid back again, the machinery became fenced again. When the machinery was moving, to comply with sect. 55, of course, the upper piece of the plate had to be in position, because, if it was left off, that part of the machine would be left unfenced. The defendants, being a company, could, of course, discharge that necessary duty of seeing that this piece of fencing was there when the machinery was in motion, or that, when it was taken off, it was properly and necessarily taken off, and that it was replaced after being taken off, when the machinery restarted, only by some agent or employee. The deceased man was a man whose duty it was to take off this piece of shield, or plate, or whatever it is called, when it was necessary and proper to do so, in order to clean the machine, and, when the machine was going to work again, it was his duty to put it back again. The evidence shows that, on the morning in question, when he started his duties in this place, the shield or plate was in place. One of the witnesses who was called swore to that, and there was no evidence to the contrary. At the

time the accident happened, however, it was out of place. Then there was evidence that nobody had been near this place, and that no other workman had been concerned there except the unfortunate deceased man, whose duty it was to remove the plate, and that, when the accident happened, the plate was removed. Therefore he

A must have removed it. He may have removed it quite properly, in order to do some cleaning. There seems to be some suggestion that, at any rate in one method of cleaning, he had not to take it off, as he had taken it off on this occasion, in order to do the cleaning. The engine-

B man said that he had not been asked to stop the engine in order that cleaning could be done, which would have involved taking off the plate. The evidence also shows, as has been pointed out, that he might have done some cleaning, and might for that purpose have taken the shield off, when the machine was stopped for the filling of the trams. Whether or not he did that, there is no evidence before the court. The fact remains

C that, when the accident happened, this piece of shield or plate was off, and it must have been taken off by this man, whose duty it was to take it off and put it back again. In those circumstances, I think that I am driven to the conclusion that the defendants do establish both lines of defence which are open to them—namely, that this accident was due

D to the man's own action, and also, having regard to the absence of the shield at the moment of this accident, that it was not reasonable and practicable for them to avoid the breach. They had given instructions to a competent man that, when the machinery started, this shield must be replaced. They could not always have somebody in a superior station

E there to see that this duty was carried out. That would be unreasonable and impracticable. There is one possibility, as it seems to me, in which it might be said that the absence of the shield, and therefore the danger to which this man was exposed, was not due to his action. I have throughout used the neutral term "his action" instead of saying "his

F contributory negligence," having in mind the discussion as to the precise nature of the epithet which should be applied to the action or the tort of the claimants, which was discussed by LORD WRIGHT in *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (2). I presume, however, that there is one possibility in which it might be said that the plate was not there,

G but not by default of the man, and that the accident may have happened then in spite of there being no default or action on his part. It has been pointed out that, when the machinery was stopped, in order to load the trams, it would be proper to take off the shield, but that, under the system of the mine, the machinery might be started again without due

H warning, and that then there might be a moment when the machinery would be revolving unfenced without the man having broken his duty to fence it again, or to put back the fence. If that had happened, and he had been starting to fulfil his duty of putting the shield back, and the accident had happened at that moment, then it might be said that the accident happened through the machinery being unfenced because of a

defect in the system of working of the defendants, and that it was unfenced at that time without there being any default or misconduct on the part of the deceased. However, although the facts are obscure—all we know is that the man was found, having been drawn into this machinery through the open hole—I think that it is perfectly manifest that the accident could not have happened when he was carrying out the process of putting back the shield into its position. When he was found, the shield, as I call it, was propped up against the wall at the bottom of the lower part of the casing, and his tool, the scraper, was in position there. The evidence also is that the shield was placed in position by being pushed into a slot from the side of the machine. It is obviously, to my mind, quite impossible that a man engaged in the process of putting the shield into its position into a slot from the side could, for some perfectly inexplicable reason, be somehow drawn through the hole into the machinery. A

The whole case, as I say, is in a very unsatisfactory state on the evidence. Although *prima facie*, under sect. 55, there was at the moment an apparent breach of the section, because this machinery was not properly fenced, yet, when one comes further to examine the facts, the defendants can say, first, that the absence of fencing was due to the misconduct, or default, or negligence or whatever you like to call it, of the deceased himself; and, secondly, that it was not practicable, in the circumstances, for them to have avoided or prevented that temporary breach. In those circumstances, I agree with GREER, L.J., that this appeal fails. B

Appeal dismissed with costs. Leave to appeal to the House of Lords. C

Solicitors: *Smith, Rundell, Dods & Bockett*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the appellant); *Furniss & Co.*, agents for *A. J. Prosser*, Cardiff (for the respondents). D

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.] E

ATTORNEY-GENERAL v. PROSSER. F

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
May 18, 19, 1938.]

Crown Practice—Information of debt—Writ of subpoena—Party out of the jurisdiction—Applicability of R.S.C., Ord. 11—*Crown Suits Act*, 1865 (c. 104), s. 37—*Supreme Court of Judicature (Consolidation) Act*, 1925 (c. 49), s. 99 (1) (a), (g). G

P. was served with certain assessments to sur-tax at a time when he was living abroad, and he paid no attention to them. The writ of subpoena under the Crown Suits Act, 1865, s. 37, was issued, and the procedure laid down in that section followed. The appellant entered no appearance, and the Crown obtained judgment against him. Upon P.'s return to this country, the Crown enforced this judgment by execution, and P. now applies to have the judgment and the service of the writ set aside. It was contended that the amendment introduced into R.S.C., Ord. 68, in 1932, and now r. 3 of that order, had the effect of requiring the Crown in such a case to follow the procedure laid down H

in R.S.C., Ord. 11, and not that laid down in the Crown Suits Act, 1865, s. 37 :—

HELD : although the Rule Committee has full power to repeal procedural statutes, the words used in the amendment contained in R.S.C., Ord. 68, r. 3, were not sufficient to repeal the Crown Suits Act, 1865, s. 37, and the judgment and service of the writ ought not to be set aside.

A [EDITORIAL NOTE. Service out of the jurisdiction is in all ordinary cases governed by the code of rules contained in R.S.C., Ord. 11, but it is here decided that, for the purpose of enforcing a Crown debt, although that code is by R.S.C., Ord. 68, r. 3, applied to such proceedings so far as it is applicable, the procedure laid down in the Crown Suits Act, 1865, s. 37, is not repealed, and is still available to the Crown.

B AS TO WRIT OF SUBPŒNA FOR ENFORCING CROWN DEBTS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 668, 669, paras. 1131-1134 ; and FOR CASES, see DIGEST, Vol. 16, pp. 216-218, Nos. 26-55.]

APPEAL from an order of PORTER, J., dated Dec. 3, 1937. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

C The Crown Suits Act, 1865, s. 37, provides as follows :

D In a suit at law on the revenue side of the court against a British subject resident out of the jurisdiction of the court in any place except Scotland or Ireland, the informant may sue out against that person a writ of subpœna, bearing an indorsement stating that the writ is for service out of the jurisdiction of the court ; and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where he is resident, and the court or a judge, on being satisfied by affidavit that the writ was personally served on the defendant, or that reasonable efforts were made to effect personal service thereof on him, and that it came to his knowledge, and either that he wilfully neglects to appear to the writ, or that he is living out of the jurisdiction of the court in order to defeat the claim to which the information relates, may order from time to time that the informant be at liberty to proceed in the suit in such manner and subject to such conditions as to the court or a judge seem fit, the time allowed for the defendant to appear being reasonable, and regard being had to the other circumstances of the case ; but it shall be a condition precedent to the informant's obtaining judgment that he give proof of the merits of the claim to the satisfaction of the court or a judge, or of the officer of the court to whom the court think fit to refer the matter.

Hon. Sir Stafford Cripps, K.C., and P. B. Morle for the defendant.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the informant.

SIR WILFRID GREENE, M.R. : This appeal raises a point of procedure which is of some importance, and is not without difficulty. The appellant, who was served with certain assessments to super-tax and sur-tax, was at the time living abroad. To those assessments he did not pay any attention, and finally a writ of subpœna was issued, on July 26, 1935, against the appellant for service out of the jurisdiction. That writ was issued under the Crown Suits Act, 1865, s. 37. It appears that after the issue of that writ the procedure laid down by that section was followed by the Crown. The appellant did not appear in those proceedings, and eventually the Crown obtained judgment against him. There is no suggestion that the procedure laid down by the section, under which the court has to be satisfied with regard to certain matters, was not complied with. Armed with that judgment, the Crown proceeded to enforce it against the present appellant on an occasion when he was

visiting this country, and under process of execution he was compelled to pay the amount claimed. He now, in these proceedings, seeks to have the judgment and the service of the writ set aside. He originally did so on several grounds, but the only ground which has been relied on before us is that the service of the writ of subpœna out of the jurisdiction was not an effective service, with the result that the court had A no jurisdiction to entertain the proceedings. PORTER, J., rejected that argument, and dismissed the application, and the present appeal results from his decision.

The substantial question involved may be shortly stated in this way. Did a certain amendment introduced into R.S.C., Ord. 68, in 1932, B and now appearing as r. 3 of that order, have the effect of substituting the provisions of R.S.C., Ord. 11, in regard to service out of the jurisdiction for the provisions of the Crown Suits Act, 1865, s. 37, so far as they relate to service? The main point, of course, is that under the Crown Suits Act, 1865, s. 37, a writ of subpœna may be sued out, and C served, without any previous application to the court. Under R.S.C., Ord. 11, the service of a writ for service out of the jurisdiction cannot be effected without the previous leave of the court. Sect. 37 provides, as I have said, that the informant may sue out against a British subject resident out of the jurisdiction a writ of subpœna bearing an indorsement D stating that the writ is for service out of the jurisdiction of the court. Then the court, when satisfied by affidavit of certain matters, such as the service, or reasonable efforts to effect service, wilful neglect to appear, or that the respondent is living out of the jurisdiction of the court in order to defeat the claim, may make orders giving liberty to proceed. E That, as I have said, was done in this case. The section also provides that before obtaining judgment the informant must give proof of the merits of the claim to the satisfaction of the court, or a judge, or an officer of the court to whom the court thinks fit to refer the matter.

That section is a section which extends the jurisdiction of the court F of exchequer, because, of course, in those days it was the court of exchequer which was concerned with such matters on its revenue side. It extended the jurisdiction of the court of exchequer, enabling it to entertain proceedings against British subjects, provided that they were brought before the court in the manner there indicated. Every provision for G service out of the jurisdiction is, of course, a provision which extends the common law jurisdiction of the King's courts. The original extension took place in the Common Law Procedure Act, 1852, and for the purposes of general litigation that has been superseded by R.S.C., Ord. 11, made originally under the Judicature Act, 1873. This sect. 37 is, like H the Common Law Procedure Act, and like R.S.C., Ord. 11, a statutory extension of the jurisdiction of the King's courts. The Rules of the Supreme Court did not apply, and they still do not apply, save in so far as they have been made applicable, to proceedings on the revenue side of the King's Bench Division. That is provided for in R.S.C., Ord.

68, r. 1. That provision has been modified, to a certain extent, by amendments introduced from time to time into that order. Thus R.S.C., Ord. 68, r. 2, made applicable to proceedings on the revenue side a number of orders there specified relating to procedural matters. R.S.C., Ord. 68, r. 2A, passed in 1906, applied R.S.C., Ord. 2, r. 8. The particular rule with which we are concerned—namely, r. 3—was introduced in 1932, and is in the following terms :

Ord. 11 (which relates to service out of the jurisdiction) shall apply, as far as it is applicable, to proceedings on the Crown side, and to proceedings on the revenue side, of the King's Bench Division.

- B It is said on behalf of the appellant that the effect of the introduction of that rule is to take away the power, which the court undoubtedly had before, of entertaining proceedings where the provisions of the Crown Suits Act, 1865, s. 37, had been followed, and to deprive the court of jurisdiction to entertain proceedings, unless leave had previously been
- C given to serve the writ out of the jurisdiction. It is said, in support of that argument, that the rule is general in terms, in the sense that it does not purport to apply merely one rule, or two rules, of R.S.C., Ord. 11, but it applies Ord. 11 generally, as far as it is applicable, and it is pointed out that that is in contrast to r. 2A, and to r. 4, each of
- D which applies specific rules of other orders. It is also pointed out that r. 3 is in the same class in that respect as is r. 2, which again applies orders, and not merely rules. It is also said that, unless the effect for which the appellant contends is given to r. 3, it will have no effective content. The way in which it is said that that rule will operate on Ord. 11
- E is that, in R.S.C., Ord. 11, r. 1, reference must be inserted in the opening words to a writ of subpoena, and a further category of cases where service out of the jurisdiction is to be permitted (which would be (j)) must be inserted—namely, words something to this effect : “ Where the proceedings are on the revenue side of the King's Bench Division.”
- F It is said that, if that is done, it has the effect of modifying the provisions of the Crown Suits Act, 1865, s. 37. Sir Stafford Cripps, on behalf of the appellant, did not accept the conclusion which I am about to state, but it appears to me that, if effect is to be given to his argument, one must not merely write those affirmative words into R.S.C., Ord. 11,
- G but also by implication negative and annul the jurisdiction which had previously existed in the court under the Crown Suits Act, 1865, s. 37. As I have already pointed out, R.S.C., Ord. 11, is an extension of the jurisdiction of the court, and so was sect. 37. Sect. 37 lays down the conditions in which the court is to have that extended jurisdiction.
- H R.S.C., Ord. 11, does the same thing, and merely by inserting a reference to a writ of subpoena in R.S.C., Ord. 11, one would not, so far as language is concerned, destroy the extended jurisdiction which had already been given by sect. 37. R.S.C., Ord. 11, in other words, is not, on the face of it, a restrictive or prohibitory order at all. It is one which extends the jurisdiction of the court.

A further curious result would follow from the argument. Under R.S.C., Ord. 11, there are certain safeguards, in that, before leave can be obtained to serve a writ out of the jurisdiction, the court must be satisfied with regard to certain matters. Subject to that, and when the court is satisfied with regard to those matters, the writ, or the notice of the writ, as the case may be, can be served, and the proceedings will continue in the ordinary way, like any other proceedings. Under sect. 37, however, as I have pointed out, there are certain safeguards which must be observed after the writ has been issued, and the court must be satisfied with regard to a number of matters. The anomalous result, therefore, would follow, that writs of subpœna would be brought under the provisions of R.S.C., Ord. 11, so far as it requires certain matters to be proved to the satisfaction of the court before leave is obtained, but would still be left in the position, unlike other proceedings, that the court would have to be satisfied about the matters mentioned in sect. 37 before it could allow the action to proceed.

Of course, if the language of the rule were such as to show a clear intention, not merely to take away an existing jurisdiction of the court, but also to leave these matters on the revenue side in the curious position which I have just indicated, it must, of course, be followed. However, the language which is relied upon appears to me, if I may say so, about as unsuitable to produce such a result as any language could be. This is a case where there was, on the statute book, a statute dealing with an important matter of jurisdiction. The Rule Committee no doubt has power to deal with existing statutes, so far as they relate to matters of procedure, but that the Rule Committee, by the language of R.S.C., Ord. 68, r. 3, should have affected in such a remarkable and striking manner an existing statute such as the Crown Suits Act, 1865, s. 37, by the language which it has used, I find impossible to believe. It seems to me that the language, on the face of it, is not the language that one would expect to find used in order to produce such an important and radical result. I quite agree that, if there were no content for the language used, unless effect were given to this argument, we should find ourselves constrained to accept it, but the Attorney-General has satisfied me that there is a content, which is quite intelligible.

At the same time as r. 3 was introduced into Ord. 68, an amendment was made to R.S.C., Ord. 11, r. 11, itself. That rule provides for the adoption of certain machinery for service in cases where conventions have been made with a foreign country in that behalf.

The original convention was, I think, made with France, and there are one or two others made since. That rule of Ord. 11, previous to the alteration to which I have referred, which was made in 1932, provided only for cases where leave had been given to serve out of the jurisdiction. That is to say, in cases of service out of the jurisdiction where no leave was required, the provisions of that rule did not apply. Contemporaneously with the introduction of R.S.C., Ord. 68, r. 3, R.S.C., Ord. 11,

- r. 11, was made applicable to cases where such leave is not required. One case where leave was not required before 1932 was a case where the writ of subpœna was served under the Crown Suits Act, 1865, s. 37. It is perfectly true that the introduction of those words "where such leave is not required" would not by itself have brought the writ of
- A** subpœna into the picture, because the rule then would have applied only to writs of summons or other ordinary procedure in the courts. Nevertheless, it was the new R.S.C., Ord. 68, r. 3, which applied Ord. 11, so far as applicable to proceedings on the revenue side, and this had the effect, by combination with the words "where such leave is not required,"
- B** of making the procedure laid down in r. 11 applicable to proceedings on the revenue side. It is said that those words "where such leave is not required" are inserted, or would properly have been inserted, to deal with a *casus omissus*—namely, the case mentioned in r. 2A, where the parties have made agreements with regard to jurisdiction.
- C** It is perfectly true that, without those words, cases falling under r. 2A would not fall under r. 11, but that does not appear to me to be any ground for saying that the only object of the alteration in r. 11 was to make it applicable to cases falling under r. 2A. The argument that there is no content for R.S.C., Ord. 68, r. 3, is one which, in my opinion,
- D** fails. I quite appreciate the force of the argument based on what is undoubtedly the fact—that r. 3 in terms purports to apply the whole order, and not merely individual rules of it—but I find myself unable to give to the language used the effect of taking away the statutory jurisdiction conferred by sect. 37. That, in short, is the substantial
- E** ground of my judgment—that I cannot construe the words as having that effect. The result is that the appeal must be dismissed with costs.

- SCOTT, L.J. : After the argument that we have heard, it is impossible not to feel doubt as to what the intention of the Rule Committee was
- F** in 1932, when it passed the new rule—R.S.C., Ord. 68, r. 3—in the general terms that it did, and at the same time passed the new r. 4 in the limited terms that it did, but I agree with the conclusion at which SIR WILFRID GREENE, M.R., has arrived. There is no doubt that under sect. 37 the court was given a jurisdiction which, either then or pursuant
- G** to the provisions of the Common Law Procedure Act, 1852, was an entirely new jurisdiction, unknown theretofore to the English common law, and consequently the rule in question here—R.S.C., Ord. 11, r. 1—is a rule which, if applied to sect. 37 of the Act of 1865, would cut down the jurisdiction of the court resulting from sect. 37 of that Act. Under
- H** the Supreme Court of Judicature (Consolidation) Act, 1925, s. 99, as it stands to-day :

(1) Rules of court may be made under this Act for the following purposes : (a) For regulating and prescribing the procedure . . . (g) For repealing any enactments which relate to matters with respect to which rules are made under this section.

There is, therefore, no doubt whatever that the Rule Committee could,

had it chosen, have passed a rule in 1932 applying what I will compendiously call the "leave" procedure of R.S.C., Ord. 11, to the proceedings on the revenue side, saying in terms that to that extent sects. 37 and 38 of the Act of 1865 should be treated as amended. The argument of Sir Stafford Cripps is that the rule, as it stands, has that effect. For the reasons given by SIR WILFRID GREENE, M.R., I do not think that we are justified in saying that that object has been achieved by the rule, and, therefore, I am not able to construe the rule as having been intended to achieve it. A

CLAUSON, L.J.: I agree, and I should like to add only this. Reading R.S.C., Ord. 11, as it stood immediately before R.S.C., Ord. 11, r. 11, was amended on Feb. 19, 1932, by the Rule Committee, I can find nothing which at that date could properly be described as being applicable to a proceeding on the revenue side of the King's Bench Division. On Feb. 19, 1932, an amendment was made to R.S.C., Ord. 11, which had the effect of introducing into Ord. 11 something which would be applicable to a proceeding on the revenue side, if it were applied. What was done was to put in a provision in R.S.C., Ord. 11, r. 11, which enabled certain forms of service to be adopted, not only in the cases to which Ord. 11, as unamended, applied—that is, cases where leave was given by the court to serve abroad—but also in cases where such leave was not required. Accordingly, if the matter had stood there, the position would have been that there was something in Ord. 11 as so amended which was applicable to proceedings on the revenue side but which did not apply to proceedings on the revenue side, because, under R.S.C., Ord. 68, r. 1, the rules do not apply, unless expressly provided, to proceedings on the revenue side. On the same day, and by the same order, the Rule Committee proceeded to apply to proceedings on the revenue side such parts of R.S.C., Ord. 11, as I read it, as were applicable to such proceedings. That seems to me to mean that they apply R.S.C., Ord. 11, r. 11 (which deals with certain special methods of service), to proceedings on the revenue side. If that is what the rule means, it is perfectly intelligible, and it seems to me to be a not wholly inapt way of dealing with the matter in hand. We are asked by Sir Stafford Cripps to construe R.S.C., Ord. 68, r. 3, as upsetting entirely the procedure laid down by the Crown Suits Act, making it impossible to get what may be called default proceedings going without the previous leave of the court—a very serious inroad upon the provisions of that section. B C D E F G

I agree with Sir WILFRID GREENE, M.R., that, under the Judicature Act, the Rule Committee has full power even to repeal, and certainly to affect, procedural statutes, but I also venture respectfully to agree with what he said—namely, that, if that was what the Rule Committee were attempting to do, they chose singularly inapt language for the purpose. As I can see a perfectly reasonable construction of R.S.C., Ord. 68, r. 3, without imputing to them the intention of affecting in H

this remarkable way the Crown Suits Act, I see no difficulty in adopting that construction. For these reasons, I agree.

Appeal dismissed with costs. Leave to appeal.

Solicitors : *Sutton, Ommanney & Oliver* (for the defendant) ; *Solicitor of Inland Revenue* (for the informant).

[Reported by REGINALD TOWNSEND, Esq., Barrister-at-Law.]

EAST MIDLAND TRAFFIC AREA TRAFFIC COMMISSIONERS v. TYLER.

KING'S BENCH DIVISION (Branson, Humphreys and du Parcq, JJ.),
May 17, 1938.]

Street and Aerial Traffic—Motor car—Carrying friends of owner-driver—Payment for oil and petrol used—Necessity for licence as a public service vehicle—Road Traffic Act, 1930 (c. 43), s. 61.

T., the owner of a motor car, took 3 friends of his, who were employed with him at an aerodrome, to their work each morning and returned with them in the evening. T. drove the car, and by agreement the expenses of oil and petrol were shared, each of the four paying 5s. per week. It was contended that the payments made were payments for oil and petrol, and not separate fares in respect of the journeys :—

HELD : T.'s friends were persons carried in consideration of separate payments, and the vehicle was therefore a public service vehicle and required to be licensed as such.

[EDITORIAL NOTE. The facts of this case represent a very common practice among motor car owners, and the importance of the decision will be apparent.

AS TO PUBLIC SERVICE VEHICLES, see HALSBURY, Supp., Street and Aerial Traffic, para. 611 ; and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 76e-76q.]

APPEAL by way of case stated from the decision of the court of summary jurisdiction sitting at Louth, Lincolnshire.

The Road Traffic Act, 1930, s. 61, provides as follows :

(1) Public service vehicles shall, for the purposes of this part of this Act and the regulations made thereunder, be divided into the following classes. . . . (b) express carriages ; that is to say, motor vehicles carrying passengers for hire or reward at separate fares (none of which is less than 1s. for a single journey or such greater sum as may be prescribed). . . . (2) It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not. Provided that a vehicle used on a special occasion for the conveyance of a private party shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion.

Valentine Holmes for the appellants.

M. A. B. King-Hamilton for the respondent.

BRANSON, J. : Informations were preferred by the traffic commissioners for the district, charging the respondent, Tyler, (a) for that

he did unlawfully cause to be used a motor vehicle on the road, he not being a holder of a public service vehicle licence, and (b) that the respondent on the same day did unlawfully use a motor vehicle, to wit, the same vehicle, he not being the holder of a road service licence, contrary to the Road Traffic Act, 1930, s. 72 (1), (10). The court of summary jurisdiction dismissed the informations, but stated a case for the opinion of this court. In that case the following facts were found : A

(a) That the vehicle in question was a Morris Minor 8 h.p. private motor car capable of seating four persons. (b) That on the day in question it was being driven by the respondent, who was the owner of the car. (c) That there were three other persons in the car. They were friends of the respondent, and all four were working at the same place, on the site of the building of a new aerodrome. (d) That each morning they went together in this car from Mablethorpe to Manby, a distance of ten miles, and returned home in the evening. B

An agreement had been made between them that they should share in the running-expenses of petrol and oil used in the car. It was found that they all lived at Mablethorpe, owing to lack of accommodation at or near the aerodrome, and had to travel daily to and from their work at such aerodrome. Then it was found : C

(g) That for some time they travelled by a public service bus, under circumstances of overcrowding and discomfort, until one day one of them, the defendant who owned the small car, suggested to his colleagues that, if they cared to share the running expenses, the four of them could daily travel together to and from their work. (h) That no other persons, other than the said owner, and his three friends, used the car for going to and from their work, as stated above. D

It was then stated that payments for petrol and oil were shown to be at the rate of 5s. per week for each of the four persons, including the owner of the car. Then the amount was set out in para. (k), showing that the expenses were petrol and oil, a proportionate part of the insurance, and a proportionate part of the licence payable in respect of the car. At E first, each of the four paid as his share 3s., but subsequently by arrangement that was increased to 5s. The defendant told the other three persons each week how much petrol and oil had been used, and they all worked six days a week at the aerodrome. The defendant was not the holder of a public service vehicle licence, and not the owner of a road F service licence.

Upon those facts, it was contended on behalf of the appellants that the vehicle came within the definitions of the statute, and that an offence had been committed by Tyler under sect. 67 (1), (3), and also under sect. 72 (1), (10). The question depends upon the construction of the relevant G sections of the Road Traffic Acts, 1930 and 1934. Without dealing with those sections at large, I think that it is sufficient to say that the precise point upon which the case turns is whether or not it is correct to say that these three people who travelled with the respondent in his car were carried in a motor vehicle for a journey " in consideration of separate H payments made by them," within the words of the Road Traffic Act, 1930, s. 61 (2), or whether the contention which is put forward by Mr. King-Hamilton, for the respondent, is correct—namely, that the payments which the case finds to have been made by the three persons who

were not the owners of the car can be said to be payments not made in respect of any journey by the car, but only payments made in respect of so many gallons of petrol, so many pints of oil, and such-and-such a proportion of the insurance and licence. To my mind, it seems to be beyond argument that, upon the facts as found in this case, the three
 A men, who were not the owners of the car, were being carried daily and duly from Mablethorpe to their work in this Morris Minor in consideration of separate payments made by them—that is to say, at first the 3s. a week, and, later on, the 5s. a week. If that is so, then, under sect. 61 (2), the vehicle in which they are carried :

B shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not.

The argument put forward by Mr. King-Hamilton is that these payments were not made in respect of the journey at all, and that that section shows that they must be payments made in respect of the journey in
 C order to bring the vehicle within the ambit of that subsection. If that is right, as a matter of fact the magistrates were correct in their decision. It seems to me to be impossible to say that these payments were not payments made in consideration of the carriage of these three men backwards and forwards between the place where they lodged and the place
 D where they had to work.

That section is, in my view, decisive of the case, and I think that the appeal should be allowed. I think it right to say that one cannot help sympathising with the respondent in this case, but one cannot allow any sympathy that one may feel to induce one to put upon an Act of Parlia-
 E ment a construction which that Act does not fairly bear.

HUMPHREYS, J. : I agree.

DU PARCQ, J. : I agree.

Appeal allowed.

F Solicitors : *Treasury Solicitor* (for the appellants) ; *Amery-Parkes & Co.* (for the respondent).

[*Reported by* MICHAEL MARCUS, Esq., *Barrister-at-Law.*]

G RATCLIFFE v. RATCLIFFE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), May 2, 1938.]

H *Divorce—Desertion—Separation deed—Husband's failure to perform covenant to pay—Special circumstances—Repudiation of deed—Matrimonial Causes Act, 1937 (c. 57), s. 2 (b).*

The petitioner and respondent separated in 1932 under a deed of separation whereby the respondent covenanted to pay the petitioner the sum of 30s. per week. He paid this sum for about a month and thereafter made no further payments. The parties had, while living together, kept a public-house, and after the separation the petitioner took the licence of another public-house in order to support herself

and her child. During their married life the respondent drank heavily, but had many times made promises, which proved quite illusory, to give up drink. After the separation he saw the petitioner on various occasions and made promises or suggestions to return, but they were quite fantastic, and were never carried beyond mere suggestion :—

HELD : although the fact that payments under a deed of separation have ceased is not sufficient evidence of repudiation of the deed, the further facts proved here showed a repudiation, and desertion had been proved. A

[EDITORIAL NOTE. The deed of separation is usually conclusive against a charge of desertion, but it may be shown that the deed has been repudiated. Mere stoppage of payments under the deed is not conclusive evidence of repudiation, and it must further be shown that the party who is alleged to have repudiated the deed has by his conduct treated it as a nullity. B

AS TO DESERTION AND SEPARATION DEEDS, see HALSBURY, Hailsham Edn., Vol. 10, p. 657, para. 966 ; and FOR CASES, see DIGEST, Vol. 27, pp. 317, 318, Nos. 2940-2956.]

UNDEFENDED PETITION by the wife for dissolution of marriage on the ground of desertion by the husband without cause for a period of three years immediately preceding the presentation of the petition within the Matrimonial Causes Act, 1937, s. 2 (b). C

S. E. Karminski for the petitioner.

LANGTON, J. : This is not an altogether easy case. The facts are that Mr. and Mrs. Ratcliffe separated from one another in 1932, under a deed of separation dated Apr. 5, 1932. It was one of the terms of that agreement that the husband should pay to the wife the sum of 30s. per week. In fact, he paid for about a month, and never paid at all thereafter. Mr. and Mrs. Ratcliffe had a licensed house called the Sutton Arms. After their separation, of course, their work in that matter was discontinued. Since that time, Mrs. Ratcliffe, in order to support herself—being obviously a woman of enterprise and energy—has taken the licence of another house, the Skinner Arms, and has supported herself. She has seen her husband from time to time—notably on the child's birthday and at Christmas time—as the years have passed. More than once Mr. Ratcliffe has suggested that they should come together again. That suggestion in itself seems to strengthen the difficulties in the case, in that this division of the parties started with an agreement, and the husband has suggested that they might make up their differences and come together, but, when the case is fully examined, and Mrs. Ratcliffe's evidence is given its full weight, it seems to me that it is really a case of desertion, in spite of the very strong *prima facie* evidence against it. Mr. Ratcliffe is a man who drank very heavily, and on that matter a diary has been put before me in his wife's evidence. The wife's evidence, of course, is quite uncontradicted, and, coming, as I say, from a woman of energy, as she is, it is very convincing evidence indeed. It seems that over and over again during their married life Mr. Ratcliffe promised to give up drink and signed rather curious agreements to that effect. The promises were quite illusory, and these promises or suggestions to return were D
E
F
G
H

- quite fantastic, and were never implemented in any way, or carried any stage further than a merely verbal suggestion. Mrs. Ratcliffe's own actions in the matter—in taking a responsible position herself, and in supporting herself and the child—are cogent evidence of the truth of her assertion. In other words, what has really happened is this. Although
- A the parties separated originally under agreement, the husband at a very early stage repudiated that agreement. As he has repudiated the agreement, the court, in my view, is enabled to look at the situation afresh. An agreement so repudiated is not, in my judgment, in itself a bar to these proceedings, though it constitutes in the first instance, of course,
- B *prima facie* evidence against desertion. However, as it has been repudiated—and I am satisfied it has been—I have had to look at the action of the parties during the not inconsiderable period for which they have now been separated. From 1932 till the present day, Mr. Ratcliffe lived apart from his wife, made no contribution towards the support
- C of his wife and child, and has done nothing at all except to make quite illusory promises. I think that, in the circumstances, Mrs. Ratcliffe is entitled to her decree. I wish it to be understood that in so doing I am not accepting the first proposition for which Mr. Karminski contended—that the mere fact that a man, after a separation agreement,
- D has not kept up his payments thereunder is sufficient to enable the court to say that the agreement is thereby repudiated. It is upon all the facts of this case, having carefully examined the relations between the parties, that I am satisfied a case of desertion is made out. There will be a decree *nisi* with costs, and custody of the child.
- E Solicitors: *Kenneth Brown, Baker, Baker* (for the petitioner).

[Reported by J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]]

TATE v. CREWDSON.

F [CHANCERY DIVISION (Morton, J.), May 18, 1938.]

- Guarantee—Right of surety to exoneration from liability—Joint and several liability of surety and principal debtor—Both treated as principal debtors of the mortgagee—Supplemental agreement that each liable for one moiety of amount of mortgage—Provision against compulsion to repay by either if*
- G *payment of interest not 30 days overdue—Whether right arises as soon as interest is 30 days overdue, although subsequently paid.*

- A mortgage dated Feb. 8, 1935, was entered into between the plaintiff and defendant as borrowers of the first part, the plaintiff as surety of the second part, and Lloyds Bank, Ltd., of the third part, whereby the bank agreed at the request of the plaintiff, and upon the security of certain interests owned by the plaintiff, to advance to the plaintiff and defendant jointly the sum of £25,000, and the plaintiff and defendant jointly and severally covenanted to repay this sum to the bank upon demand. The mortgage deed provided that, as between the borrowers and their property on the one hand and the surety and his property on the other hand, the borrowers and their property should be primarily liable in exoneration
- H of the surety and his property, but that, as between the surety and the bank, the surety should be liable as a principal debtor. On Nov. 25,

1935, a supplemental agreement was entered into between the plaintiff and the defendant which provided that, notwithstanding their joint and several liabilities, the amount borrowed on the joint account should be deemed to have been borrowed as to one moiety for the benefit of the plaintiff, and as to the other moiety for the benefit of the defendant, and that each should be liable for payment of the principal and interest to the extent of their respective moieties of the loan for the time being owing. The agreement contained a further proviso that as between themselves neither the plaintiff nor the defendant should be at liberty to compel the other to repay his moiety, whether to the bank or otherwise, so long as interest owing thereon should be paid within thirty days of the same becoming due. The defendant failed on several occasions to pay the half-year's interest due on his moiety of the loan within thirty days of its becoming due. The plaintiff issued a writ claiming an order that, upon his paying to the bank one moiety of the principal and interest owing under the mortgage, the defendant should be ordered to pay the remaining moiety of the principal moneys and interest. At the time of the issue of the writ there was no interest payable by the defendant which was more than thirty days overdue, but upon three occasions the interest had been paid more than thirty days after the due date. The defendant contended, first, that neither party could compel repayment by the other unless there was at the time some interest more than thirty days in arrears, and, secondly, that, apart from the supplemental agreement, the plaintiff had no right to compel the defendant to pay off the mortgage of the mortgagee, the bank :—

HELD : (i) the period of years specified by the proviso had come to an end by reason of non-payment of interest by the defendant within thirty days of the due date.

(ii) the plaintiff and defendant were under a present liability without demand to pay to the bank the principal sum and interest due under the mortgage, and the plaintiff was entitled to compel the defendant to pay his moiety of what was due to the bank.

[EDITORIAL NOTE.] The first point in this case is whether or not a proviso that interest shall be paid within thirty days of the same becoming due ceases to be effective as soon as any payment of interest is thirty days overdue and is not brought into operation again by the subsequent payment of all interest due. In the circumstances of this case, it is held that, immediately upon interest becoming thirty days overdue, the proviso becomes ineffective, and it is immaterial that at some subsequent time all interest then due has been paid. The other point follows the case of *Ascherson v. Tredegar Dry Dock & Wharf Co.* (1), where it was held that a person entitled to an indemnity may enforce his right as soon as his liability to the third party has arisen, and he can obtain relief before he has suffered any loss by payment to the third party.

AS TO EXONERATION OF SURETY BEFORE PAYMENT BY HIM, see HALSBURY, Hailsham Edn., Vol. 16, pp. 104-106, paras. 114-117; and FOR CASES, see DIGEST, Vol. 26, pp. 126-129, Nos. 896-923.]

Cases referred to :

- (1) *Ascherson v. Tredegar Dry Dock & Wharf Co., Ltd.*, [1909] 2 Ch. 401; 26 Digest 127, 902; 78 L.J.Ch. 697; 101 L.T. 519.
- (2) *Dale & Perry v. Lolley* (1808), 2 Bro. C.C. 582, n.
- (3) *Hughes-Hallett v. Indian Mammoth Gold Mines Co.* (1882), 22 Ch.D. 561; 26 Digest 128, 913; 52 L.J.Ch. 418; 48 L.T. 107.
- (4) *Re Anderson-Berry, Harris v. Griffith*, [1928] Ch. 290; Digest Supp.; 97 L.J.Ch. 111; 138 L.T. 354.
- (5) *Bradford v. Gammon*, [1925] 1 Ch. 132; 26 Digest 128, 918; 94 L.J.Ch. 193; 132 L.T. 342.
- (6) *Norton v. Ellam* (1837), 2 M. & W. 461; 32 Digest 329, 148; 6 L.J.Ex. 121.

(7) *Re Brown's Estate, Brown v. Brown*, [1893] 2 Ch. 300; 32 Digest 338, 219; 62 L.J.Ch. 695; 69 L.T. 12.

(8) *Bradford Old Bank v. Sutcliffe*, [1918] 2 K.B. 833; 32 Digest 333, 182; 88 L.J.K.B. 85; 119 L.T. 727.

A ACTION by the plaintiff for an order that upon payment by the plaintiff to Lloyds Bank, Ltd. (at such time and place as the court may direct), one moiety of the principal moneys and interest owing upon a mortgage dated Feb. 8, 1935, and made between the plaintiff and defendant of the first part, the plaintiff of the second part, and Lloyds Bank, Ltd., of the third part, the defendant pay to the bank (at such time and place as

B aforesaid) the remaining moiety of the principal moneys and interest.

Cyril J. Radcliffe, K.C., and *G. P. Slade* for the plaintiff.

H. B. Vaisey, K.C., and *Wilfrid M. Hunt* for the defendant.

C MORTON, J. : On Feb. 8, 1935, a mortgage was entered into between the plaintiff in this action, Henry Burton Tate, and the defendant in this action, Roger Bevan Crewdson, of the first part, who were thereafter called the borrowers, the plaintiff of the second part, who was therein-after called the surety, and Lloyds Bank of the third part, who were thereafter called the bank. After certain recitals of the title of the

D plaintiff to a number of reversionary interests, recitals of certain prior charges created by the plaintiff on those reversionary interests, and recitals of a voluntary settlement and other documents, to which recitals I need not refer at length, it was recited finally :

E The bank at the request of the surety have agreed to advance to the borrowers the sum of £25,000 upon having the repayment thereof with interest as hereinafter mentioned secured in manner hereinafter appearing and it was a term of such agreement that interest in arrear shall be capitalised in manner hereinafter appearing. Now this deed made in pursuance of the said agreement and in consideration of the sum of £25,000 paid to the borrowers at the request of the surety by the bank (the receipt of which sum the borrowers hereby acknowledge and the payment whereof in manner aforesaid the surety hereby admits) witnesseth and it is hereby agreed and declared as follows that is to say . . .

F I pause here to point out that this sum of £25,000 was paid to both of the gentlemen who are described as the borrowers, and it was paid to them apparently jointly. By cl. 1 it is provided as follows :

G The borrowers and the surety hereby jointly covenant and each of them severally covenants with the bank to pay to the bank on demand the sum of £25,000 and also any sum which may be added to principal under subcl. (a) of this clause together in each case with interest thereon in the meantime at the rate of £1 per cent. above bank rate for the time being in force with a minimum of £4 per cent. per annum commencing in the case of the said sum of £25,000 from Nov. 30, 1934, and in the case of any and every sum to be added to principal under subcl. (a) of this clause from the date when such sum first becomes due as interest hereunder, such interest to be paid and computed both before and after any demand (and as well after as before any judgment or order to be recovered or made hereunder) up to the date of actual payment of principal and to be paid (until such demand shall have been made and complied with) by half-yearly payments on May 30 and Nov. 30 in every year.

H It is to be observed that the principal sum under that clause is payable on demand.

I should say at this stage that it is alleged and admitted on the pleadings

that it was the practice of the bank to charge interest, not as at May 30 and Nov. 30 in each year, but as at June 30 and Dec. 31 in each year, and that :

both the plaintiff and the defendant were well aware of and acquiesced in this practice and that the said dates, June 30 and Dec. 31, were by mutual consent of the plaintiff and the defendant and the bank treated as substituted for the respective dates for payment of interest mentioned in the said mortgage. A

That appears from an allegation in para. 3 of the statement of claim, which is admitted in para. 2 of the defence.

Clause 1 (a) contains a provision for the capitalisation of interest which is fourteen days in arrear. I need not read it at length. Clause 1 (b) B relates to the payment off of such portion of the principal money as shall for the time being represent capitalised interest. Clause 1 (c) gives the bank a certain option, which is not, I think, material for the present purpose. In cl. 2 of the mortgage, the plaintiff, as beneficial owner, assigned unto the bank (putting it quite shortly) the reversionary interests C which I have already mentioned by way of mortgage, subject to the prior interests which were existing. There was then a provision for redemption in cl. 3. Clause 4 gave the bank certain powers which are expressed to be exercisable :

at all times during the continuance of this security and as well before as after demand D for payment of the moneys hereby secured.

I do not think that I need read cl. 5 or cl. 6. Clause 7 is as follows :

The power of sale and of appointing a receiver vested in the bank by virtue of this deed and the relevant statutes shall be immediately exercisable by them (without the necessity of giving any notice in that behalf to the borrowers) at any time after demand for payment of the moneys hereby secured. E

I refer to that because there, again, is a reference to demand for payment. By cl. 10 (a) it is provided :

The Law of Property Act, 1925, s. 93 (1), shall not apply to this security.

By cl. 10 (b), (c), it is provided : F

(b) As between the borrowers and their property on the one hand and the surety and his property on the other hand the borrowers and their property shall be primarily liable hereunder in exoneration of the surety and his property but this provision shall not affect the bank or their right to resort to and enforce all or any rights or remedies available under this deed or otherwise at such times and in such order and manner as they shall think fit. (c) Although as between the borrowers and the surety the surety is only a surety for the borrowers yet as between the surety and the bank the surety shall be liable as a principal debtor for all moneys and obligations hereby secured and shall not be released by time or indulgence being given to or any arrangement or alteration of terms being made with the borrowers or by any release or dealing by the bank or by any act omission matter or thing whatsoever whereby the surety as a surety only would or might have been released. G

Therefore, as between the bank and the surety, the surety is a principal H debtor, and one has a case of these two gentlemen who jointly borrowed the money, both of whom, as between themselves and the bank, are treated as principal debtors.

On Nov. 25, 1935, an agreement was entered into between the plaintiff of the one part and the defendant of the other part, and,

after a recital which, strangely enough, appears to be a most inaccurate recital of the mortgage of Feb. 8, 1935, there is a recital with regard to the assignment by the defendant of a certain policy, which is not material for present purposes, and it is agreed that, notwithstanding the joint and several liability of Mr. Tate and Captain Crewdson, the following

A provisions shall apply :

(a) The amount borrowed on the joint account as aforesaid shall be deemed to have been borrowed as to one moiety for the benefit of Mr. Tate and as to the other moiety for the benefit of Captain Crewdson and each of them shall be liable for the repayment of such loan to the extent of one half. (b) Mr. Tate and Captain Crewdson shall respectively be liable for the payment of the interest payable to Lloyds from time to time to the extent of the amount of their respective moieties of the loan for the time being owing. . . . (d) It is hereby agreed that Lloyds mortgage [the mortgage of Feb. 8, 1935] shall enure for the benefit of Mr. Tate and Captain Crewdson to the extent to which any payment may be made by either of them in respect of the moiety of the other of them and the interest thereon and nothing herein or in Lloyds mortgage contained shall prevent Mr. Tate or Captain Crewdson being entitled to the same security for any payment made by him in respect of the half for which he is not primarily liable hereunder as Lloyds Bank would have been entitled to had such last-mentioned moiety not been so paid as aforesaid.

There then follows a proviso which is of importance in the case. It is in these terms :

D Provided always that as between themselves neither Mr. Tate nor Captain Crewdson shall be at liberty to compel the other of them to repay his moiety whether to Lloyds Bank or otherwise for a period of ten years from the date hereof so long as the interest owing thereon shall be paid within thirty days of the same becoming due.

E It looks, from the terms of that proviso, as if the parties contemplated that, unless some special provision was made, one or other of them would be at liberty to compel the other to repay his moiety, and this proviso seems to be inserted in order to prevent such a compulsion being applied for the period therein mentioned.

It is alleged in para. 3 of the statement of claim, and not disputed in the defence, that :

F the defendant failed and neglected to pay the half-year's interest which was charged by and payable to the bank on June 30, 1936, Dec. 31, 1936, and June 30, 1937, upon his moiety of the said sum of £25,000 or any part thereof as regards the sum payable on June 30, 1936, until Sept. 11, 1936, and as regards the sum payable on Dec. 31, 1936, until Apr. 2, 1937, and as regards the sum payable on June 30, 1937, until Oct. 18, 1937.

G There is no dispute that the delay there stated to have occurred in payment of interest by the defendant did in fact occur. By his defence the defendant has alleged that the plaintiff was also on certain occasions out of time in paying his interest, but, as the plea of waiver which is inserted in the defence has not been persisted in by counsel for the defendant, I
H do not think that it is material whether or not the plaintiff was in default.

In these circumstances, the plaintiff issued a writ on Jan. 20, 1938, and he claims :

An order that upon payment by the plaintiff to Lloyds Bank, Ltd. (at such time and place as the court may direct) of one moiety of the principal moneys and interest owing upon a mortgage dated Feb. 8, 1935, and made between the plaintiff and the

defendant of the first part the plaintiff of the second part and Lloyds Bank, Ltd., of the third part, the defendant do pay to the said bank (at such time and place as aforesaid) the remaining moiety of the said principal moneys and interest.

He also claims further or other relief and costs.

It is to be observed that, at the time when the writ was issued, the interest payable on June 30, 1937, had been paid, and the interest which became payable on Dec. 31, 1937, was not thirty days overdue. A

The arguments against the plaintiff, which have been put forward by Mr. Vaisey and Mr. Hunt in this case, are these. First of all, they say that the proviso in the supplemental deed of Nov. 25, 1935, really means that neither party is to have a right to compel repayment by the other unless, at the time when one party seeks to compel the other, there is some interest which is more than thirty days in arrear. Secondly, they say that, even if that contention is incorrect, apart altogether from the supplemental agreement, the plaintiff has no right to compel the defendant to pay off the mortgage of the mortgagee, the bank. B

Dealing first with the argument on construction, it appears that the words "for a period of ten years from the date hereof so long as the interest owing thereon shall be paid within thirty days of the same becoming due" lays down a period which comes to an end if an instalment of interest is not paid within thirty days of the same becoming due. One can well appreciate that it was of importance to the parties to satisfy themselves each that the other was a punctual payer of interest and they may well have been content to allow the matter to go on and the liability to remain, so long as the interest was punctually paid. Mr. Vaisey invited me to read the words "so long as" as meaning "provided that." Even so, reading them as "provided that the interest owing thereon shall be paid within thirty days of the same becoming due," I think that I at once get into difficulties unless I treat it as being a proviso which has the effect that, as soon as an instalment of interest is not paid within thirty days of the same becoming due, the period comes to an end. I think that it would be straining the words of the proviso beyond any point which would be justified to read them as meaning "provided that no interest owing thereon is more than thirty days in arrear," or some such phrase as that. C
D
E
F

To my mind, the period specified by the proviso has come to an end, and therefore one has now to ascertain whether, apart from this proviso, the plaintiff would have been entitled to the relief which he claims in this action. G

Mr. Radcliffe, for the plaintiff, has referred me to *Ascherson v. Tredegar Dry Dock & Wharf Co., Ltd.* (1), and he has called attention to the fact that in that case SWINFEN EADY, J., as he then was, said, at p. 409: H

The present action is not like *Dale & Perry v. Lolley* (2), where a surety brought an action to compel the debtor to pay a bill not due for twenty months, or *Hughes-Hallett v. Indian Mammoth Gold Mines Co.* (3), where he asked for indemnity against a future contingent liability. The obligation of the executors [they were the executors of the surety in that case] is a present liability, and they are entitled to the relief they ask. There must be a declaration that the plaintiffs, as executors

of the deceased, are entitled to be discharged and exonerated from all liability under the guarantee by payment by the defendant company [the principal debtor] to the bank of the £17,219, with interest. . . .

In that case, there were several co-guarantors of the company's account with the bank. One of the guarantors had died, having appointed the plaintiff his executor. The bank heard of his death on June 30, 1908, and at once closed the old account with an overdraft of £17,219 and opened a new account for the defendant company under the continuing guarantee. The case says, at p. 402 :

The bank informed the defendant company of this change in the account, and obtained the names of the executors, to whom they gave formal notice of their liability under the guarantee, but they did not demand payment of the overdraft either from the defendant company or the guarantors.

The position then was that there was a liability of the plaintiff's executors under a guarantee, but there had been no demand for payment by the bank, and there was, in the view of the court, a present liability. In these circumstances, the court held that the executors were entitled to compel the principal debtor to pay what was due from him.

That case was further explained by SARGANT, L.J., who had appeared as counsel in *Ascherson's* case (1), in *Re Anderson-Berry, Harris v. Griffith* (4), when he said, at pp. 307, 308 :

In such cases as that of *Ascherson v. Tredegar Dry Dock & Wharf Co., Ltd.* (1), the jurisdiction which was exercised was to a considerable extent *quia timet*, because there the position was this, that the five directors of the company had given a guarantee ; then one of them died and the bank were quite satisfied to rest on the guarantee. The deceased director had left a large estate and they were perfectly satisfied with his guarantee together with the other guarantees and they were prepared to let the guarantee go on indefinitely. They had ascertained the amount and the result would have been that the company could have gone on trading with the benefit of the guarantee on which this sum of £17,000 had already accrued and it would not have been necessary for the new directors, or directors who came in, to join in any guarantee to the same extent to which the original guarantor had joined in the guarantee. I only mention those facts, because I was counsel in that case, and I have some special acquaintance with the facts, for the purpose of pointing out that there was no probability at all at that time of the debt of the executors of the testator being due within any measurable distance of time, and yet it was held that they were entitled to come to the court and get an order on the company to pay the bank, because this cloud should not be left hanging over the estate.

It seems to me possible that, in using the word "due," SARGANT, L.J., had in mind becoming actually demanded. That passage makes it clear, however—perhaps it was left a little obscure by certain passages in *Ascherson's* case (1)—that there was in fact no demand made by the bank in *Ascherson's* case (1).

In the case which was decided between *Ascherson's* case (1) and *Re Anderson-Berry, Harris v. Griffith* (4)—*Bradford v. Gammon* (5)—EVE, J., held that the plaintiff in that case was not entitled to have a certain overdraft on the partnership account at the bank paid off. I need not deal with the case in detail, because I think it was a decision upon the construction of a clause in the partnership articles which was in question ; but EVE, J., at p. 138, referred to *Ascherson's* case (1), and distinguished it, on the ground that there was in *Ascherson's* case (1) a demand for payment by the bank. I think that that particular ground of distinction



cannot be relied upon, and no doubt, if EVE, J., had had before him at that time the information which was subsequently given by SARGANT, L.J., in *Re Anderson-Berry* (4), he could not have distinguished *Ascherson's* case (1) on that ground, though no doubt he would have arrived at the same conclusion on the construction of the particular document before him.

Ascherson's case (1) appears to me to cover completely the case before me, unless it makes any difference that, in the case before me, the money due on the mortgage is expressed to be payable on demand. In every other respect the present case seems to come within *Ascherson's* case (1), and it does not seem unreasonable, if there is a present liability for the payment of this large sum, that the plaintiff, who in fact provided the security for the sum, should be, to use the phrase used by SARGANT, L.J., in *Re Anderson-Berry* (4), relieved of the cloud which is hanging over him.

Does it make any difference that, in the present case, the mortgage deed is expressed to be repayable on demand? Mr. Radcliffe has referred me to *Norton v. Ellam* (6). The question there was as to when the Statute of Limitations began to run upon a promissory note payable on demand. The court held that the statute began to run from the date of the note, and not from the date when demand was made. PARKE, B., said, at p. 464 :

I entertain no doubt at all on this point. It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all; if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan. Where money is lent, simply, it is not denied that the statute begins to run from the time of lending. Then is there any difference where it is payable with interest? It is quite clear that a promissory note, payable on demand, is a present debt, and is payable without any demand, and the statute begins to run from the date of it. Then the stipulation for compensation in the shape of interest makes no difference, except that thereby the debt is continually increasing *de die in diem*. It is quite different from the case of a note payable at sight, because there, by the terms of the contract, it must be shown before the action is brought.

Further, ALDERSON, B., said, at p. 464 :

I am of the same opinion. It must be so unless there is something to show that a demand is to be a collateral matter.

In the subsequent case of *Re Brown's Estate*, *Brown v. Brown* (7), to which I was also referred by counsel on each side, it was held that a right of action under a covenant contained in a mortgage by a surety to pay on demand did not accrue against the surety's estate until demand was first made. After referring to the judgment in *Norton v. Ellam* (6), CHITTY, J., said, at pp. 304, 305 :

That is a general proposition and not one based upon the law merchant; and, without going through the whole of the cases to which I have referred in the course of the argument, it is plain that a distinction has been taken and maintained in law, the result of which is, that where there is a present debt and a promise to pay on demand, the demand is not considered to be a condition precedent to the beginning of the action. But it is otherwise on a promise to pay a collateral sum on request, for then the request ought to be made before action brought.

He then goes on to deal with the particular instrument before him, and arrives at the conclusion which I have stated in regard to the surety. However, I see no reason to doubt that the view of CHITTY, J., was that, so far as the principal debtor was concerned, there was no immediate liability on the making of the loan.

A I shall refer briefly to one passage in the judgment in *Bradford Old Bank v. Sutcliffe* (8). I need not deal with the facts of that case, but SCRUTTON, L.J., said, at p. 848 :

Even if the word "demand" is used in the case of a present debt, it is meaningless, and express demand is not necessary, as in the case of a promissory note payable on demand. . . But it is otherwise where the debt is not present but to accrue, as in the case of a note payable three months after demand . . . or where the debt is not a present debt, but a collateral promise. . .

B In the present case, I am invited, as I understand it, to find that, on the construction of the mortgage, there is not a present liability upon the plaintiff and the defendant to pay the bank at all. I have carefully
C considered the points of construction which have been put before me by counsel for the defendant, but I cannot accept that view. I think that these gentlemen, to whom the money was paid jointly, and both of whom, under the terms of the deed, were to be treated as principals as between them and the bank, were under an immediate liability without demand.
D Applying to the case the test of whether, if the bank had issued a writ, it would have been a complete barrier to the bank's success for the mortgagors to say, "You have made no demand before action," it seems to me that that would have been no answer at all. The result is that, in my opinion, the present case comes within the principles of *Ascherson's* case (1), and the supplemental agreement to which I have referred does not alter the legal position, because the period stipulated in the proviso to that deed has come to an end, and the plaintiff is entitled to the relief which he claims.

E Counsel for the defendant does not raise any objection to the form of
F the relief claimed in the event of my taking the view, which I have in fact taken, that the plaintiff is entitled to succeed, but he asks that the court shall direct payment by the plaintiff of one moiety of the principal money to-morrow. Mr. Radcliffe, on the other hand, says that that is too short a period to select, and that a week hence would be a fair
G time for the court to direct payment. Having carefully considered the matter, I do not think that it is unreasonable to fix, for the payment by the plaintiff of the principal money and interest, one week from to-day, and I order that :

H upon payment by the plaintiff to the bank [the time and place to be stated] of one moiety of the principal money and interest due to the bank upon the security of [the mortgage of Feb. 8, 1935] the defendant do pay to the said bank at such time and place as aforesaid the other moiety of the said principal money and interest.

It is true that in the statement of claim the plaintiff pleaded that he was ready and willing to pay his own moiety of the money due to the bank, but, the action having been fought and the matter having now for the

first time been determined, so that the parties know what their rights are, I do not think that it is unreasonable that a week should be given for the provision of the money.

Solicitors: *Kenneth Brown, Baker, Baker* (for the plaintiff); *Waterhouse & Co.* (for the defendant.)

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

SMITH v. CAMELL LAIRD & CO., LTD.

[COURT OF APPEAL (Greer, Slessor, and Clauson, L.J.J.), **March 8, 9, 13, April 12, 1938.**]

Factories and Workshops—Shipbuilding yard—Vessel under construction—Defective staging—Occupation of part of a vessel—Factory and Workshop Act, 1901 (c. 22), ss. 79, 82, 104, 140, 141, 142, 149, 151—Shipbuilding Regulations, 1931, (S.R. & O., 1931, No. 133).

The defendants were the owners of a shipbuilding yard, in which there was a ship which they had built but not completed. In the ship they had built a staging, which they permitted the C.I. Co. to use in order to do certain work for the future owners of the vessel. Owing to a defect in the staging, the plaintiff fell, and sustained serious injuries. The plaintiff contended that, by virtue of the Factory and Workshop Act, 1901, and the Shipbuilding Regulations, 1931, the defendants were under a statutory duty, as occupiers of the shipbuilding yard, to make the staging safe. The defendants maintained that the occupier at the material time was not themselves but the C.I. Co.:

HELD (SLESSER, L.J., dissenting): the C.I. Co. were in actual occupation of the staging at the time in question, and therefore the plaintiff had no cause of action against the defendants.

[EDITORIAL NOTE.] The operations of building ships and constructing or repairing works or factories necessarily involve the employment of a large number of contractors, each of whom will be engaged upon the construction or installation of some particular part of the completed whole. Each contractor requires for his own purposes certain staging, scaffolding or works of that kind for the use of the men engaged on his job. In many cases, the regulations impose upon the "occupier" of such staging, etc., a statutory duty to see that it is in such a fit and proper state that the workmen will not be in danger of injury, and it therefore becomes necessary to define the meaning to be attached to the word "occupier" as used in such regulations. In the circumstances of the present case, it is decided that the contractor responsible for the particular job for which the staging was at the time being used was the "occupier" of the staging. In a dissenting judgment, SLESSER, L.J., expresses the view that, in regulations made under the Factory and Workshop Act, 1901, ss. 79, 82, the term "occupier" must relate to the occupier of the whole factory, and not to the occupier of a part thereof. It is otherwise, he suggests, in regulations made under sect. 104.

AS TO "OCCUPIER," see HALSBURY, Hailsham Edn., Vol. 14, pp. 619-621, para. 1174; and FOR CASES, see DIGEST, Vol. 24, pp. 916-918, Nos. 117-126.]

Cases referred to:

- (1) *Tasmania (Ship Owners & Freight Owners) v. Smith, etc., City of Corinth (Owners)*, *The Tasmania* (1890), 15 App. Cas. 223; 41 Digest 708, 5446; 63 L.T. 1; *reusg.* (1889), 14 P.D. 53.
- (2) *Bartell v. Gray (W.) & Co.*, [1902] 1 K.B. 225; 24 Digest 917, 122; 71 L.J.K.B. 115; 85 L.T. 658.

- (3) *Raine v. Jobson & Co.*, [1901] A.C. 404; 24 Digest 916, 105; 70 L.J.K.B. 771; 85 L.T. 141.
- (4) *Flowers v. Chambers*, [1899] 2 Q.B. 142; 24 Digest 916, 109; 68 L.J.Q.B. 648; 80 L.T. 834.
- (5) *Weavings v. Kirk & Randall*, [1904] 1 K.B. 213; 24 Digest 920, 145; 73 L.J.K.B. 77; 89 L.T. 577.
- A (6) *Smith v. Standard Steam Fishing Co.*, *Burdon v. Gregson & Co.*, [1906] 2 K.B. 275; 24 Digest 917, 124; 75 L.J.K.B. 640; 95 L.T. 42.
- (7) *Houlder Line, Ltd. v. Griffin*, [1905] A.C. 220; 24 Digest 915, 104; 74 L.J.K.B. 466; 92 L.T. 580; *revsg.*, [1904] 1 K.B. 510.
- (8) *Mackey v. Monks (Preston)*, [1918] A.C. 59; 24 Digest 919, 135; 87 L.J.P.C. 28; 118 L.T. 65.
- B (9) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274; 36 Digest 35, 208; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867), L.R. 2 C.P. 311.
- (10) *Jackson v. Rodger & Co.* (1900), 2 F. (Ct. of Sess.) 533; 24 Digest 916, case 105 *ii*.
- (11) *Law v. Abernethy & Co.* (1900), 2 F. (Ct. of Sess.) 722; 24 Digest 916, case *e*.
- C (12) *Merrill v. Wilson, Sons & Co., Ltd.*, [1901] 1 K.B. 35; 24 Digest 917, 119; 70 L.J.K.B. 97; 83 L.T. 490.
- (13) *Clelland v. Edward Lloyd, Ltd.*, [1938] 1 K.B. 272; [1937] 2 All E.R. 605; Digest Supp.; 106 L.J.K.B. 626; 157 L.T. 236.

APPEAL from a decision of GODDARD, J., at Liverpool, dated Apr. 20,

D 1937. The facts of the case are fully set out in the judgments.

Noel B. Goldie, K.C., and *C. N. Shawcross* for the appellant.

F. A. Sellers, K.C., and *Selwyn Lloyd* for the respondents.

Goldie, K.C.: The plaintiff was an invitee, having a common interest with the defendants. They were under a duty to warn him of any danger of which they knew, or ought to have known: *Indermaur v. Dames* (9). The defendants were the occupiers, until the vessel was handed over to the owners. It was their duty to erect and maintain this staging in a state of safety. [Counsel referred to *Jackson v. Rodger & Co.* (10), *Law v. Abernethy & Co.* (11), and *Merrill v. Wilson, Sons & Co., Ltd.* (12).]

F If the Cork Insulation Co. had constructed and maintained this staging, then the duty would be on them, but here the defendants are entirely responsible. The occupiers of a dock are undertakers within the meaning of the Workmen's Compensation Act: *Raine v. Jobson & Co.* (3). [Counsel referred to *Bartell v. Gray (W.) & Co.* (2), *Burdon v. Gregson & Co.* (6), *Weavings v. Kirk & Randall* (5), *Clelland v. Edward Lloyd, Ltd.* (13).] This is an absolute statutory duty, which must be carried out by the occupier.

Shawcross, following on the same side: These regulations concern, not a ship, but a shipbuilding yard. Most of the cases cited are under sect. 104, which deals with docks. This case is under sect. 79, and is not a case of the occupier of a ship, or of a part of a ship, but of the whole yard, and the question is who is the occupier. There can be only one occupier of a factory, and a shipyard is a factory. The defendants were the occupiers. If a yard is divided, compliance with the regulations becomes impossible. In *Burdon v. Gregson & Co.* (6)—a case directly

in favour of the appellants—it is said that *Houlder Line, Ltd. v. Griffin* (7) overrules *Bartell v. Gray (W.) & Co.* (2), on which case the judge's decision is partly founded.

Sellers, K.C. : The position here is the same as if the Cork Insulation Co. had erected this staging for themselves. If the defendants are exempted from penal liability, they are also exempted from civil liability. A The real cause of this accident is the intervening negligence of the Cork Insulation Co. There can clearly be more than one owner of a factory. Ship-repairing takes place in many docks. In the case of a private dock, the ownership is a question of fact. [Counsel referred to *Mackey v. Monks (Preston)* (8).] B

Goldie, K.C., in reply : The staging was for the use of various people, including the defendants' men. By the regulations, the person using the plant is to be deemed to be the occupier of the factory. One cannot have an innumerable number of little occupiers of a ship, and here the defendants were the occupiers. C

GREER, L.J. [read by SLESSER, L.J.] : For some time prior to Nov. 6, 1935, the defendants were engaged under contract to build a vessel for the Blue Star Line. The vessel is referred to in the evidence as the *Dunedin Star*, and in all probability she was so named when D launched. After being launched, she was taken into a wet-dock, part of the defendants' shipbuilding premises on the River Mersey. The work of finishing the vessel for the purpose for which she was required was done partly by the defendants and partly by tradespeople employed directly by the Blue Star Co. Amongst the firms employed by the E Blue Star Co. was the Cork Insulation Co., who employed the plaintiff to do certain insulating work they had undertaken to do for the Blue Star Co. The work on which the plaintiff was engaged was on a stage in the lower hold of the *Dunedin Star*, and, owing to a defect in that staging, he met with a serious accident, and brought an action against the defendants. F

The only question litigated at the hearing before GODDARD, J., was whether the defendants continued in occupation of the ship and every part thereof, or whether they had handed over possession and occupation of the staging to the Cork Insulation Co. It was not suggested that, under the regulations, the defendants could not hand over any part of G their premises to an occupier, so as to make such occupier an occupier of a factory within the meaning of the regulations. It was established by the evidence that the defendants' workmen were not working on the staging, that the staging was, at the time of the accident, required solely for the purposes of the Cork Insulation Co., that the Cork Insulation H Co. were a company controlled by the Blue Star Line, the owners of the *Dunedin Star*, that the plaintiff's employers did the insulation, that the defendants had nothing whatever to do with the insulation, and that the staging had been handed over to the Cork Insulation Co. by the defendants for the use of the Cork Insulation Co.'s workmen. While it was so

occupied, one of the planks seems to have got displaced, and the plaintiff fell through the staging into the lower hold and received severe injuries. At times another firm named Hall used the staging, but at the time of the accident to the plaintiff the Cork Insulation Co. were the sole occupiers of the staging.

- A Some cases were cited by counsel for the plaintiff relating to the occupation of part of a vessel in a dry-dock or a wet-dock by tradespeople, but no contention was put forward at the trial to the effect that in law shipbuilders, as the occupiers of a shipbuilding yard, which is a factory subject to the regulations made by the Minister, were the only people who could be held liable as such occupiers, and no such contention was put before this court by Mr. Goldie in his argument before us, but the plaintiff was also represented by Mr. C. N. Shawcross, who had not been present at the hearing. It is sometimes thought to be an advantage to an appellant, or a respondent, to be represented by counsel who was not present at the hearing, because such counsel, without a blush or apology, is able to raise some question that counsel present at the hearing would be unlikely to raise except in an apologetic manner.

- It is provided by the Factory and Workshop Act, 1901, s. 149 (2), that a part of a factory or workshop may, with the approval in writing of the chief inspector, be taken, for the purposes of the Act, to be a separate factory or workshop, and it is provided by sect. 151 that the Secretary of State may, by special order, direct, with respect to any class of factories or workshops, that different branches or departments of work carried on in the same factory or workshop shall, for all or any of the purposes of the Act, be treated as if they were different factories or workshops. Whether or not there was an approval in writing of the chief inspector to the effect that the staging should be treated as a separate factory or workshop, or an order by the Secretary of State under sect. 151 which would have the same effect, is a question of fact.
- D of the chief inspector, be taken, for the purposes of the Act, to be a separate factory or workshop, and it is provided by sect. 151 that the Secretary of State may, by special order, direct, with respect to any class of factories or workshops, that different branches or departments of work carried on in the same factory or workshop shall, for all or any of the purposes of the Act, be treated as if they were different factories or workshops. Whether or not there was an approval in writing of the chief inspector to the effect that the staging should be treated as a separate factory or workshop, or an order by the Secretary of State under sect. 151 which would have the same effect, is a question of fact.
- F If the contention had been put forward at the trial, it might have given rise to a right to prove a fact that would have constituted the staging a separate factory. I am not suggesting that this would, in fact, have been proved. It is sufficient to say that it might have been proved, and, accordingly, as was stated in the *Tasmania* (1), at p. 225 :

- G A point . . . not taken at the trial and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised . . . A Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention as . . . would have been the case if the controversy had arisen at the trial ; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness-box.

- H See also other cases cited in THE ANNUAL PRACTICE, 1938, at pp. 1288, 1289. I think that we ought not to be satisfied beyond doubt that we have before us all the facts bearing upon the new contention put forward by Mr. Shawcross, and referred to in the judgment of SLESSER, L.J., which I have had the opportunity of reading. In my opinion, we ought

in our discretion to refuse to listen to this belated argument. I further think that, even if we do entertain it, it is not entitled to any weight, having regard to two decisions of the Court of Appeal. In *Bartell v. W. Gray & Co.* (2) it was held that certain employers who were doing work on a ship in a dock were in occupation of that part of the dock which was occupied by the ship, though there was no work of loading or unloading going on. In that case, it was contended for the employers that, as the Act speaks of the person having the actual use or occupation, it shows that the Act contemplates that there shall be one such person, and that it could not mean that every person who has in the course of business to go into part of a ship in a dock has, for the purposes of the Act, the actual use or possession of that portion of the ship where for the time being he is in the performance of his business. This argument is very like the argument put forward by Mr. Shawcross in the present case. The Court of Appeal refused to accept the argument. In the course of his judgment, SIR RICHARD HENN COLLINS, M.R., said, at p. 229 :

The ship was lying in a dock, and was therefore occupying part of a factory, and the person in possession of the ship would come within the description of a person having the actual use or occupation of a dock or of premises forming part thereof. The Factory and Workshop Act, 1895, s. 23, contains a provision that for the purpose of the enforcement of certain enumerated sections of the Factory and Workshop Act, 1878, the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, shall be deemed to be the occupier of a factory.

That provision is now reproduced in the Factory and Workshop Act, 1901, s. 104. SIR RICHARD HENN COLLINS, M.R., then refers to the decision in the House of Lords in *Raine v. Jobson & Co.* (3), overruling *Flowers v. Chambers* (4). The other of the two cases mentioned above is *Weavings v. Kirk & Randall* (5), where it was held that, though a warehouse is made a separate factory by the Factory and Workshop Act, 1901, and the rules thereunder, a defendant who had such use and occupation of part of the warehouse as was necessary for the work that he had contracted to do was in actual use or occupation thereof within the meaning of the Factory and Workshop Act, 1901, s. 104. The court there expressed their approval of, and followed, *Bartell v. Gray (W.) & Co.* (2), and treated it as applying to a warehouse, though a warehouse is just as much a separate factory as is a dock or a shipyard. For these reasons, so far as this court is concerned, the point made by Mr. Shawcross ought to be rejected.

It was contended in the present case that, since the regulations made under the Factory and Workshop Act, 1901, s. 79, which made shipbuilding premises a factory within the Act, the provisions relating to docks could no longer apply to a dock which was part of a shipbuilding yard. It appears from the cases already cited that, as regards a dock, whether wet or dry, the actual occupation might be in someone other than the dock owner or the shipowner. Before the new regulations relating to shipbuilding yards came into force, it could not, I think,

have been contended that, under sect. 104 of the Act, there could not have been an occupation by the Cork Insulation Co. I think that the fact that all of the yard was made a factory within the Act by sect. 79 of the Act and the regulations made thereunder has not the effect of taking a part of the yard which was in fact a dock outside the area of sect. 104, which was the section equivalent to that which, in the earlier Act, would have applied to the dock in question.

Reliance was also placed by Mr. Shawcross on *Smith v. Standard Steam Fishing Co., Ltd.*, *Burdon v. Gregson & Co.* (6), but that case seems to me to have no application to the facts established in this case, as the defendants there, who were merely working in a ship in a dock, could not, in the absence of any evidence as to the part of the ship of which they had the actual use or occupation, be brought within provisions similar to those now contained in sect. 104. Nor do I think that *Houlder Line, Ltd. v. Griffin* (7) affects the question, inasmuch as the claimant in that case was a seaman, performing his ordinary duties as a seaman, at the time when ships were not brought within the purview of the Factory Acts. It seems to me that the last-mentioned case was merely a decision that a seaman, doing his ordinary work in a vessel while in dock, was not, at the time of the decision, a workman to whom the Workmen's Compensation Act applied, though there are some *dicta* of some of their Lordships which indicate that, in their view, the owner of a ship afloat in a dock was not in any sense the occupier of the dock. Warehouses were made factories by the Act of 1901, and sect. 104 applies to them. There might quite easily be a warehouse in a shipbuilding yard. If so, I think that it would be none the less a warehouse subject to the special provisions of sect. 104, and it would be possible for any court to hold, on sufficient evidence, that each floor of the warehouse had been let to, and was occupied by, a different person, who would then be the actual occupier within sect. 104. For the reasons I have stated, this appeal should be dismissed with costs.

SLESSER, L.J. : In this case, the question has arisen as to who is the occupier within the meaning of a statutory regulation made under the Factory and Workshop Act, 1901, of a staging in a ship which, by reason of its defective maintenance in proper condition, caused damage to the appellant. The appellant bases his case upon breach of statutory regulations in the Shipbuilding Regulations, 1931, made under the Factory and Workshop Act, 1901, s. 79. Part II, cl. 11 (b), is to the effect that :

all staging shall (i) be . . . maintained in such condition as to ensure the safety of all persons employed . . .

He maintains that the respondents as occupiers, whose duty it is under the regulations, are liable in damages for the injury to him flowing from breach of statutory obligation. The respondents deny that they were at material times such occupiers, and the judge has so found, and has con-

sequently given judgment in their favour. As I have said, the real problem raised in this case is : What is the proper meaning to be given to the word "occupier" in the regulations ?

In order adequately to deal with this question, it is necessary to examine the relevant provisions of the Factory and Workshop Act, 1901, under which these regulations are made. By sect. 79 of that Act, where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour used in factories is dangerous, he may certify it to be dangerous, and thereupon may make such regulations as may seem to him reasonably practicable, and to meet the necessities of the case. By sect. 82, regulations made under the foregoing provisions may be applied to all factories in which the manufacture, etc., certified to be dangerous is used, or to any specified class of such factories. They may provide for the exemption of any specified class of factories. I omit words not relevant.

Thus sects. 79 and 82, as such, do not impose any liability. Their combined effect is to give power to the Minister, first to make regulations, after certification, and then to apply them to such factories as he may prescribe. It is under these powers that the regulations in this case were made. Under sect. 79, he has certified as a dangerous industry, and has applied his powers to, the construction and repair of ships (that is to define the process) in shipbuilding yards. That is, under sect. 82 he has defined the class of factory. This latter power he possesses because a shipbuilding yard is expressly defined as a non-textile factory by Sched. 6, Part II (25)—that is, generally, where mechanised power is used : "any premises in which ships, boats or vessels used in navigation are made, finished or repaired."

It can hardly be questioned that, regarding the premises as a whole from the standpoint of a regulation applied to occupiers under sect. 82, the respondents are the occupiers of the factory, the whole shipbuilding yard. It is said, however, that the portion where this defective staging was situated was at all relevant times in the occupation of another company, the Cork Insulation Co., to whom, as occupiers, the duty to maintain the staging above-mentioned attached.

Subject to a particular argument, which I will consider hereafter, I do not think that, save in special circumstances, which admittedly do not arise here, there can, within the contemplation of the Factory Acts, be more than one occupier of one factory. The exceptional circumstances to which I refer are the cases where a part of the factory, with the approval of the chief inspector, is to be taken to be a separate factory (sect. 149 (2)), or where the Secretary of State, by special order, has directed that different branches of work carried on in the same factory shall be treated as if they are a separate factory (sect. 151). Neither of these cases arises in the present appeal. This unity of occupation is made particularly clear by a consideration of sects. 140, 141 and 142. Sect. 140 provides for fines upon persons actually committing

offences for which the occupier is liable. Sect. 141 provides power for the occupier to exempt himself from fine on conviction of the actual offender, and sect. 142, in certain cases, makes the owner of a machine liable, instead of the occupier. So far, apart from contentions still to be considered, I think that there can be no doubt that, where sect. 82 of the Act is invoked by the Secretary of State, the extant regulations made under sect. 79 (save for certain provisoes in those regulations otherwise defining the occupier, which do not here apply) must be read as imposing duties on the occupier of the factory as such—the respondents.

I pass, therefore, to an argument which formed the principal subject for consideration at the trial—that this case is governed by sect. 104 of the 1901 Act, which does contemplate part occupation, to which so far I have not drawn attention. In that section, by subsect. (1) it is provided that, for the purpose of the enforcement of the provisions of the Act with respect to regulations for dangerous trades :

the person having the actual use or occupation of a dock, wharf, quay or warehouse or of any premises within the same or forming part thereof . . . shall be deemed to be the occupier of a factory.

The judge has found as a fact, on consideration of the evidence, that the persons so having the actual use and occupation of that part of the dock where the staging was situated were the Cork Insulation Co. I do not think it necessary here to discuss the authorities (mostly on the Workmen's Compensation Act, 1897, s. 7, which used a corresponding section of the earlier Factory Act, 1895, by way of reference), which appear to support the view that the question of occupation of a part of a dock depends upon the circumstances of the case, for, in my opinion, the definition of "occupier" in sect. 104 has no application in the case of an actual factory to which regulations made under sect. 79 have been directly applied by sect. 82. As was stated by several members of the House of Lords in *Mackey v. Monks (Preston)* (8), all that sect. 104 does is to create its subject-matter—the dock, wharf, quay, and warehouse and certain machinery or plant—a notional factory for certain defined purposes only. That section, as was pointed out in *Mackey's* case (8), does not create any liability. LORD PARKER OF WADDINGTON said, at p. 88 :

It merely creates certain notional factories for the purposes of the other sections therein specified, and, inasmuch as some of these other sections impose a liability on the occupier, defines who is to be deemed the occupier, such a definition being necessary if the liability was to be enforced.

Thus, sect. 104 extends the power of the Minister (given him under sect. 79) to make regulations for dangerous trades to cases not covered by sect. 82 where the place, apart from sect. 104, might not be a factory. In such a case, as LORD FINLAY, L.C., said in *Mackey's* case (8), at p. 70 :

the regulations are said to have been made under the provisions of sect. 79 . . . with which must be read sect. 104.

It is said that in this case, in so far as this accident occurred in a dock, the provisions of sect. 104 as to part-occupiers must be applied. I do not

agree. Had we to construe regulations made under that section, such as the dock regulations, which have in fact been made, the argument might be sound, but the shipbuilding regulations are not concerned with occupiers as so defined in different regulations made under a different power. There is no extant reference to staging in the dock regulations, but here the sole question is concerned with the meaning of the word "occupier" in the shipbuilding regulations, and I am unable to see how a definition *secundum subjectam materiam* can affect the matter. The conclusion, therefore, at which I arrive is that sect. 104 has no application to the regulations made in the present case under sect. 82. If this view be correct, sect. 82 makes it clear, to my mind, when read with the other relevant sections which I have cited, that the word "occupier" in these present regulations means the occupier of a factory as a whole, and that, though, for the purpose of regulations under sect. 104, not here applied, the Cork Insulation Co. might have to be regarded as being in part occupation of a dock, that fact does not make them occupiers for the purpose of this case, where the occupier must, of necessity, be the occupier of the whole factory.

The case which has given me the greatest trouble in accepting the argument of Mr. Shawcross for the appellant on this head is that of *Weavings v. Kirk & Randall* (5), in which, dealing with a warehouse, SIR RICHARD HENN COLLINS, M.R., says, at p. 216 :

It is admitted that this warehouse was a "factory" within the Act.

Nevertheless, he applies sect. 104 to it, and quotes the relevant words : the person having the actual use or occupation of a . . . warehouse . . . shall be deemed to be the occupier of a factory.

If, by these words, SIR RICHARD HENN COLLINS, M.R., is to be understood to be saying that the warehouse was a factory, apart altogether from sect. 104, and yet sect. 104 applied, it would be an authority supporting the view of the trial judge. In my opinion, however, when that case is considered, I think that his Lordship was saying no more than that it was admitted in that case that the warehouse was a factory of the notional kind created by sect. 104 itself. The problem was that of the application of sect. 104 to the Workmen's Compensation Act, and not that of the construction of a regulation made under sect. 82. It is not every warehouse which, apart from sect. 104, is a factory, but only certain warehouses such as those mentioned in Sched. 6, Part I, of the Act, and, possibly, places named in Part II of that schedule within the curtilage of which steam, water or other mechanical power is used in aid of the manufacturing process carried on, and incidental manual labour, together with certain premises defined under sect. 149 (1) as textile factories. No evidence was given in *Weavings'* case (5) that the warehouse was a factory, other than notional, and in that case, as in all the others cited to us, the problem raised by Mr. Shawcross, in my view, does not arise.

Had the regulations here to be construed been regulations under sect. 104, as might have been the case if we were here considering dock

regulations, or regulations applicable to warehouses which were not notional factories, the defendants might have shown that they were not occupiers within that section or such regulations. Such a conclusion, however, does not seem to me to conclude the present point. The fundamental question is: What do regulations made under sect. 82, dealing with a factory as such, mean when they speak of the "occupier"? None of the cases seems to me to decide this point. I think that it is *res integra*.

Finally, I must deal with the objection that the argument of Mr. Shawcross admittedly was not taken below. On a jealous scrutiny, such as is directed by the *Tasmania* (1), I am satisfied beyond doubt that we have before us all the facts bearing upon his new contention, and that it is not a case which turns upon evidence which was not thoroughly examined in the court below. The only possible evidence which might have been given on this head would have been that the area of the staging had been partitioned as a separate factory under sect. 149 or sect. 151. To my mind, it is inconceivable that, in the temporary building of a ship, such a procedure could, or would, have been invoked, and, if it had been, it would have been so conclusive in favour of the defendants that I cannot doubt that it would have been proved. Discovery disclosed no such orders, and no suggestion to this effect was, at any time, made before us, nor was a reply sought to raise the matter. In my view, it would be wrong in such a case, if Mr. Shawcross's argument were right, to refuse to allow justice to be done upon this plea, and I think that any consequences might have been corrected by an appropriate order as to the costs. As, however, the majority of the court is of a different opinion upon the principal issue, this matter does not arise.

CLAUSON, L.J.: In this case, the plaintiff sues the defendants for damages for personal injuries sustained by him. The defendants are owners of, and carry on their business as, ship-repairers in a shipbuilding yard. The defendants had built, but not entirely completed, a vessel for a customer. The vessel had undergone its trials, and had been brought back into a basin within the perimeter of the shipbuilding yard, where it lay at the time of the accident. In the forehold of the ship, the defendants, for purposes connected with their completion of the vessel for their customer, had erected a staging. The work for which the staging had been erected was duly completed. It then appeared that the customer, the prospective owner of the vessel, desired certain work to be done in that hold by the Cork Insulation Co. The defendants permitted the Cork Insulation Co. to enter upon the forehold and use, for the purposes of this work, the staging just mentioned. Owing to a defect in the staging, the plaintiff had a serious fall, and sustained the injuries in respect of which he claims in this action.

The judge held the action to be misconceived. In the first place, the plaintiff based his claim on breach by the defendants of a common law

duty towards him. The judge negatived any such duty, and found the claim, so far as it was based on any such duty, unsustainable. I do not desire to add anything to what appears in the judgment of the judge on this part of the case.

The claim was, however, alternatively based on the suggestion that, under the Factory and Workshop Act, 1901, and the Shipbuilding Regulations, 1931, made thereunder, the defendants as being occupiers of the *locus in quo*, were under an absolute statutory obligation to see to the safety of the staging. The judge rejected this ground of claim, holding that the obligation imposed by the Act and the regulations under it was imposed, not on the defendants, but on the Cork Insulation Co., and that the latter company, and not the defendants, were, in his view, on the facts as I have outlined them, the occupiers at the relevant time, for all material purposes, of the place where the accident occurred.

The matter stands thus. The shipbuilding yard in question is admittedly, by reason of the Factory and Workshop Act, 1901, s. 149 (1), Sched. 6, Part II, cl. 25, a factory in respect of which the Minister may, under sect. 79, certify (as he has in fact certified) that construction and repair of ships are dangerous, and may accordingly make the regulations which he has in fact made in the shape of the Shipbuilding Regulations, 1931. Under those regulations, it is the duty of the occupier of this yard to comply with regulations in respect of staging, which had admittedly not in fact been complied with. The plaintiff suggested that the defendants were the occupiers of the yard within the meaning of the Act, and claimed that accordingly, the regulations having been broken, they were liable to him for the accident resulting from the breach. The judge held, on the facts which I have summarised above, that, in truth, at the material time, the occupier of the *locus* where the staging stood and the accident took place was the Cork Insulation Co. Argument was addressed to this court to suggest that the Cork Insulation Co. was not, on the facts, the occupier of this *locus*. I need say no more than that on this point. I see no ground whatever for differing from the judge's findings as to the fact of occupation.

It appeared at one stage of the case as though that would be the end of the appeal, but a fresh point, which does not appear to have been argued below (at all events, there is no trace in the judge's judgment of its having been presented to him), was suggested in a very able and ingenious argument put forward by Mr. Shawcross for the appellant. The argument, as I understood it, ran thus. The shipbuilding regulations put the duty (which has *ex hypothesi* been neglected) on the occupier of the shipbuilding yard. The proviso to the clause in the regulations headed "Duties," referring to circumstances not present in this case, indicates, so it was said, that, in the absence of those circumstances, the occupier on whom the duty is placed is the occupier of the shipbuilding yard as a whole—in this case, the defendants who cannot avoid their obligations by handing over the occupation of a vessel, or part of a vessel,

- within the yard to others. The question, however, does not necessarily turn on the regulations. It is necessary to consider whether or not there is anything in the Act which bears upon the point in issue. I do not find it necessary to consider the interesting question as to how far, and in what circumstances, a factory can, for the purpose of the Act, be treated
- A** as in part occupied by one party and in part by another. Several of the cases cited to us in argument illustrate the difficulties as to "occupation" which arise from the fact that, in a shipbuilding yard, one may, in a wet or even in a dry dock, have lying physically within the perimeter of the yard a vessel of which it would be almost ludicrous to say that it is
- B** occupied by the general occupier of the yard, the fact being that it may be wholly or in part occupied (in all reasonable senses of the word) by a crew, or a skeleton crew. These difficulties seem to have presented themselves forcibly to the mind of the legislature, with the consequence that the Act is found to contain a sect. 104, which seems directed to
- C** solving these and similar practical difficulties. That section provides, as pointed out in the House of Lords in *Mackey v. Monks (Preston)* (8), a glossary, aimed at getting over those and like difficulties by creating "notional" factories, within such a "factory" as a shipyard, for the purpose of the application of such regulations as those in question. The
- D** section is rather awkwardly expressed, as it aims at dealing in the same sentence with certain areas (dock, wharf, quay and warehouse) and certain machinery used for defined purposes, but it appears to me to enact (omitting irrelevant words, and adapting the language to the matters with which this case is concerned) that, for the purpose of enforce-
- E** ment of regulations for dangerous trades (namely, the Shipbuilding Regulations, 1931), the person having the actual use or occupation of a dock, or of any premises within a dock or forming part of a dock, shall be deemed to be the occupier of a factory. This enactment has, in my judgment, the effect of requiring that, for the purpose of ascertaining the
- F** person who, under the term "occupier" in the Shipbuilding Regulations, 1931, is responsible for the safety of the staging in question, situate, as it is, in the forehold of the vessel, lying within a dock situate within the defendants' shipbuilding yard, the question to be asked is: Who, at the material time (i.e., when the accident occurred), was in actual use or
- G** occupation of the *locus* in question—namely, the forehold, or, at all events, so much of it as was occupied by the staging? Nothing to be found in, or inferred from, the language in which the shipbuilding regulations are framed can affect the meaning and the operation of this enactment. The judge appears to me to have addressed his mind to the relevant question
- H** —namely, who was in actual use or occupation of the *locus* in question—and I can see no ground for criticising his finding that that person was not the defendants, but the Cork Insulation Co., who, through the plaintiff and a number of other workmen, were actually using and occupying the staging, and the space in the forehold in which the staging was erected, for the purpose of carrying out certain works of the nature of construction

for the customer who was to become in due course, on completion, the owner of the vessel. This new point therefore, in my judgment, fails, and I thus find myself in agreement with the judge that the action is misconceived. In my judgment, the appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to House of Lords.

Solicitors: *Helder, Roberts, Giles & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the appellant); *Layton & Co.* (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

GERMANY v. GERMANY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), **April 29, May 3, 4, 5, 1938.**]

Divorce—Condonation—Return to marital home—Modern social conditions—Burden of proof—Matrimonial Causes Act, 1937 (c. 57), s. 4.

A wife petitioned for the dissolution of marriage on the ground of her husband's adultery with S., and he pleaded that such adultery had been condoned. The petition was served on July 19, 1937, and shortly afterwards the respondent saw the petitioner, and told her he would give up S. if she would take him back, forgive the offence and drop the proceedings. He then went to Newcastle and broke with S. On his return he telephoned his wife on July 31, and told her what he had done, and she then agreed to forgive him and drop the proceedings. On Aug. 3, while he was acting as *locum tenens* at Blackpool, he wrote to his wife saying that he was happy that she had decided to return to him, and that they would make a fresh start. On the same day he wrote to the managing clerk to the solicitors handling his wife's petition saying that his wife had decided to return to him. Very shortly afterwards, however, the petitioner changed her mind, and did so on various occasions between Aug. 3 and the hearing of the petition. During August she spent a fortnight with her husband at Blackpool, but during that time she did not live in the same house; but it was found as a fact that there had been marital intercourse between the parties at that time, and that on several occasions while there the petitioner agreed to forgive her husband:—

HELD: (i) the Matrimonial Causes Act, 1937, s. 4, places upon the petitioner the burden of proving that there has not been condonation.

(ii) upon the facts, the petitioner had condoned her husband's adultery. It is not now necessary to prove a return to the marital home in order to establish condonation.

[EDITORIAL NOTE.] It has already been decided that in the case of connivance the Matrimonial Causes Act, 1937, s. 4, has altered the incidence of the burden of proof and has removed the presumption of law against the existence of connivance. There never was any presumption of law in the case of condonation, but nevertheless the Act now places upon the petitioner the burden of showing that there has not been condonation. The question of condonation is now one of more difficulty than formerly, because condonation was usually evidenced by a taking back into the home. At the present time, owing partly to the change of habits of people in general and partly to the different class of people now seeking divorce, there is sometimes no home to which the offending party can be taken back, and condonation has to be proved by reference to other facts of married life.

AS TO CONDONATION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679, 680, paras. 1004, 1005; and FOR CASES, see DIGEST, Vol. 27, pp. 337-342, Nos. 3169-3228.]

Cases referred to:

- (1) *Poulden v. Poulden & Alexander*, [1938] P. 63; [1938] 1 All E.R. 508; Digest Supp.; 107 L.J.P. 27; 158 L.T. 231.
- A (2) *Keats v. Keats & Montezuma* (1859), 1 Sw. & Tr. 334; 27 Digest 336, 3166; 28 L.J.P. & M. 57; 32 L.T.O.S. 321.
- (3) *Crocker v. Crocker*, [1921] P. 25; 27 Digest 338, 3178; 90 L.J.P. 136; 124 L.T. 493; *affg.* (1920), 122 L.T. 749.

PETITION by the wife for dissolution of marriage on the ground of adultery. By his answer the husband pleaded condonation.

- B *E. Holroyd Pearce* for the petitioner.
R. J. A. Temple for the respondent.

- LANGTON, J.: Dr. George Reginald Germany and his wife were married in 1928. They have one child, a daughter, born in 1929. Dr. Germany, who was originally a dental surgeon, now practises as a physician, and he is a man of education and standing in his profession. His wife, on the other hand, although no doubt a lady of his own rank in life, is not a highly educated person, and therefore is to be judged by slightly different standards when one comes to attempt to appreciate her evidence. The parties lived, as I understand it, a fairly happy life until 1936, but it was clouded to a certain extent by the fact that the husband did not get on with his mother-in-law, who lived near his own house. In the summer of that year, Dr. Germany took a holiday by himself in Blackpool, and there struck up an acquaintance with a young woman who is described in the petition as Eleanor Stubling, but whose real name is Eleanor Stubley. This acquaintanceship developed into an intrigue shortly after that stay at Blackpool.

- I have had, by way of assistance, contemporaneous correspondence between the parties. This again, so often a reliable source, has proved F unreliable because the correspondence is one-sided. Far the greater number of letters comes from the doctor, very few from his wife, and very few indeed of the letters are really genuine productions from Dr. Germany. In this matter, at least, he was entirely frank. At quite an early stage, going back to Feb., 1937, he was seeking assistance from a G friend who was a solicitor, and the letters which he wrote to his wife were either submitted to or dictated by this solicitor friend.

- Dr. Germany says that, when he returned from his holidays in 1936, he made it quite clear to his wife that he had committed adultery with Miss Stubley. Here I very much doubt Dr. Germany. He may have H thought that he made it clear. I do not think that he did. I have not formed a very high impression of Mrs. Germany's intelligence. I think that she would need to have a thing made very clear to her before she would understand it. She never had cause to suspect her husband at all before, and I think that she was devoted to him, and realised with reluctance that he was drifting away from her, but not that he was

actually committing adultery. At intervals of about a fortnight after his return in 1936, throughout the autumn of 1936 and the beginning of 1937, Dr. Germany paid visits to this young woman, Miss Stubley, in Newcastle, and eventually it was thrust upon even Mrs. Germany's reluctant mind that those visits could hardly be platonic. At long last, in early February, I think, she did realise quite fully that her husband was committing adultery with this young woman. At that stage, it is very difficult to get from these people any clear idea of what the relationship between them was. I do not think myself that it is a matter of first importance, and therefore I have decided that I can leave it undetermined. It is quite clear, and agreed, that, for a considerable period before Mrs. Germany left her husband, he had gone into a back room, and Mrs. Germany was sharing what had been the conjugal bedroom with her child. Dr. Germany said that, notwithstanding this, his wife frequently came into his room at his invitation, and there had intercourse with him, which certainly sounds a most surprising state of affairs, and the only contemporary letter, unfortunately again not an uninspired one, is against that contention of the doctor's, rather than in his favour.

When his wife had left him, in Feb., 1937, he wrote a letter asking her to come back, and in this letter he proceeded to make all the excuses of which he, or his solicitor friend, could possibly think. He points out that he had got the impression that he meant very little to his wife. He goes on :

and that idea was strengthened by the very unrelenting attitude that you adopted since the holidays [the summer holidays of 1936], e.g., when you consistently denied your company to me on every occasion (and very many they were) that I invited you to accompany me to the pictures, motor runs, etc., and as you avoided me as much as possible when I was in the house.

Of course, that may be merely an inspiration on the part of the solicitor from imperfect information which Dr. Germany had communicated to him, but it is curiously unlike the story that he tells now—namely, that his wife was perfectly ready to surrender to his advances to the extent of leaving her own bedroom to come to him and remaining there the greater part of the night. Why he should call such a person very unrelenting, and describe her as avoiding his company, it is difficult to imagine. Against that, however, one has to weigh what one knows of this lady, and she was by all accounts, and in the light of the known circumstances, a person of curious mood. I cannot pretend to say that I am satisfied that what Dr. Germany says there is true. I do not think, however, that it is a matter of the first importance, save as to his credibility, because thereafter, when his wife left him in early February, Dr. Germany continued his intrigue with Miss Stubley, and on some five or six subsequent occasions went to Newcastle and had relations with Miss Stubley. Therefore, whether or not his wife was having relations with him until the time when she left, such internal evidence as there is seems to show that there is no question of condonation up to that time, because any such condonation,

of course, would be in its turn blotted out by the subsequent offences of Dr. Germany.

I now come to what is the real issue between the parties. After they had been separated for some months, Mrs. Germany decided to take divorce proceedings against her husband. Just what Dr. Germany's position was at that time I do not pretend to know. At first, in the autumn of 1936, he seems to have been quite willing that she should, according to his own account. At a later period, towards the end of 1936, when he found a diary kept by his wife chronicling his movements during the autumn, he appears to have been very angry, and to have persuaded her to destroy it. If she was going to launch a petition, the movements of her husband were obviously important, and, if he did not object to it, I cannot understand why he objected to her chronicling his movements. There again my mind is left completely in doubt. Mrs. Germany, having made up her mind to launch her petition, did so, and on July 19 the doctor was duly served with the petition. He then made up his mind that swift and decisive action was necessary. He had been in communication with his wife, and, indeed, had seen her immediately prior to the service of this petition, and was not a little surprised when he received it. At that moment, he certainly did not act with any hesitation, nor had he any doubt at all as to what he did. He went to see his wife, and put the whole position before her. The wife was naturally concerned as to the position with Miss Stubley, and wondered how far the husband might be committed. He said that he was not committed with her in any sense at all. He now realised that the matter was thoroughly serious, and said that he was prepared to go there and then to Newcastle and to break off his association unconditionally, completely and finally, if his wife on her side would agree to take him back, and forgive the offence, and drop her proceedings. I do not think that there is any dispute between the parties that that was the result of the interview of July 21. The whole dispute in this case centres upon whether or not there was condonation by Mrs. Germany.

Dr. Germany went to Newcastle and he broke finally with Miss Stubley. There is no suggestion that he did not. There is no suggestion that there was any reserve or any condition of his breaking with her, and no suggestion that he went back to Miss Stubley, or that he has seen her since. He broke with her, as he promised to do. He returned and reported that to his wife. Here, I think, in an uninspired and perfectly natural letter from him, he referred exactly to what he says he did. On July 31, he had a conversation with his wife on the telephone and told her that he had broken with Miss Stubley. Upon that, she agreed that she would implement her part of the bargain, forgive him, and drop her proceedings. As to that, there are two most important letters of Aug. 3. It is worthy of note that at that time Dr. Germany was at Blackpool. He heads his letter "Victoria Road, Thornton, Blackpool." He was at Blackpool, or in the Blackpool district. It is typical of the

kind of evidence he gave that he was always ready to dispute whether he was at Blackpool or at Thornton. Being at Thornton near Blackpool on Aug. 3, he was not in company with his friend the solicitor, and the letters which he wrote on that occasion are quite clearly uninspired letters. Indeed, one of them is a letter which no solicitor would ever write. The first letter was to his wife, written on Aug. 3, some three or four days A after his talk with his wife, and he says this :

I am so happy to know that you have decided to return to me. I have been very foolish, but in future I will do my utmost to make you happy, and all in my power to make amends. I will do my best to get a practice and make a home for you both, and we can make a fresh start together on new lines. I am sure that you will not regret having made this decision. If you and Enid will join me here I shall be ever so delighted, and we can then make our plans together for the future. I have written to Mr. Smith at Messrs. Stabler, Kesteven & Co. and if you are in any difficulty or need advice I am sure that he will be only too pleased to help you. Here's to a fresh start and a brighter future. Best love to you both. B

He followed up that letter by writing a letter to the managing clerk, Mr. Smith, who was in charge of his wife's affairs, and who was in charge C of the affairs of this petition. He writes :

Dear Mr. Smith, I have been in communication with my wife and have asked her forgiveness for that for which I am now truly sorry. She has promised to return to me and I will do my utmost to make her happy, and do all in my power to make amends. I have promised to make another home, and have most earnestly assured her that she will have no cause to regret having decided to return to me. I am thankful for the opportunity to prove that I still greatly care for them both. I do feel that your advice and kind influence has done much to help my wife to reach this happy decision, and I wish to thank you most sincerely. I know that you will still continue to help her, as this decision to return to me may result in marked unpleasantness from another source [his wife's parents] which I would like my wife to be spared as much as possible. My duties here prevent me from coming to Sheffield for another three weeks, but if my wife and Enid will join me here I shall be delighted to receive them, and we shall be able to make plans together for the future. D E

Upon that, Mr. Pearce, in a most persuasive argument which he addressed to me yesterday, says : " Yes, but that is the policy of a *fait accompli*. Here you have an astute man, who says to himself : ' Well, my wife is undecided, but, if I make up my mind to-morrow, if I write a letter to her telling her she made a decision, and follow that up by writing a letter to the solicitor acquainting him with the decision, she will probably take the line of least resistance and say : " I have done it " and come back.' " I do not think that he is anything like so astute as that, nor do I think that these letters, fairly read, have that kind of intention behind them. Forgiveness, if forgiveness it was, took place on July 31. His wife agreed that, he having done his share, she would do hers, and he wrote his letters in all innocence on Aug. 3, under the impression that the whole matter was concluded. F G

Very shortly afterwards, the lady seems to have changed her mind. Without going through the details of the case, between that period—Aug. 3 and the hearing of this case—she changed her mind on certainly two, if not three, occasions. Dr. Germany, in a letter in November, unhappily again inspired, pointed out the strength of his case and the weakness of his wife's. This letter would be just as much a thorn in H

his side as it would be of any assistance to him. He does not there recite the one matter which is the strongest point in this case—namely, a resumption of marital intercourse on some two or three occasions. That perhaps shows the disadvantage of this kind of correspondence. Over and over again she had changed her mind. Her whole course of
A conduct, in keeping in quite close relationship with her husband, goes to show that she was in a most undecided frame of mind during this time. Indeed, when during her evidence I put to her the question, “Have you been wavering throughout?” she said: “Yes.”

- The next important thing is that, in the same month of August, Mrs.
B Germany agreed to go to Blackpool, or Thornton, whichever it was, and to spend a fortnight in the society of her husband. It is quite true that she did not agree, as she might have agreed, that he, who was acting as a *locum* to a doctor there, should go and sleep at the same lodgings, but it is incontestable that she went there, took the child there, and spent
C day after day, and an occasional evening as well, in the society of her husband. I now come to a very important point, though it is not at all conclusive, and here the parties are wholly at issue. Dr. Germany—a responsible man on oath—has told me with considerable detail that on two occasions—once in the house where he was working as a *locum*
D *tenens*, and once in a motor car—in this period his wife agreed to marital intercourse between them. Mrs. Germany denies that any such intercourse took place. I have had to make up my mind which of them is telling me the truth. I think that Dr. Germany is telling the truth. There Mr. Pearce again put his argument in the most attractive way.
E He pointed out how simple it is for a person to recount an incident of this kind, with every kind of wealth of detail, because he is accurately recounting something that happened, but something that happened on another occasion, perhaps with another person. In other words, he does not invent, but tells something that happened, with all the detail as
F it happened, but transposes the date to another occasion with another person. It does not require great astuteness to do that. On this issue as to whether there was marital intercourse between these parties after Aug. 3, at the time when she came to Blackpool in 1937, I find as a fact that there was such marital intercourse. I am equally satisfied that on
G more than one occasion after she came to Blackpool she agreed to forgive her husband.

- It therefore remains, really, a question of what is the proper inference in law from these facts. Does this amount to condonation or does it not? Fortunately, in most cases, when one has ascertained the facts, the
H law is not so difficult to apply. In this case, the difficulty has been to ascertain what the facts were, and, when once those facts are ascertained, I cannot find it easy to determine whether or not those facts amount to condonation. To begin with, the burden of proof is now altered. BUCKNILL, J., in a judgment which I readily follow, in *Poulden v. Poulden & Alexander* (1), has pointed out that, under the Matrimonial Causes

Act, 1937, s. 4, the incidence of the burden of proof has completely altered. Mr. Temple put the case that there were now two burdens. I cannot think that the legislators ever meant to impose anything so complex and difficult either upon those practising the law or upon subjects of the realm. They may have altered—I think that they have altered—the incidence of the burden of proof, but they have not added A
a burden, so as to render the difficulty of establishing cases twice as great as it was before. The revolution is not quite so striking on the question of condonation as it is on the question of connivance, because, as was pointed out by BUCKNILL, J., and as is recognised by everybody, there was a presumption of law against the existence of connivance B
before this Act, and that presumption has been swept away. There was never, as I understand it, any presumption of law, however, either in favour of, or against, condonation, but the burden of proving condonation lay with the party who alleged it—that is to say, upon the respondent. As the Act has altered the matter, the burden now lies upon the petitioner C
to show that there has not been condonation. I do not think that in this case the point is one of major importance, because the difficulty I have had has been not so much in determining the facts—though there has been great difficulty there, I have been able to arrive, as I have pointed out, at a certain determination of the facts—as in deciding D
whether, as a matter of law, the proper inference of law and fact is that there has been condonation here. When one approaches this matter from that standpoint, it is difficult to get any guidance from decided cases. The old case of *Keats v. Keats & Montezuma* (2) contains an excellent charge to the jury of SIR CRESSWELL CRESSWELL, and there he E
gives great instruction as to this question of condonation. There is his famous definition of condonation, at p. 346 :

I have come to the conclusion that condonation means a “blotting-out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed.”

That has been developed in subsequent cases, notably by LORD F
STERNDALE, M.R., in *Crocker v. Crocker* (3), where he pointed out that there were two things essential—not only forgiveness, but also restoration. That, I think, is really the doctrine of the old ecclesiastical courts as well. It is just on that point that the difficulty arises. Forgiveness in this case there was, over and over again. I am quite satisfied G
about that. If forgiveness alone, in the sense that the lady agreed in the clearest terms, were enough, there would be no difficulty at all. I am quite satisfied that she forgave him in words in the telephone conversation of July 31, and thereafter on subsequent occasions when they were at Blackpool together, but the difficulty arises from the second H
part—namely, the restoration. As to that, I think that there is some useful guidance from LORD CHELMSFORD, L.C., in his opinion in the House of Lords on the appeal in *Keats v. Keats & Montezuma* (2), where he says, at p. 357 :

to say that condonation requires conjugal cohabitation or connubial intercourse,

leaves the nature of the cohabitation or intercourse to be adapted to the varying condition and circumstances of different parties.

In the earlier days, when the matter was considered, this question of restoration admitted in apparently every case a very simple test. People who came to seek the remedy of divorce were all well-to-do people. They all possessed at least one residence, if not two, and, if one wanted to know whether or not there had been any restoration of the offending party, one had a simple test : had they been taken back into the residence of the forgiving party ? Now, however, we have people of all conditions, and of all ranks of life, coming to this court, and many of them are compelled to live, for long spaces at any rate, in different houses. In the present instance, since Dr. Germany was pursuing the business of a *locum tenens* in another doctor's house, it was convenient that he should live there. His wife came to Blackpool, obviously for his society. It would have been possible for him to give up the residence in the doctor's house and to go to some lodgings with his wife, but it would have been, no doubt, added expense, and there may have been powerful reasons against it. One has to realise that in modern times one will not get the simple test of whether or not they went back under the same roof. I think that LORD CHELMSFORD, L.C., was intending that when he said that he had to look at this connubial intercourse—using it in quite a wide way—with the varying circumstances, varying conditions, of different parties.

I therefore feel that I have to ask myself what this lady really did intend and do. That she intended to forgive her husband on July 31, and did in fact forgive him, I have no doubt at all, but thereafter she undoubtedly swayed from that intention. Not only did she sway away from it, but she also swayed back to it, and when she came to Blackpool she was in a state of indecision as to which way she would go. I think that it would be far beyond any powers of mine to find exactly what she intended to do when she came to Blackpool. I think that the probability is that she did not know herself. What she did when she got there was to restore her husband to the position of a husband, save for the fact that she occasionally again wavered, and that, after she had parted from him, she wavered more strongly away from the determination which she had reached as early as July 31. One has to ask oneself, therefore, on this question of restoration, whether the acid test must always be : did she remain for a certain period of time of one mind, or did she actually go under the same roof for a particular time, and, if so, how long ? Whenever one approaches the subject from that standpoint, it seems to me to become almost impossible, or quite impossible, to apply any one acid test. One must look at all the circumstances. If a husband comes to one decision, and means to act upon it, and then afterwards says, " Well, notwithstanding that I arrived at that decision and acted upon it, I am now going to take another line," it is clear that, as far as a man is concerned, there is no going

back. One act of marital intercourse would always be construed as condonation. In the case of a woman, however, the courts have been far more lenient. This has not been a case where the woman has put herself, as it were, deliberately in the hands of the man, being undecided as to whether she would do one thing or the other, without warning him that it was merely a test. She seems to have tried out the idea of returning to him, and, after having tried it out, to have altered her mind, with the thought that perhaps after all she would like to go on with her proceedings. I am afraid that one cannot escape from the view that this lady has got a wholly wrong notion as to the meaning of condonation, and that in fact she did condone her husband's adultery. She forgave her husband upon a condition, which was fulfilled. She acted upon her own forgiveness in going to Blackpool to him, and, so far as she then could in those circumstances, restored him to the position which he had had before. The fact that she has wavered afterwards to my mind really is not the point. The real point is whether what she did originally, followed up by her conduct in going to Blackpool, amounts to condonation. In my view, as I read the law, that, coupled with the evidence, which I accept as being true, of the conduct between the parties amounts to condonation. For that reason, this petition fails.

Solicitors: *Maude & Tunnicliffe*, agents for *Stabler, Kesteven & Co.*, Sheffield (for the petitioner); *Collyer-Bristow & Co.*, agents for *Ashington & Denton*, Sheffield (for the respondent).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

McLAUGHLIN v. CALEDONIA STEVEDORING CO., LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Macmillan, and Lord Romer), **March 28, May 31, 1938.**]

Workmen's Compensation—Partial incapacity—Claim as for total incapacity—Inability to obtain work—Whether "all reasonable steps" taken to obtain employment—Whether onus of proof on employer or on workman—Workmen's Compensation Act, 1925 (c. 84), s. 9 (4)—Workmen's Compensation Act, 1931 (c. 18), s. 1 (1).

By the Workmen's Compensation Act, 1925, s. 9 (4), as amended by the Workmen's Compensation Act, 1931, s. 1 (1), it is provided that a workman's partial incapacity may be treated as total incapacity "provided that (i) no order shall be made under this subsection if it appears . . . that the workman has not taken all reasonable steps to obtain employment."

In 1926, a dock labourer suffered injuries in the course of his employment resulting in the amputation of the middle and ring fingers of his left hand. He was paid full compensation until Apr., 1927, and thereafter he was paid compensation as for partial incapacity until Apr., 1928. In Nov., 1928, he was refused further compensation, on the ground that he was able to earn, and was in fact earning as a hatchmouth man, wages equal to his pre-accident wages, and a suspensory award was made, as there was a likelihood that his hand might become worse in the future. In 1935, the workman claimed compensation as for total incapacity, on the ground that he had failed to obtain employment in consequence of

the accident. After hearing evidence, an arbitrator found that the workman's failure to obtain employment was mainly due to his injuries, and he awarded compensation as for total incapacity, holding that there was an onus on the employers to establish that the workman had not taken all reasonable steps to obtain employment, which onus the employers had failed to discharge :—

A **HELD** : although the workman was bound to prove his failure to obtain employment, he could do so by evidence short of proof of taking all reasonable steps to obtain employment, for the effect of the amendment was to remove from the workman the onus of proving that he had taken all such reasonable steps. In the circumstances, therefore, he was entitled to compensation.

Interlocutor of the Second Division of the Court of Session in Scotland reversed.

B *Hancox v. Balfour, Beattie & Co., Ltd. (1), and Donachie v. Whitehaven Colliery Co., Ltd. (2) overruled, and Hughes v. Penmaenmawr & Welsh Granite Co., Ltd. (3), and Chapman v. Marshall, Sons & Co., Ltd. (4), considered.*

[EDITORIAL NOTE. The question raised upon this appeal is quite a short one, and is whether any alteration was made in the burden of proof by the amendment made in 1931 to the Workmen's Compensation Act, 1925, s. 9 (4). The House of Lords have held that the amendment did effect such an alteration and that the onus of proving that he has taken all reasonable steps to obtain employment is not now upon the workman. This overrules a line of decisions of the Court of Appeal in England.

D **AS TO PARTIAL INCAPACITY TREATED AS TOTAL INCAPACITY**, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 232, 233, paras. 546-548; and FOR CASES, see DIGEST, Supp., Master and Servant, Nos. 3283f-3283n. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 274, 275.]

Cases referred to :

- E** (1) *Hancox v. Balfour, Beattie & Co., Ltd. (1932)*, 25 B.W.C.C. 596; Digest Supp.
 (2) *Donachie v. Whitehaven Colliery Co., Ltd. (1933)*, 150 L.T. 6; Digest Supp.; 26 B.W.C.C. 63.
 (3) *Hughes v. Penmaenmawr & Welsh Granite Co., Ltd. (1933)*, 148 L.T. 485; Digest Supp.; 26 B.W.C.C. 99.
 (4) *Chapman v. Marshall, Sons & Co., Ltd. (1936)*, 29 B.W.C.C. 14; Digest Supp.
 (5) *Docherty v. Baird (William) & Co., Ltd. (1935)*, 28 B.W.C.C. Supp. 89; Digest Supp.
F (6) *Thomson (W.) & Co. v. Anderson (or Scrimgeour) (1921)*, 91 L.J.P.C. 87; 34 Digest 318, 2602; 126 L.T. 386; 15 B.W.C.C. 77.
 (7) *Espie v. British Basket Co., Ltd. (1920)*, 13 B.W.C.C. 492; 34 Digest 288, case f.

G **APPEAL** from a judgment of the Second Division of the Court of Session in Scotland (The Lord Justice-Clerk (LORD AITCHISON), LORD MACKAY, LORD WARK), dated Nov. 26, 1936, upon an appeal at the instance of the present respondents by case stated under the provisions of the Workmen's Compensation Act, 1925. The facts are set out in the opinion of LORD THANKERTON.

H *Arthur P. Duffes, K.C., and John Wheatley* for the appellant.
D. P. Blades, K.C., and Allan G. Walker for the respondents.

LORD ATKIN : My Lords, I have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend LORD THANKERTON, and, agreeing with it as I do, I only add some words

of my own to explain why I feel bound to differ from the decision of the Court of Session, and from more than one decision of the Court of Appeal upon which the Court of Session relied. I will confine my remarks to the effect of the amendment in 1931 of the Workmen's Compensation Act, 1925, s. 9 (4), so far as it affects onus of proof. I find myself quite unable to hold that the amended clause leaves upon the workman the onus of proving that he has taken all reasonable steps to obtain employment under the first proviso. The original clause runs :

If a workman . . . proves to the satisfaction of the judge of the county court that he has taken all reasonable steps to obtain, and has failed to obtain such employment, and that his failure to obtain such employment is a consequence, wholly or mainly, of the injury, the judge shall order . . .

Here the onus is clearly on the workman to prove three facts : (i) that he has taken all reasonable steps to obtain such employment, (ii) that he has failed to obtain such employment, and (iii) that his failure is a consequence wholly or mainly of the injury. In the amending clause, the express obligation on the workman "to prove to the satisfaction of the judge" disappears.

As amended, the section provides that, if a workman has failed to obtain employment, and it appears to the county court judge either (i) that it is probable that, but for the continuing effects of his injury he would be able to obtain similar work as before, or (ii) that his failure to obtain employment is a consequence wholly or mainly of the injury, the judge shall order, etc. Provided that (i) no order shall be made under this subsection if it appears to the judge that the workman has not taken all reasonable steps to obtain employment.

Here are three judicial determinations provided for, two positive and one negative. The first two are strictly conditions of the judge being able to make an order. (i) The judge must be satisfied of the fact that the workman in the stage of recovery predicated has "failed to obtain employment." These words are in the original section, and it appears plain that it is for the workman to prove this fact. If he fails, his claim fails. (ii) The alternative conditions as to the effect of the injury. These must "appear to the judge," presumably from the evidence in the case, and, similarly, if the workman fails so to make it appear to the judge, his claim fails. For all practical purposes, the statute imposes the onus upon him. (iii) No order is to be made, however, if it appears to the judge that the workman has not taken all reasonable steps to obtain employment.

Here, unless the judicial mind has received this "appearance," the workman has become entitled to his order if he has so far satisfied the statutory requirements. There must be an actual determination by the judge that the negative fact exists. Unless the judge reaches that conclusion, there is no bar to the order. He may come to the conclusion on evidence given on behalf of the workman or on evidence given on behalf of the employer. It is the latter whose interest it is, if any, to establish

the negative fact, and, on the hypothesis, it is the employer who will fail if no evidence producing the required conclusion is forthcoming. From that point of view, the onus is, if at all, on the employer. It seems to me, however, with great respect, to be a misapprehension of the section, and to be inconsistent with the plain words, to read it as it appears the

A Lord Justice-Clerk did in the following words :

on the other hand the employer's contention is that it must appear to the arbitrator that the workman has taken all reasonable steps to obtain employment, that being a condition precedent of the workman's right to have his partial incapacity treated as total incapacity. In my opinion, the latter construction is the correct one.

B It will be observed that this involves altering the negative form of the proviso, and turning a negative proviso into a condition precedent. In my opinion, the sole object of removing this particular limit as to taking all reasonable steps to obtain employment from its collocation with failure to obtain employment in the original section, where it plainly formed an
C essential part of the workman's proof, and throwing it into a separate proviso in the amending section, couched in negative form, was to remove the onus of proof from the workman.

He remains bound to prove that he has failed to obtain employment, but this he can do by evidence short of proof of taking all reasonable
D steps. If the judge on the whole case is left in a state of doubt as to whether all reasonable steps have been taken, the proviso (i) will not come into operation.

It follows from what I have said that I cannot agree with the judgment of LORD HANWORTH, M.R., in *Hancox v. Balfour, Beattie & Co., Ltd.* (1), where he says that he cannot find any shifting of the onus as between
E the first form and the second form of the subsection. Nor can I agree with his *dictum* in *Donachie v. Whitehaven Colliery Co., Ltd.* (2), that this proviso really imposes a condition precedent to the application of the section, and that the workman has to establish that he has taken
F all reasonable steps. I say *dictum*, for the county court judge had found as a fact in that case that the workman had taken all reasonable steps, and his finding was not disturbed. In *Hughes v. Penmaenmawr & Welsh Granite Co., Ltd.* (3), LORD HANWORTH, M.R., while repeating that the proviso must be treated as a condition precedent, seemed to indicate that his former view as to there being no change of onus had altered.
G He said, at p. 106 :

The learned county court judge now can, upon the summation of the evidence brought before him, deal with the case if it "appears" to the judge : that may make a difference in the question of onus, and it may relieve the workman from a burden otherwise falling upon him under the old section.

H It follows also that the statement of SLESSER, L.J., as to onus in *Chapman v. Marshall, Sons & Co., Ltd.* (4), to which my noble and learned friend LORD THANKERTON refers, cannot be approved. I do not think that this question really arose for decision in *Docherty v. William Baird & Co., Ltd.* (5), but, so far as there are *dicta* contrary to what I have said, I must hold them to be mistaken. For the reasons I have given

I think that the line of English authorities as to the meaning of this proviso is not to be followed, and I agree with the motion as suggested by my noble and learned friend LORD THANKERTON.

LORD THANKERTON: My Lords, the appellant, in May, 1926, was injured by an accident arising out of and in the course of his employment with the respondents as a dock labourer. The injury was to his left hand, and in consequence of it the middle and ring fingers of that hand were amputated. He was paid compensation by the respondents as for total incapacity till Apr., 1927, and, under an award dated June 27, 1927, as for partial incapacity from Apr., 1927, until Apr. 14, 1928, as from which date the payments were suspended, as the result of an arbitration, in which it was found, *inter alia*, by an award dated Nov. 28, 1928, that the appellant was able, working as a hatchmouth man, to earn, and was in fact earning, the same amount as he had been able to earn before the accident as a general dock labourer, but that there was a likelihood that the condition of the injured hand might become worse in the future.

On May 17, 1935, the appellant, having been unemployed since Jan., 1932, raised the present arbitration proceedings, in which he claimed that his incapacity should be treated as total incapacity resulting from the injury under the provisions of the Workmen's Compensation Act, 1925, s. 9 (4), as amended by the Workmen's Compensation Act, 1931, s. 1 (1).

After proof had been led before him, the arbitrator, on June 2, 1936, made an award in favour of the appellant in the following terms:

Finds in fact (i) that since Jan. 7, 1932, the claimant has failed to obtain employment; (ii) that but for the incapacity in his left hand due to the injury he would, since Jan. 7, 1932, have been able to obtain work in the same grade in the same class of employment as before the accident, namely, as a general dock labourer; (iii) that his failure to obtain employment is a consequence mainly of the injury; and (iv) that it does not appear that the claimant has not taken all reasonable steps to obtain employment; therefore orders that the claimant's incapacity shall be treated as total incapacity resulting from the injury as from Jan. 7, 1932, until the further orders of the court; but subject to the condition that this order shall cease to be in force if the claimant receives unemployment benefit; and in respect of the foregoing order, and subject as aforesaid, awards the claimant compensation against the respondents as for total incapacity at the rate of £1 10s. sterling per week as from Jan. 7, 1932, till the same shall be ended, amended or redeemed by some competent process.

At the request of the respondents, the arbitrator stated a case for the Court of Session under sect. 49 of the Act of 1925, in which the questions for answer by the court are:

- (i) Was I right in holding that the onus lay on the appellants to show that the respondent had not taken all reasonable steps to obtain employment?
- (ii) Was I entitled to award compensation on the basis of total incapacity as from Jan. 7, 1932?

On Nov. 26, 1936, the Second Division of the Court of Session answered both questions in the negative, and sustained the appeal. The present appeal is taken against that decision.

In addition to the award of the arbitrator, already quoted, it is only necessary to quote para. 3 of the stated case, which states as follows :

3. It was not proved, and it was not made to appear, either (a) that the respondent had taken all reasonable steps to obtain employment, or (b) that he had not taken all reasonable steps to obtain employment. In other words, it was neither proved to my satisfaction, nor did it appear to me from the evidence, whether or not the respondent had taken all reasonable steps to obtain employment. *Quoad ultra* my findings on the evidence are sufficiently indicated in the terms of my award.

My Lords, the decision of this appeal turns on the proper construction of the revised form of sect. 9 (4) of the Act of 1925, which was substituted for the original provision by the Act of 1931. The judges of the Second Division have construed it in agreement with certain decisions of the Court of Appeal in England referred to later, whereas the arbitrator had come to an exactly contrary decision, in express disagreement with these decisions, which were not technically binding on him, and had held that the onus was transferred to the employers by the 1931 Act. In both courts, that question was treated as one of onus. With all respect, I find myself unable to agree with any of these views.

The original sect. 9 (4) of the Act of 1925, as applied to Scotland, and so far as material to the present question, provided as follows :

If a workman who has so far recovered from the injury as to be fit for employment of a certain kind proves to the satisfaction of the [sheriff] that he has taken all reasonable steps to obtain, and has failed to obtain, such employment, and that his failure to obtain such employment is a consequence wholly or mainly, of the injury, the [sheriff] shall order that his incapacity shall, for the purposes of this Act, continue to be treated as total incapacity for such period, and subject to such conditions, as may be provided by the order, without prejudice however to the right of review conferred by this Act.

There can be no doubt that, under this provision, the workman was required to satisfy the arbitrator by evidence that he had taken "all reasonable steps" to obtain the employment referred to, as a condition of obtaining the benefit of the subsection. That might properly be described as an onus placed on the workman, and there can be little doubt that in many instances it proved a heavy one.

This provision was superseded by the revised form enacted by the Act of 1931, which is as follows :

If a workman who has so far recovered from the injury as to be fit for employment of a certain kind has failed to obtain employment and it appears to the [sheriff] either—(i) that, having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident ; or (ii) that his failure to obtain employment is a consequence, wholly or mainly, of the injury, the [sheriff] shall order that the workman's incapacity shall be treated as total incapacity resulting from the injury for such period, and subject to such conditions, as may be provided by the order, without prejudice, however, to the right of review conferred by this Act : Provided that (i) no order shall be made under this subsection if it appears to the [sheriff] that the workman has not taken all reasonable steps to obtain employment. . . .

The substantial alteration of the provision as to the steps taken to obtain employment naturally suggests that it was intended to modify the original provision, but, shortly after the passing of the Act, it was held

by the Court of Appeal in *Hancox v. Balfour, Beattie & Co., Ltd.* (1) that the onus on the workman of proving that he had taken all reasonable steps to obtain employment remained unaltered. LORD HANWORTH, M.R., stated, at p. 602 :

I cannot find any shifting of the onus as between the first form and the second form of the subsection. A

This decision was followed in *Donachie v. Whitehaven Colliery Co., Ltd.* (2), in which LORD HANWORTH, M.R., expressed the view that proviso (i) of the subsection really imposed a condition precedent to the application of the subsection, in *Hughes v. Penmaenmawr & Welsh Granite Co., Ltd.* (3), in which it is true that LORD HANWORTH, M.R., expressed a slightly modified opinion, and in *Chapman v. Marshall, Sons & Co., Ltd.* (4), in which SLESSER, L.J., said, at p. 16 : B

It has been now decisively held that to satisfy that proviso the onus of proof is on the workman. C

In the present case, the judges of the Second Division all express their agreement with the above decisions. I should add that, in my opinion, the case of *Docherty v. William Baird & Co., Ltd.* (5), is of no assistance on this point, and LORD ANDERSON, whose opinion is referred to by the judges in the present case, does not appear to me to have dealt with the present point at all, for, in speaking of provisos to the subsection, he is not referring to the provisos properly so called, but to conditions (i) and (ii) as to obtaining work in the same grade and class and as to the failure being a consequence of the injury. D

My Lords, my reluctance to hold that the alterations on this point in the revised form of the subsection are otiose is satisfied by the clear view which I take that these decisions, with the greatest respect to the judges who pronounced them, proceed on an incorrect construction of the subsection. E

So far as the taking of steps to obtain employment is concerned, the workman, in order to obtain the benefit of the subsection, requires to prove, as provided in the opening sentence, that he "has failed to obtain employment." It is clear to me that the workman must accordingly prove that he has made attempts to obtain employment, which have resulted in failure, and that he must prove reasonable attempts to obtain employment. For instance, I cannot think that one isolated attempt would satisfy this provision. The attempts must be genuine, and reasonable in volume, and this must be established by the evidence before the arbitrator. There remains the first proviso. In my opinion, the words "if it appears to the sheriff" do not lay down any rule of onus at all, but mean "if it appears to the sheriff on the evidence before him" that the workman has not exhausted all reasonable steps to obtain employment. This may appear from the evidence of the workman himself, as would seem to have been the case in *Hancox's* case (1), in which my noble and learned friend LORD ROMER, then ROMER, L.J., took that F
G
H

view of the county court judge's findings, or it may be established by substantive evidence led by the employer, but that is not properly described as a question of onus.

Turning to the present case, the arbitrator, in accordance with practice, has appended his note to the stated case, but it is well-established that
 A the note can be referred to for limited purposes only. In *Thomson (W.) & Co. v. Anderson (or Scrimgeour)* (6), this House expressly approved of the opinion of LORD SCOTT DICKSON, Lord Justice-Clerk, in *Espie v. British Basket Co., Ltd.* (7), that it is not legitimate to use statements in the note for the purpose of supplementing the specific findings in
 B fact which are contained in the stated case, but that it is legitimate to use the note in order to discover the ratio in law of the arbitrator's judgment.

In his award, the arbitrator has found in fact (i) that since Jan. 7, 1932, the claimant has failed to obtain employment, and (iv) that it does
 C not appear that the claimant has not taken all reasonable steps to obtain employment. I do not find anything in the arbitrator's note to suggest that he has misdirected himself as to the first of these findings, which follows the opening words of the subsection, and it seems clear that, while the first finding covers attempts reasonable in genuineness and
 D volume, the fourth finding is dealing, quite properly, with proof of the complete exhaustion of every reasonable step. This is confirmed by the statement in para. 3 of the stated case. It follows that there was no evidence before the arbitrator which would lead him to enforce the prohibition of the first proviso to the subsection, and the claimant,
 E having otherwise satisfied the conditions of the subsection, was entitled to an award. No question of onus arises.

In this view, I am of opinion that the first question of law should be answered in the negative, but that the second question should be answered in the affirmative. I therefore propose that the appeal should be allowed,
 F that the interlocutor appealed from should be recalled, that the questions of law should be answered as above suggested, and that the respondents should pay the appellant his costs of this appeal and in the Court of Session.

G LORD MACMILLAN : My Lords, I concur.

LORD ATKIN : My Lords, I have been asked by my noble and learned friend LORD ROMER to say that he also concurs in the opinions which have been pronounced.

H *Appeal allowed with costs.*

Solicitors : *Raymonds*, agents for *William Thornton*, Glasgow, and *Thos. J. Addly*, Edinburgh (for the appellant); *Jaques & Co.*, agents for *D. M. Hutchison & Dow*, Glasgow, and *Charles T. Nightingale*, Edinburgh (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

KAWASAKI KISEN KABUSHIKI KAISHA OF KOBE v.
BANTHAM S.S. CO., LTD.

[KING'S BENCH DIVISION (Goddard, J.), May 25, 26, 1938.]

Shipping—Charterparty—Exceptions—Liberty to cancel if "war breaks out involving Japan"—Meaning of "war."

By a charterparty dated June 2, 1936, the owners of the *Nailsea Meadow* chartered their ship to the plaintiffs on a time charter. The contract contained a clause to the following effect: "Charterers and owners to have the liberty of cancelling this charterparty if war breaks out involving Japan." In reliance on this provision, on Sept. 18, 1937, the owners withdrew the ship from service and cancelled the contract, on the ground that war had broken out involving Japan. The charterers contended that the owners were not entitled to do so. They denied that the strained relations between China and Japan amounted to "war" within the meaning of the above clause of the charterparty, and claimed damages for breach of the contract. The position at the date of the cancellation was that very serious fighting was in progress between the regular armed forces of China and Japan, and had been for some time before Sept. 18, involving heavy casualties and very extensive movements of troops. On the other hand, there had been no formal declaration of war, and diplomatic relations between the two countries had not been formally broken off. An inquiry addressed to the British Foreign Office elicited the reply that the position was anomalous and indeterminate, and that the government were not prepared to say that a state of war existed:—

HELD: the interpretation of the charterparty was not controlled by the niceties or refinements of writers on international law, nor by the expression of opinion of the Foreign Office. The document ought to be interpreted in a broad way by ascertaining what commercial men intended by the use of such a term in a commercial document. On the facts, a war had broken out in which Japan was involved, and the owners were entitled to withdraw the vessel.

[EDITORIAL NOTE.] The point in this case is the short one as to when it can be said, for the purposes of a commercial document, that war has broken out. In the case of the present hostilities between China and Japan, there has been no declaration of war, nor have other governments committed themselves to any decision whether or not the hostilities amount to war. The interpretation of a commercial document is, however, held to be governed, not by the niceties of governments or diplomats, nor by the definitions of writers on international law, but by the broad view of the situation taken by commercial men.

As to "WAR," see HALSBURY, 1st Edn., Vol. 26, Shipping, p. 132, para. 216; and FOR CASES, see DIGEST, Vol. 41, pp. 440, 441, Nos. 2763, 2764.]

Cases referred to:

- (1) *Driefontein Consolidated Gold Mines v. Janson, West Rand Central Gold Mines Co. v. De Rougemont*, [1900] 2 Q.B. 339; 38 Digest 5, 4; 69 L.J.Q.B. 771; 83 L.T. 79; *affd.*, [1902] A.C. 484.
- (2) *Bolivia Republic v. Indemnity Mutual Marine Assurance Co., Ltd.*, [1909] 1 K.B. 785; 17 Digest 276, 901; 78 L.J.K.B. 596; 100 L.T. 503.
- (3) *Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Insurance Asscn.*, [1921] 1 A.C. 99; 41 Digest 990, 8753; 89 L.J.K.B. 881; 123 L.T. 721.
- (4) *Thelluson v. Cosling* (1803), 4 Esp. 266; 22 Digest 319, 3127.
- (5) *Engelke v. Musmann*, [1928] A.C. 433; Digest Supp.; 97 L.J.K.B. 789; 139 L.T. 586; *revsg.*, [1928] 1 K.B. 90.

SPECIAL CASE stated by the umpire in an arbitration between the charterers and a shipping company, the question turning on the construction of the charterparty, in which the meaning of the word "war" was in doubt.

Hon. Sir Stafford Cripps, K.C., and P. Devlin for the appellants.

A *H. U. Willink, K.C., and C. T. Miller* for the respondents.

GODDARD, J. : On June 2, 1936, a Japanese firm at Kobe chartered from an English firm of shipowners the steamship *Nailsea Meadow* on time charter, and cl. 31 of the charterparty provides :

B Charterers and owners to have the liberty of cancelling this charterparty if war breaks out involving Japan.

C On Sept. 18, 1937, the owners, contending that war had broken out involving Japan, cancelled the charterparty, and a claim was made by the charterers, which was referred to arbitration, claiming damages for breach of contract in so determining the charter. The arbitrators appointed an umpire, and he has awarded that on Sept. 18, 1937, war had broken out involving Japan, and he has stated his award in the form of a special case asking whether, on the true construction of the D charterparty, he was so entitled to award.

E If this case goes higher, as the Court of Appeal will have before it the whole of the facts found in the case, it is unnecessary for me to read them out at length, but I think that it is desirable that I should read two or three paragraphs of the case to make my judgment clear. The umpire finds :

On Sept. 18, 1937, the position in the Shanghai area was as follows :—50,000 men, supported by the guns of the Japanese fleet and a strong air arm, were engaged in battle with Chinese forces of over 150,000 men on a 30-mile front. Fighting had lasted over three weeks, in the course of which the Japanese had made good their landing from troopships and had pushed the Chinese army back to their prepared F lines of defence. Casualties had been heavy, and many thousands of Japanese and Chinese were killed or wounded. The position on Sept. 18, 1937, in North China was as follows :—One Japanese army had struck west, carried the Nankou Pass after 11 days of intensive bombing and mass attack, and captured Kalgan. This secured the right flank of the Japanese forces operating in North China. From there, the army was striking rapidly south west into the Shansi province and had advanced 100 miles and so cut road connections with Russia and Mongolia. A G second Japanese army was striking south along the Peking-Hankow railway on a 50-mile front. A third Japanese army was advancing south from Tientsin astride the Tientsin-Nanking railway, and had driven the Chinese back 40 miles. These three armies numbered over 100,000 men, fully equipped with aeroplanes, tanks and heavy artillery. The Japanese advance was effected in the teeth of opposition of Chinese armies numbering 300,000, and, while the latter offered all the resistance they could, they were ill-supplied with artillery, and were driven back. Over fifty battles were fought between Aug. 20 and Sept. 16. The Chinese losses were H estimated by the Japanese at 60,000, while the latter also lost heavily. In addition to these major objectives, air operations on an extensive scale had been conducted. The Japanese had gained command of the air and had destroyed a great number of Chinese aeroplanes in the air and in aerodromes. They had not only attacked the Chinese lines of communication but had frequently bombed Chinese cities, including Nanking, Hangchow, Soochow, Kwangteh and Shanghai, and cities as far south as Canton and Amoy, and the seaports between Hong Kong and Swatow.

The umpire also refers to the fact that a naval blockade had been main-

tained over a stretch of 1,000 miles of coast-line, and that the Japanese Foreign Minister had given notice

that foreign ships carrying munitions to China would not pass safely through the blockaded zone. On Sept. 5 the blockade was extended to all coastal waters from Chinwangtao, on the borders of Manchukuo, to Pakhoi, near the borders of French Indo-China.

It is perhaps necessary also to say that one of the curious facts which emerged in this matter is that diplomatic relations had not, at any rate at this time, been broken off between China and Japan, in the sense that the ambassadors of either country were present at the capitals of the other, and that there had been no declaration of war. The umpire, on these facts, has found, and one is not surprised that he has found, that war in which Japan was engaged had broken out. There seem to be present all those factors which were dealt with in the one case in which, so far as I know, any definition in English law has been given to the word "war," if one needs to give a definition of that. That case is *Driefontein Consolidated Gold Mines v. Janson* (1). MATHEW, J., quoting with approval from HALL ON INTERNATIONAL LAW, said, at p. 343 :

What is a state of war is well described in HALL ON INTERNATIONAL LAW, 4th Edn., p. 63 : "When differences between States reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant."

As I understand the argument for the charterers here, it is said that, in spite of the acts of force and the acts of violence which Japan had offered towards China, China had not chosen to look upon it as a breach of the peace, but, as the umpire finds that the Japanese had killed many thousands of Chinese, and that Chinese troops were operating, not in hundreds or thousands, but in hundreds of thousands, it would seem perfectly clear that China at this time was looking upon it as a breach of the peace. It is difficult indeed to understand how any ordinary person could regard this state of affairs as other than involving war.

The main point which Sir Stafford Cripps has argued, and which he has supported with a wealth of authority, is this. He says that it is my duty as a judge to exercise judicial cognisance on the question as to whether or not the two foreign countries were at war, and that, if my own knowledge does not enable me to answer that question, I must apply to the Crown, through the appropriate Minister, and obtain information from him, and that that was what was done in this case, in that one of the parties applied to the Foreign Office and asked whether on Sept. 18 war was in progress. The answer received from the Foreign Office was this :

With reference to your communication of Sept. 8 inquiring whether His Majesty's government recognise that there was an outbreak of war in which Japan is involved either on or before Aug. 25 or at the date of this reply, I am directed by Mr. Neville Chamberlain to inform you that the current situation in China is indeterminate and anomalous and His Majesty's government are not at present prepared to say that in their view a state of war exists. At the same time I am to suggest that the

question of the meaning to be attached to the term "war" as used in a charter-party may simply be one of interpreting the relevant clause, and that the attitude of His Majesty's government may not necessarily be conclusive on the question whether a state of war exists within the meaning of the term "war" as used in particular documents or statutes.

A I have only to say that, as, in my view, the question of judicial cognisance of this matter does not arise, I refrain from expressing any opinion, tempting as it may be, on the main question which Sir Stafford Cripps has argued. I think that it is much better that I should not express any view, although I have formed one, as to whether the question of the existence of a state of war between two foreign countries, has to
B be proved by evidence in the ordinary way, or whether, if the court is precluded from taking evidence, it must apply to the Secretary of State to enable the judge to take judicial cognisance of that fact. As I take that view, I do not think that it is necessary to say more about the letter than that I am far from being of opinion that this letter could
C be regarded as conclusive one way or the other. The words are :

His Majesty's government are not at present prepared to say that in their view a state of war exists.

It seems to me also to follow from that that His Majesty's government were not at the time of the letter prepared to say that a state of war
D did not exist. I think that it merely says : " At the present moment, His Majesty's government suspend judgment on the fact."

Sir Stafford called attention to passages in many cases which show how inconvenient it would be if courts took one view on such matters as this and the executive took another view, though I do not think that
E it has gone further than the question of boundaries of states, or whether or not a state is an independent sovereign state. With regard to the suggestion of how inconvenient it would be if the courts took one view and the executive took another on the subject, one is relieved to find in the second passage of this letter that His Majesty's Principal Secretary
F of State for Foreign Affairs seems to be of opinion that the word " war " in the charterparty may very likely be given a different interpretation in construing that document from that which might be given to it in some public document or statute.

It seems to me that what I have to determine is what the parties
G meant by this clause. I think that they were using the word " war " in this clause, and must be taken as intending it to be construed as war in the sense in which an ordinary commercial man would use it, or, if one may so put it, as the captain of a tramp steamer would interpret it. I have not a doubt that a captain of a tramp steamer, arriving at
H Shanghai, and finding the state of things described by the umpire, would have had no difficulty in recognising that a state of war existed. I do not think that the parties in a case of this sort are going into the niceties of international law. There is always a temptation in these cases to turn to the words of great international jurists, such as Grotius and Hall and others, who wrote some time ago, when modern conditions did

not prevail, though the question whether the state of civilisation which then prevailed was the same as the state of civilisation which prevails now with regard to the methods of warfare is not for me to enter into. At any rate, in those times things were done more formally. In those days, there were declarations which one now knows, from recent examples in this century, are often omitted. In my opinion, the parties meant in A this charterparty that, if there were a state of conflict going on—not a revolution or a civil conflict, but if there broke out a state of affairs in which there was armed conflict between competing nations, of which Japan was one—that would justify the breaking off of the contract. It is not to be expected that business men can concern themselves with the B extraordinarily nice distinctions which are drawn by great international lawyers between reprisals, armed intervention, peaceful penetration and war, definitions which have probably far less importance nowadays than they may have had years ago. No such thing as armed intervention not producing a state of war, or a pacific blockade, both of which we C know have been much discussed by the text-writers, can ever take place except between two states one of which is far too inferior and weak to resist.

I desire to say that I decide this case exactly on the same grounds, and applying the same rules of construction, as PICKFORD, J., did in D the Court of Appeal in *Bolivia Republic v. Indemnity Mutual Marine Assurance Co., Ltd.* (2). In that case, the court had to construe what the word “pirates” meant. The court said that one is not to go into niceties or refinements of writers on international law, but that one is to look at it in the broad sense, or in the coarser sense, which is one E expression used, and find whether commercial men, using that expression in a commercial document, would mean, or would visualise, a state of affairs which was there found to exist. I apply, if I may so put it, the coarser meaning to the word “war.” If I had to give a complete definition of the word “war,” I do not think that it would be necessary to go F further than Professor Hall did in the passage which I read at the beginning of my judgment.

On the facts found by the umpire, I am quite satisfied that he was well justified in coming to the conclusion that, for the purpose of constructing this document between the parties, a war had broken out in which G Japan was involved. Therefore, I uphold the award of the umpire, and the respondents will have the costs of this argument.

Solicitors: *Thomas Cooper & Co.* (for the appellants); *Ince, Roscoe, Wilson & Glover*, agents for *Allen Pratt & Geldard*, Cardiff (for the H respondents).

[Reported by C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MAY v. SIR ROBERT McALPINE & SONS (LONDON), LTD.

[KING'S BENCH DIVISION (Branson, J.), May 18, 1938.]

Negligence—Fatal accident—Recovery of damages under Fatal Accidents Act—Further action under Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41)—Whether further award made and the amount thereof.

A A widow brought an action under the Fatal Accidents Act on behalf of herself and her children in which she accepted a sum of £2,050 paid into court. She then brought an action under the Law Reform (Miscellaneous Provisions) Act, 1934, in which negligence was admitted, and the only question was the assessment of damages. The deceased left no will, and the damages awarded in this action would, therefore, subject to the rights of any creditors, be for the benefit of the widow and children, who had already benefited by the result of the previous action. The opinions given in the House of Lords in *Rose v. Ford* (2) have laid it down that any overlapping of damages must be avoided.

B His Lordship directed the jury that they should first decide how much they would give for loss of expectation of life if there were no question of the action under the Fatal Accidents Act. Having decided that, they would consider how much it would be fair to take off that figure in view of the receipt of £2,050 in the former action.

C [EDITORIAL NOTE. This is the first case in which, after a successful action under the Fatal Accidents Act, a further action has been brought under the Law Reform (Miscellaneous Provisions) Act, 1934. So far as the assessment of damages is concerned, the same position arose in *Feay v. Barnwell* (1), and the same result is reached, but in that case the two claims were made in the same action.

D AS TO DAMAGES FOR PERSONAL INJURIES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 724, 725, para. 1016; and FOR CASES, see DIGEST, Vol. 36, pp. 125, 126, Nos. 831-838.]

Cases referred to:

E (1) *Feay v. Barnwell*, [1938] 1 All E.R. 31; Digest Supp.

(2) *Rose v. Ford*, [1937] A.C. 826; [1937] 3 All E.R. 359; Digest Supp.; 106 L.J.K.B. 576; 157 L.T. 174.

ACTION for damages for personal injuries.

F The plaintiff was killed by the fall upon him of a loose length of steel tubing during the course of building operations which were being carried out by the defendants. The accident was admitted to be due to the negligence of the defendants' servant. The widow had previously brought an action under the Fatal Accidents Act, in which the defendants had paid into court £2,050 for the benefit of the widow and the children, and this sum had been accepted in full settlement of the claim. The present action was brought under the Law Reform (Miscellaneous Provisions) Act, 1934. As the deceased left no will, any sum recovered in this action, although available for the general estate only of the deceased, would be for the benefit of the widow and children.

H *Hon. Sir Stafford Cripps, K.C.*, and *E. Terrell* for the plaintiff.

Philip Vos, K.C., and *Norman V. Craig* for the defendants.

Vos, K.C.: When the £2,050 was paid into court, the decision of the House of Lords in *Rose v. Ford* (2) had not been given, and it was not then known that the plaintiff also had a claim for damages for loss of expectation of life. The damages should not be duplicated, and, if

further damages are awarded now, the sum of £2,050 previously paid under the Fatal Accidents Act should be cut down.

Cripps, K.C. : There is no overlapping here, and therefore the damages previously paid should not be cut down.

The following is an extract from the summing up of His Lordship to the jury :

BRANSON, J. : You have heard that there is another question involved. This plaintiff, the widow, has already brought an action against the same people in respect of the same accident, and has in that action recovered under Lord Campbell's Act a sum of £2,050 in respect of the loss which she has suffered, because, had the husband, who was the breadwinner for her and the children, continued to live, that was the amount which he would probably have given to them for their benefit during the course of their dependency upon him. It was not found by a jury, but it was found by one side paying it into court and the other side taking it out as sufficient. If that had not yet happened, but was being tried before you now, along with this other question of the amount to be paid in respect of the husband's loss of his expectation of life, I should have to tell you that you would have to bear two figures in mind when you were assessing what would have to be given, because that is what has been decided already in *Feay v. Barnwell* (1), and I think that it is obviously the correct way of approaching the matter. It is said in this case that, because the action under Lord Campbell's Act came first and this comes second, you must pay no attention to that sum of £2,050. I must take the responsibility of directing you whether to take any notice of it or not, and I think that, in view of the fact that one of the Law Lords gave directions, in deciding *Rose v. Ford* (2), of which you have heard so much—which was a case in which the Lords were, in a sense, giving directions to those who had to deal with these matters of what to put to the jury—it would not be respectful of me to the highest tribunal in the land were I not to direct you in the words which LORD WRIGHT used as being the proper direction to give to the jury upon this question as to the effect of recovery of money under Lord Campbell's Act upon the amount which should be assessed under the Law Reform Act, which is the matter before you. You have heard it read twice, I think, but I will ask you to let me read it to you again, because I want to put it to you as my direction, following what I think is the way in which the highest tribunal in the land has decreed that this matter should be put to a jury. LORD WRIGHT says, at pp. 852, 853.

I think that in practice no duplication of damage need occur. I think the jury would be properly directed to take into account either that they were at the same time giving damages under Lord Campbell's Act as they did here [in *Rose v. Ford* (2)] or [and this is the matter as it comes before you now] that such damages had been or might be given. The object of damages in these cases is compensation for the benefit of the estate. It is true that the claims under Lord Campbell's Act are independent and are for the separate pecuniary loss sustained by the dependants, whereas the damages under the Act of 1934 go into the general estate in which quite different persons, creditors, legatees, or other beneficiaries, may be interested.

We have heard nothing of any creditors or legatees, or of anybody but this family of mother and children, who really benefit under the verdict you will give to-day in this case. There may be some small expense of administration. We have not had that quantified in any way. Then he goes on, at p. 853 :

A But one of the fruits of continued life is generally provision for dependants. If that provision is made good by awards under the Fatal Accidents Acts, the loss consequent on the shortening of life may be deemed to be *pro tanto* reduced. The award of damages in the present case shows how duplication may be avoided. This matter can fairly be left to the good sense of the jury or judge.

To your good sense, members of the jury, I leave it.

B If I might suggest the way in which you should approach the matter, it would be to get an idea at first of how much, if there were no question of Lord Campbell's Act, we should give in this case for the loss of expectation of life which befell this poor man. Then, having come to a conclusion about that, you would say : How much, then, would

C it be fair to take off that figure in view of the fact that we are told that the dependants' rights to support under Lord Campbell's Act have been assessed, and have been satisfied in the amount of £2,050 ?

Verdict for £600 and judgment with costs for the plaintiff for £600, with interest at the rate of 5 per cent. as from the date of the writ.

D Solicitors : *Harold Kenwright & Cox* (for the plaintiff) ; *William Charles Crocker* (for the defendants).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

E

SIGLEY v. HALE.

[COURT OF APPEAL (Greer, Slessor and MacKinnon, L.JJ.), **May 31, 1938.**]

F *Practice—Joint tortfeasors—Jurisdiction of master to allow one defendant to offer to pay a proportion of any liability—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6—R.S.C., Ord. 30, r. 2.*

One defendant in an action for personal injuries applied to the master to make an order that either defendant might send a letter to the other submitting to pay a proportion of any sum that might be awarded to the plaintiff, and that such letter should be treated as a payment into court with a denial of liability :—

G

HELD : there was no jurisdiction under the Rules of the Supreme Court to make any such order.

[EDITORIAL NOTE. This appeal was an attempt to take advantage of the well-known procedure of payment into court in the case of a claim for contribution by joint tortfeasors. As MACKINNON, L.J., says in his judgment herein, it would be eminently sensible that the judge should have power to make such an order, but unfortunately it is found that the rules make no provision for this.

H

AS TO PAYMENT IN, see HALSBURY, Hailsham Edn., Vol. 26, pp. 62-64, paras. 100-107 ; and FOR CASES, see DIGEST, Practice, pp. 479-482, Nos. 1591-1615.]

Case referred to :

(1) *Davies v. Scott Lewis*, [1918] W.N. 166 ; Digest, Practice, 482, 1615.

APPEAL from a decision of ASQUITH, J., dated May 2, 1938, refusing to make the order set out in the judgment of GREER, L.J.

G. J. Paull for the appellant.

The respondent was not represented.

GREER, L.J. : In this case, Mr. Paull, who appears for the appellant, in the absence of anyone appearing for the respondent, has quite rightly, as is the traditional conduct of counsel in such cases, called our attention to his difficulties as well as to the arguments in support of his contention. The case has now to be determined under the new rules which have been passed since the present editions of THE ANNUAL PRACTICE and THE YEARLY PRACTICE were published, and certain slight changes have been made by the rules which are now in force.

The appellant desired to have an order from the judge in chambers to this effect :

Either defendant to be at liberty to serve and file claims for a contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, to be tried immediately after the hearing of the action. If any further grounds of negligence are relied upon by either defendant other than those contained in the pleadings in the action particulars thereof are to be given to the other defendant within ten days from to-day. Leave to either defendant within fourteen days after delivery of such particulars, or within fourteen days before date of trial, to write to the other defendant making any offer on a percentage basis he may think fit, such offer to be treated as a notice of payment into court in proceedings between the defendants.

For some considerable time, under the old rules that obtained in reference to proceedings under the new procedure, which are dealt with in R.S.C., Ord. 30, r. 2, orders of that kind have frequently been made. Of course, it may be a convenience that such orders should be made, but, unless there is power in the rules to make them, no such orders can be made. I have searched in vain for any rule, and we have not been directed to any rule of practice, that gives power to the court to make any such order. The rule which is now binding on the court is r. 6 of the amended rules, which provides :

The following amendments shall be made in Ord. 30 : (a) Rules 2 and 2A shall be revoked and the following rule shall be substituted therefor : "2 (1) Upon the hearing of the summons the powers of the court or a judge shall include those specified in this rule."

It was suggested by Mr. Paull that that means the summary of the order which follows, and that they are not the only orders that can be made, that they are orders which it is stated are to be included, and that that necessarily involves that there is power to make orders other than those which are mentioned in the subsequent part of the rule. That means, in my judgment, only a saving of any other rules of court under which it might be suggested that this order could be made. I know of no such rules, and the only support that can be found for the argument is *Davies v. Scott Lewis* (1). In that case, there was a rule to the effect that a payment of a sum of money with a denial of liability can only be made with the defence. The Court of Appeal, for reasons which I find

it difficult to appreciate, came to the conclusion that the court might make an order in a case which was half-way between an admission of liability and a denial of liability—namely, a case where there was an admission of negligence, but a denial of any damages arising from that negligence. That seems to me necessarily to mean a denial of liability, because, unless there is damage in addition to negligence, no liability is established. Damage is just as essential as is the allegation of negligence, but the court came to the conclusion in that particular case that they could allow the denial of liability, so far as it was concerned with damages, to be raised otherwise than by the defence. Of course, if a similar case ever comes before this court on similar facts, we will feel ourselves bound, owing to the traditional way in which these matters are treated, to follow that decision, but it has, in my judgment, no bearing upon the question which we have to decide here. I am satisfied that the judge was right in refusing to make the order, and that this appeal should be dismissed. As there has been no appearance on the other side, the appeal will be dismissed without costs.

SLESSER, L.J. : I am of the same opinion. In my view, the effect of the amendment of R.S.C., Ord. 30, which has been produced by the recent new rule is to curtail the jurisdiction of the judge in this sense. The old R.S.C., Ord. 30, r. 2, provided :

Upon the hearing of the summons the court or a judge shall, so far as practicable, make such order as may be just with respect to all the proceedings to be taken in the action . . .

As has been pointed out by GREER, L.J., those words were construed very broadly in *Davies v. Scott Lewis* (1), even to the extent of giving the court power to say that a party could pay money into court denying liability, when previously the rule, on the face of it, could only be read in a different manner. However that may be, the change that has now been made is that those words—"make such order as may be just with respect to all the proceedings to be taken in the action"—have disappeared, and the rule reads :

Upon the hearing of the summons the powers of a court or a judge shall include those specified in this rule.

Then follow specific powers stated in the rule, and beyond that I can read the rule only as meaning that it does not purport to affect such other powers as the court or judge may otherwise possess. It is, therefore, as I say, a limitation of the generality of the language in the old R.S.C., Ord. 30, r. 2. We are told that under the old R.S.C., Ord. 30, r. 2, judges have been in the habit, in certain cases, of making such orders as appear in this case. That is to say, under the recent Act dealing with contribution among tortfeasors, they have allowed one defendant to write to the other making an offer on a percentage basis that they will agree to pay such amount of damages as may be found owing to the plaintiff from the tortfeasors in advance before that sum has actually

been ascertained. I express no opinion as to whether or not that kind of order was justified under the old R.S.C., Ord. 30, r. 2, as being an order which :

may be just with respect to all the proceedings to be taken in the action.

I am quite clear that no such power exists under the specific language of the new R.S.C., Ord. 30, where the power is set out. Nor—as Mr. Paull is, I think, willing to concede—is there any other power of the court or judge so to order in any other rule. It follows, therefore, that, either because such a power never did exist, or because it certainly ceased to exist after the passing of the new order, the appeal must fail, and the judge was right in refusing to allow this order to be made.

MACKINNON, L.J. : I agree, although with regret. The order that the judge and master were asked to make appears to me to be eminently sensible. It is perhaps for that reason that I search in vain through the pages of THE ANNUAL PRACTICE, and its supplement to discover anything which gives the judge power to do so sensible a thing. With the powers conferred upon the judge, I think that he was right in his decision, and this appeal fails.

Appeal dismissed.

Solicitors : *White & Co.* (for the appellant).

[*Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.*]

Re BARON BURTON'S CHARITY, QUEEN ANNE'S BOUNTY *v.* ATTORNEY-GENERAL.

[CHANCERY DIVISION (Farwell, J.), May 31, 1938.]

Charity—Gift to provide stipend for a third curate—Insufficiency of gift due to increase in stipend—Variation of trust—Augmentation of stipends of two curates.

A donor in 1898 transferred to the governors of Queen Anne's Bounty certain stock upon trust to pay the income thereof to the incumbent of a parish for securing the services of three or more curates for that parish, and the governors were to require, upon making each half-yearly payment of income, a certificate that three or more curates had been assisting in the parish at stipends amounting in the aggregate to not less than £400 per annum. Up to 1934, three curates had been assisting in the parish. It was now found that the income from the stock together with other money available was, on account of the larger stipends now payable to curates, sufficient only to provide the necessary stipends for two curates. The court was asked for directions as to the execution of the trusts of the charity, and, if necessary, for a scheme making the income available for the augmentation of the stipends of two curates :—

HELD : a scheme should be ordered whereby the income of the fund should be made available for the augmentation of the stipends of two curates, instead of three.

[EDITORIAL NOTE. The necessary increase in the stipends of curates rendered the income of the gift here in question quite insufficient to fulfil its stated object,

and the court has ordered a scheme to be prepared so that the income, which, according to the intention of the donor, should have been applied to the provision of a third curate shall be applied to the augmentation of the stipends of two curates.

AS TO FAILURE THROUGH CHANGE OF CIRCUMSTANCES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 225, 226, para. 331; and FOR CASES, see DIGEST, Vol. 8, pp. 346-348, Nos. 1396-1418.]

ADJOURNED SUMMONS asking the directions of the court as to the execution of the trusts of a charity instituted by Baron Burton for the provision of three or more curates in the ecclesiastical parish of St. Paul, Burton-upon-Trent, and for a scheme in so far as necessary.

F. H. L. Errington for the plaintiffs.

J. W. Brunyate for the Attorney-General.

FARWELL, J.: This is an application by the governors of Queen Anne's Bounty as to directions regarding the execution of a trust constituted under an instrument dated Mar. 16, 1898. By the instrument, the governors signified their intention to accept from the Right Hon. Michael Arthur Baron Burton of Rangemore in the county of Stafford :

£1,650 South Eastern Ry. Co. 6 per cent. preferred ordinary stock and to stand possessed thereof on trust to pay the annual income arising therefrom or the investments representing the same to the vicar or incumbent for the time being of St. Paul's Vicarage, Burton-on-Trent, in the county of Stafford and diocese of Lichfield, to be applied by him for or towards securing the services of three or more curates for the said parish of St. Paul, Burton-on-Trent, aforesaid and not towards his own use and benefit. Provided always that such vicar or incumbent shall upon each occasion before receiving the dividends or other annual income from the said stock or the investments representing the same produce to our treasurer a certificate under the hand of the said vicar or incumbent countersigned by the churchwardens that for the half-year for which such dividend or income shall be payable he has employed three or more curates to assist him in discharging the duties of the said parish at stipends amounting in the aggregate to not less than the sum of £400 per annum.

There follows a power to apply the money for temporary clerical services or to capitalise the income upon the same trusts as the fund, subject to and without prejudice to the trust. Then, the trust is accepted as follows :

We the said governors do hereby signify our consent to stand possessed of the said stock and the investments representing the same upon trust to appropriate the same to the benefice of St. Paul, Burton-on-Trent, aforesaid and to apply and dispose thereof for the benefit and augmentation of the said benefice in such manner and with such powers and authorities as are provided mentioned or referred to in and by the Church Building Act, 1839, and the Queen Anne's Bounty Act, 1840.

I do not think that it is necessary for me to make any special reference to those Acts. Up to 1934, there were three curates. Owing to the bounty of the late Lord Burton, the first two curates were paid out of moneys he had provided, and his intention in executing this document was to provide for the services of a third curate to assist in the parish of St. Paul, Burton-on-Trent. The parish is one of some size, having a population of over 7,000 people. There are two churches and various schools, and other work is carried on. No doubt it is a parish in which three curates can be very fully occupied, and, if it were possible, three

ought to be appointed. Under the conditions that existed in 1898, when this fund was instituted, a stipend of £170, or of £150, was not an unusually small stipend. It was possible in those days to procure the services of a curate for that sum. However, the evidence shows that at the present time it is quite impracticable to procure a curate for the work required to be done at anything like that sum. The amount now A available for providing two curates is insufficient to pay their salaries in full, and, if this fund cannot be employed in any way other than providing for a third curate—and it is not possible to use it in that way, because a third curate cannot be found to accept the position at the stipend to be provided by the fund—the result will be that it will not be possible to B support the two curates who are now occupied in the work of the parish. The evidence shows perfectly clearly that, unless I am prepared to sanction some such arrangement as that the income of the fund should be applied to augment what is available to pay the two curates, the whole purpose of this trust must fail, because the purpose of the trust was to provide C adequate clerical aid in the work of the parish, and in carrying on the charitable work in connection therewith. Although, at the time the fund was instituted, it seemed, and no doubt was, a most useful method of giving clerical aid by providing for the stipend of a third curate, in the light of modern events, that purpose cannot be carried out. It seems D to me that this is exactly the case where the court can, and ought, to see that the main purpose of the charity—the promotion of religion by the provision of adequate clerical aid—ought still to be given effect to. The actual method by which it was to be done—namely, by the providing for a third curate—is no longer possible. It seems to me right E that this money, instead of being accumulated and used to no purpose, should be applied so that it will be possible in the future for this parish to have the services of two curates, and in that way effect will be given to the purpose of the original trust. I have no doubt whatever that I ought to authorise that, and the most satisfactory way to do it would F be by way of a scheme to authorise the payment of the yearly sum to the payment of two curates, instead of three.

Solicitors : *Solicitor to Queen Anne's Bounty* (for the plaintiffs) ;
Treasury Solicitor (for the Attorney-General).

[Reported by W. K. SCRIVENER, ESQ., *Barrister-at-Law.*] G

NEWSOME v. DARTON URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Greer, Slessor and MacKinnon, L.J.J.), May 27, 30, 1938.]

Highways—Excavation by sanitary authority—Non-feasance—Excavation for drainage purposes—Accident due to subsequent subsidence three years after work completed.

A

In July, 1933, the defendants, who were the local sanitary authority as well as the local highway authority, had made a trench in a highway for the purpose of executing certain drainage work. The excavation was filled in, and in 1935, when the surface was tar-sprayed and chippings were rolled in with a steam-roller, the surface was said to be level. In 1936, a depression had formed at the place where the work had been done, and the jury found that the highway at this place was dangerous to those using it with due care. The jury also found that, although the original work was executed without negligence, the dangerous condition was due to the work of the defendants, and that the defendants were negligent in not discovering and taking steps to remedy the danger. The plaintiff, having been thrown from his bicycle and injured by reason of the subsidence of the road at the place in question, brought an action against the defendants as the authority responsible for the repair of the road:—

B

C

HELD: there was a duty on the defendants as the sanitary authority to make good the inevitable subsidence resulting from their work in 1933. They were negligent in not discovering, and in not taking steps to remedy, the danger, and this negligence amounted to misfeasance.

D

Decision of ATKINSON, J. ([1938] 1 All E.R. 79) affirmed.

[EDITORIAL NOTE.] In this case the principle that a highway authority is not liable for non-feasance but is liable for misfeasance is again discussed. It must be noted that there was a finding by the jury that the subsidence was due to the excavations made by the sanitary authority, and, once this is established, the case seems to be governed by the decision in *Shoreditch Corpn. v. Bull* (4). If that authority interferes with the structure of the road, then the operation of restoring it to the condition in which it was before such interference includes the remedying of a subsequent subsidence. This is held to be so in the present case although it was not established that there was any subsidence until after the expiration of two years from the date of the excavation, and the accident complained of occurred as long as three years after the excavation.

E

F

AS TO NON-FEASANCE, see HALSBURY, Hailsham Edn., Vol. 16, pp. 332-337, para. 455; and FOR CASES, see DIGEST, Vol. 26, pp. 398-409, Nos. 1239-1298.]

Cases referred to:

- (1) *Skilton v. Epsom & Ewell Urban District Council*, [1937] 1 K.B. 112; [1936] 2 All E.R. 50; Digest Supp.; 106 L.J.K.B. 41; 154 L.T. 700.
- (2) *Russell v. Men of Devon* (1788), 2 Term Rep. 667; 26 Digest 587, 2780.
- (3) *Shoreditch Corpn. v. Bull* (1904), 90 L.T. 210; 26 Digest 412, 1320; *affg.* (1902), 67 J.P. 37.
- (4) *Bathurst Borough v. Macpherson* (1879), 4 App. Cas. 256; 26 Digest 405, 1274; 48 L.J.P.C. 61; 41 L.T. 778.

G

H

APPEAL from a decision of ATKINSON, J., dated Dec. 20, 1937, and reported in [1938] 1 All E.R. 79.

J. Willoughby Jardine, K.C., and *G. H. B. Streatfeild* for the appellants.
Herbert Malone and *H. Glyn-Jones* for the respondent.

Jardine, K.C.: There was no misfeasance here, as the subsidence had been properly filled in in 1933. This action is against the highway

authority, but it was the sanitary authority that did the work. In *Shoreditch Corpn. v. Bull* (3), the road had been repaired only a few days, and the ground had never become hard. Here the ground was thoroughly hard. [Counsel also referred to *Bathurst Borough v. Macpherson* (4) and *Skilton v. Epsom & Ewell Urban District Council* (1).]

Malone was not called on.

GREER, L.J. : AS SLESSER, L.J., said in *Skilton v. Epsom & Ewell Urban District Council* (1), questions of this kind are questions of very considerable difficulty. It is fortunate that in this case there is no complaint, and no complaint can be made, with regard to the summing up of the judge. The piece of good fortune on the plaintiff's part in this case is that the right question was asked of the jury, and the jury answered it favourably to the plaintiff. It seems to me that the law is quite clear that, notwithstanding the various statutory changes which have been made in the position of those who are responsible for the highways, the authority of the old case of *Russell v. Men of Devon* (2) now extends to every highway authority, and a highway authority cannot be sued in respect of failure to keep its roads in order. Whether that disability of suing a highway authority ought to have been followed in the cases which apply that old decision to the surveyor of highways, and to corporations that took over his duties, is a matter that we are not entitled now to consider. It has been decided by authorities that are binding upon us that, unless the obligation which has been broken is an obligation upon a public body in respect of the powers that they have otherwise than as a road authority, then they cannot be liable for mere non-feasance. As regards a sanitary authority, once they exercise their rights as a sanitary authority to make a hole in the road for sanitary purposes, then the obligation is put upon them, by the fact that the hole is made for sanitary purposes, in the first instance, to fill it up properly, and then, subsequently, to maintain it by the exercise of reasonable care and reasonable supervision. In my judgment, unless there has come a time when the tribunal of fact is able to state that there is no longer any danger in that part of the road which has been dealt with by the sanitary authority, the obligation of the sanitary authority to exercise reasonable care is to see that the roadway in the place where they originally made their hole is maintained in a safe condition. I think that that is the net result of the cases that have been decided, especially in *Skilton v. Epsom & Ewell Urban District Council* (1), where ROMER, L.J., in giving judgment, said, at p. 60 :

Here the defendants, as I understand it, made a series of holes in the highway not for the purpose of maintaining the highway at all, but for the purpose of inserting in those holes a certain number of studs. They did not take steps to see that those studs remained at all times in the position in which they had been placed. One of the studs came out, and it appears to me that the defendants are just as liable in those circumstances as though they had dug a hole in the highway and had omitted to fill it up. The act they did was not an act done in pursuance of their duties to maintain the highway, but in pursuance of powers conferred

upon them by the Road Traffic Act, 1930. For those reasons, in addition to those which have been given by SLESSER, L.J., I agree that this appeal fails.

A It seems to me that the inevitable result of that is that, where the making of a hole by a sanitary authority results in a state of affairs which necessitates examination of the roadway from time to time, to see that that which has been done by the sanitary authority has not resulted in an unsafe condition of the roadway, they, as the sanitary authority, are still responsible for that which is found to be the consequence of the failure to exercise reasonable care. The questions left to the jury were :

B Was the trench dangerous to those using the highway with due care ?—Yes.
—Yes, it was.
Was the original work done negligently ?—No.
Were the defendants negligent in not discovering and taking steps to remedy the danger ?—Yes.

C After the summing up of the judge, especially the passages which are referred to by SLESSER, L.J., I cannot read that answer as meaning other than that the hole in question in the roadway which led to this unfortunate accident was due to the negligence of the sanitary authority in failing to carry out their duty of inspecting the road sufficiently to see that at no time did it become a danger to those lawfully using the road. For those reasons, I think that this appeal must be dismissed.

D I have referred to one authority, and the only other authority to which I think it right to refer is a case in the House of Lords, *Shoreditch Corpn. v. Bull* (3). I read that case as meaning that, where there is something that may be regarded as non-feasance by a local authority who may happen also to be a road authority, then the action will lie for that which they have done, not as a road authority, although they happen to be a road authority, but in some other capacity.

E In those circumstances, I think that the only conclusion to which we can possibly come is that this appeal must be dismissed with costs.

F SLESSER, L.J. : I am of the same opinion. The local authority, the defendants in this case, being the urban district council, were both the sanitary authority and the highway authority for their district. There is no doubt in my mind, on the evidence, that the trench which was here dug, the original work being for the purpose of connecting certain water-closets, was work of a sanitary kind executed by the local authority
G in their capacity of a sanitary authority, and not as a highway authority. After what I think was an adequate direction from the judge, the jury found that the original work—that is, this work of the sanitary authority—was not done negligently. However, they were further asked :

H Were the defendants negligent in not discovering and taking steps to remedy the danger ?

This they answered in the affirmative. It is quite clear to my mind, both because of the direction which the judge gave and because of the context of the questions and the second answer, that the defendants were negligent in not discovering and in not taking steps to remedy the danger, and that that refers to them in their capacity of sanitary autho-

rity, and not as highway authority. In the summing up, the judge is at pains to point out the distinction. He said :

It is a totally different thing from saying that you must go and be watching and looking over all your roads continually [that is the obligation of the highway authority]. All that is said on behalf of the plaintiff is that, when you know there has been a trench made which may subside [that is a reference to their function as sanitary authority], you ought periodically to inspect that place.

By inference, also, although he does not mention it, there is a duty to make good that place. To that the jury have replied that the defendants were negligent—that is, that they failed in their duty so to inspect. That failure is a failure amounting, at most, to a non-feasance by an authority which thereby created a nuisance, not being a highway authority, and, as GREER, L.J., has stated, and I entirely agree—and the authorities all support the view—the somewhat artificial protection of the highway authority which, as was explained in this court in *Skilton's* case (1), has been inherited from the days when actions lay against the inhabitants at large, is not to be extended to any other authority which has a different historical derivation. In those circumstances, I think that this case in principle is covered completely by the decision of the House of Lords in *Shoreditch Corp'n. v. Bull* (3). That was a case where the authority sued was both a sanitary authority and a highway authority. There, as sanitary authority, they had found it necessary to dig a trench. There, also, the jury found that the work—that is, the work of digging the trench, the sanitary work—was properly finished when it was completed. There also, as here, the jury found that later there was negligence. Then the jury were asked :

Was the work properly finished by the defendants after the trench was completed ? The answer was :

Yes, it was properly finished at the time, but rain had spoiled it.

It was argued in that case, on behalf of the authority, that a distinction must be made between the work which was done as sanitary authority, which, on the finding of the jury, was properly completed, and the later failure to prevent the road becoming stopped, for which it was contended by the authority it could only be responsible as highway authority, and, the failure being a mere non-feasance, it would not be responsible. As I read the opinion of the EARL OF HALSBURY, L.C., he refused to accept that argument. Speaking of that argument, he said, at p. 211 :

That is a process of reasoning to which I for one will not assent. The moment the structure of the road is interfered with, and it comes within the ambit of the operation commenced by the person who is entitled to interfere with the structure of the road, then, until that road is restored into the condition in which it was before that alteration of its structure began, it seems to me the person who interfered with it is responsible for a misfeasance.

That cannot, as Mr. Jardine argued, refer merely to the original restoration to a perfect state, because the jury had, by their answer to the question, already held that the work was properly finished by the defendants after the trench was completed. It must refer to the fact that, until the work was fully restored, in the sense that no further danger

could develop from the original work, the authority were responsible for non-feasance. That seems to me to be precisely the case on the finding of the jury here. Here, also, there is a finding of an original good restoration, followed by negligence in not discovering and taking steps to remedy the danger. The only difference is one of fact and degree. In that case, the headnote reads as follows :

The appellants, who were both the sanitary and the highway authority, dug a trench along a road under their control for the purpose of laying a sewer. When the work was completed they filled in the trench and opened the road for traffic. About a week afterwards the respondent was driving along the road in a cab at night. The driver found that the part of the road where the trench had been opened was soft, and crossed on to the other side, and ran into a heap of rubbish. . . .

Here, in this case, there is a long history extending over some years, and it is found that in 1935, for example, the road was in a proper condition. The judge told the jury that that did not decide the question of the condition of the road the year after. In my view, that is a question of degree and of fact, and, the jury having found affirmatively that the defendants at the time of the accident were negligent, and there being evidence on which they could so find, it is impossible for the local authority here to say that that is not a finding that their failure to discover that there had been a further subsidence was not a non-feasance of the local authority acting as the sanitary authority. Therefore, as no protection can be invoked on the principle of their being the highway authority, it follows that they are liable, and the appeal fails.

MACKINNON, L.J. : I agree. The law on this subject as laid down by the cases is a little involved. The primary rule is that the highway authority is liable for acts of misfeasance, and not for the results of non-feasance. If a defect arises in a highway only as the result of the friction of traffic and the operation of natural causes, and that is not remedied by the authority, that is a defect arising only from non-feasance. Where, however, the authority, either in its capacity as highway authority or otherwise, does something to the surface of the highway, and that which it does is, in addition to the friction of traffic and the operation of natural causes, the origin of the defect which they do not remedy, then the defect may be regarded as the result of misfeasance, and not merely non-feasance. This seems to me to be the result of the principle laid down in *Shoreditch Corpn. v. Bull* (3), a case which differs from this only in that there the lapse of time between the doing of the act and the disaster arising from the defect was much shorter than it was in the present case. That, however, appears to be only a difference of fact, and I do not see how it can make any difference to the legal principle to be applied. In the result, I think that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Corbin, Greener & Cook*, agents for *Dibb & Clegg*, Barnsley (for the appellants); *Kingsley Wood, Williams & Murphy* (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

BARNES (INSPECTOR OF TAXES) *v.* HELY HUTCHINSON.[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
May 16, 17, June 2, 1938.]*Income Tax—Double taxation—Relief—Shares in English company held by Indian company—Dividends of English company suffering tax—Relief to preference shareholder in Indian company.* A

The respondent was a preference shareholder in an Indian company. The Indian company was a shareholder in two English companies, the profits of each of which had suffered United Kingdom taxation. The dividends received by the Indian company from the two English companies formed 44.12 per cent. of the total profits of the Indian company, and the respondent contended that he was to be treated as having borne 44.12 per cent. of the tax upon the dividends received by him from the Indian company:—

HELD: notwithstanding the fact that the tax upon dividends from foreign companies depends upon Sched. D, Case V, and Misc. Rules, r. 1, the principle against double taxation applies to foreign companies so as to exempt shareholders in foreign companies from suffering double taxation. The respondent was, therefore, entitled to relief from taxation upon his dividends to the extent of 44.12 per cent. thereof. C

Decision of LAWRENCE, J., [1937] 4 All E.R. 286 *affirmed*.

[EDITORIAL NOTE. The present case would seem to extend the principle in *Gilbertson v. Fergusson* (1) in two ways. That case applied, in the circumstances there considered, the principle of double taxation relief to ordinary shares, and it is here held that the principle also applies to preference shares. In that case, also, the company who suffered the tax was the company paying the dividends, whereas here the English companies had suffered the tax, but it was an Indian company which subsequently paid the dividends to the person assessed. D

AS TO *Gilbertson v. Fergusson* RELIEF, see HALSBURY, Hailsham Edn., Vol. 17, p. 195, para. 399; and FOR CASE, see DIGEST, Vol. 28, p. 79, No. 431.] E

Cases referred to:

- (1) *Gilbertson v. Fergusson* (1881), 7 Q.B.D. 562; 28 Digest 79, 431; 46 L.T. 10; 1 Tax Cas. 501.
- (2) *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744; 28 Digest 81, 445; 92 L.J.K.B. 736; 129 L.T. 546; 8 Tax Cas. 481.
- (3) *Neumann v. Inland Revenue Comrs.*, [1934] A.C. 215; Digest Supp.; 103 L.J.K.B. 210; 150 L.T. 481; 18 Tax Cas. 332. F

APPEAL from an order of LAWRENCE, J., dated Oct. 18, 1937, and reported in [1937] 4 All E.R. 286. The facts and arguments are fully set out in the judgments herein.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills G
for the appellant.

Roland Burrows, K.C., and Terence N. Donovan for the respondent.

SIR WILFRID GREENE, M.R.: This is an appeal by the inspector of taxes against a decision of LAWRENCE, J., affirming a decision of the general commissioners for the city of London, who had allowed an appeal by the respondent. The assessment in question was made upon the respondent for the year ending Apr. 5, 1933, under the rules applicable to the Income Tax Act, 1918, Sched. D, Case V, in the sum of £6,045. The respondent owns certain 8 per cent. cumulative preference shares in H

an Indian company called George Henderson & Co., Ltd., whose issued capital comprises both preference and ordinary shares. That company owns a large number of ordinary shares in two British companies the whole of whose profits are assessed to United Kingdom income tax. During the year ending Apr. 5, 1931, the Indian company received dividends upon its shares in the British companies. The dividends were paid out of profits of the British companies which had borne United Kingdom income tax, and tax was deducted from the dividends when they were paid. On June 22, 1931, the Indian company paid the dividend on its preference shares. It was paid in full, without deduction of tax, by means of rupee warrants sent direct to the shareholders (including the respondent) without the intervention of any paying agents.

The assessment made upon the respondent was on a sum which included the sterling equivalent of the full amount of his dividend. The respondent claimed that, as part of the dividend (agreed at 44.12 per cent.) was paid out of the taxed dividends received by the Indian company from the British companies, that part should not again be subjected to United Kingdom income tax in his hands, and that the assessment should be reduced accordingly. This claim was, as I have said, successful before the general commissioners and LAWRENCE, J.

Questions which deal with the operation of the Income Tax Acts in relation to the dividends distributed by companies are usually troublesome. The present question is no exception to the rule. In my opinion, however, it has been correctly answered by the general commissioners and LAWRENCE, J. In the case of a company the taxable income of which is derived exclusively from British sources, it is the company that is taxed, not the shareholders. If the income is derived from a trade or business, it is taxed as the company's income, and, when it is distributed in the form of dividend to the shareholders, they are regarded in effect as receiving their shares in profits which have already been subjected to tax (see All Schedules Rules, r. 20). The company may, if it pleases, deduct from each dividend which it so pays a sum which in theory (but not necessarily in practice) represents the share of the tax borne by the company which is referable to that dividend. The shareholder is in effect receiving a share in a fund out of which the Crown has already taken the tax to which it is entitled. The fact that the profit is, so to speak, passed through the company before it emerges in the shape of dividend is not regarded as creating a new income for tax purposes, and accordingly the shareholder is not liable to assessment in respect of his dividend. If the company holds shares in another company the profits of which are subject to tax, and receives dividends on those shares, the position is more complicated, but the principle to be applied is the same. The holding company is not taxable in respect of those dividends, any more than an individual shareholder would be taxable. When, in its turn, it distributes a dividend to its shareholders which is referable in whole or in part to the dividends which it has received, they, in their

turn, are not liable to be assessed, any more than they were in the case of dividends paid out of trading profits. They are in this case, too, regarded as receiving their share of a fund which has already borne tax, and that notwithstanding that the holding company is, so to speak, interposed between them and the company which originally earned the profits and paid the tax. In fact, the revenue is not entitled to put its hands into the same bag more than once, and the bag is regarded as keeping its identity until its contents are finally divided. The simile of the bag is, of course, inaccurate, in that a particular dividend cannot necessarily be related to a particular profit, while the provisions for deduction of tax from dividend have become quite artificial. For present purposes, however, the simile is not, I think, a misleading one. A
B

I will now take the case of a foreign company part of the income of which is subjected to British income tax. Let it first be assumed that the company's share capital consists entirely of ordinary shares, that it carries on a trade here the profits from which are assessable to tax under Sched. D, and that it also holds foreign investments the income from which is not subject to tax. It pays a dividend in part out of the profits of its trade and in part out of the income received from its investments. In so far as the dividend is referable to the profits of the trade, it is paid out of a fund which has already borne tax, and the amount available for distribution has been diminished by the amount of the tax. It appears to me that on principle the revenue is not entitled to assess the British shareholder to tax in respect of so much of his dividend as is referable to the profits of the trade. If it could, it would be putting its hands into the same bag twice, and there would be double taxation. I see no ground for saying that a new income, taxable in the shareholder's hand, comes into existence when the dividend is paid. Here, just as in the case of the wholly British company first mentioned, he is receiving a share of a fund which has already borne tax. In other words, the bag remains the same. C
D
E

I cannot see that any different result ought to follow if the position is reversed, and the foreign company carries on a trade abroad, the profits of which are not subjected to tax, and receives dividends from an English company. It is true that in this case the foreign company is not liable to direct assessment, as was the case with the foreign company which carried on a trade here. It is also true that the English company from which it receives its dividends has been taxed on its profits in its own right, and not in right of its shareholders. Nevertheless, the foreign company receiving the dividend has suffered the burden of tax, in that the fund or profits out of which the dividend is paid has been struck with tax. In respect of those profits, the revenue has received the tax to which it is entitled, and it is not, in my opinion, entitled to follow them into the hands of the ultimate recipient and tax them again in his hands. If the view which I have expressed is correct, it disposes of the main argument of the Crown, which was to the effect that, in the case of a F
G
H

foreign company, a new income arises when its dividend is received by a British shareholder, and that this new income is taxable in his hands without regard to the tax history of the fund out of which the dividend is paid. In other words, the Crown claims that, in the case of a foreign company, the bag must be treated as losing its identity, and that what
A would amount to double taxation in the case of a British company and its shareholders is unobjectionable when the company is a foreign one. I can find no support in principle or in authority for this view.

The alternative argument advanced on behalf of the Crown was directed to the special case of the preference shareholder. It was said
B that, whatever may be the case of an ordinary shareholder, the preference shareholder who receives his dividend in full has not suffered any diminution of his dividend by reason of British taxation, and that therefore he ought to be liable to be assessed on the full amount of his dividend. In my opinion, this argument is unsound. The preference dividend,
C like the ordinary dividend, is paid out of a fund in respect of which the revenue has received its tax. The way in which the balance of that fund is divided up among the shareholders is a domestic matter for them, and the fact that a certain class of shareholder is entitled to receive out of it a fixed amount before the other class can claim anything does not
D appear to me to alter the position in any way. It simply means that, as between the two classes of shareholders, the burden of the tax is thrown upon the ordinary shareholder, but this does not, in my judgment, give the revenue any greater rights.

The general commissioners and LAWRENCE, J., held that the case was
E covered by the principles laid down by this court in 1881 in *Gilbertson v. Fergusson* (1). That case was decided at a time when the application of the Income Tax Acts in the matter of dividends had not been fully worked out, and some of the observations made may require qualification in the light of subsequent decisions. Nevertheless, the correctness of
F the result, so far as it is relevant for present purposes, was then admitted by the revenue, and we were informed at the bar that it has regularly been followed in practice. There are two real differences and one apparent difference between that case and the present. The apparent difference lies in the fact that the same persons—namely, the London
G agents of the Imperial Ottoman Bank—were assessed in respect both of its English profits and of the dividends paid to English shareholders. However, they were so assessed in different capacities, and the same result must have followed if the dividends had been remitted direct to the English shareholders from Turkey and they had been subjected to direct
H assessment, as was admitted by Mr. Dicey, who argued the appeal for the Crown. The two real differences are, first, that there was a direct assessment on the bank through its London agents in respect of the bank's English profits, which is not the case here, and, secondly, that the shares were ordinary, and not preference, shares. I have already given my reasons for thinking that these two differences do not

affect the result, and, in my opinion, the principles laid down in that case apply to the present. The appeal is accordingly dismissed with costs.

SCOTT, L.J. : The question in this appeal is one of general importance—namely, whether a shareholder resident in England and taxable under Case V in respect of interest or dividends paid him by a foreign company, itself not liable to British income tax, is entitled to relief from the gross figure of his assessment on proof by him that the source of the company's income was wholly or in part dividend on shares owned by it in British companies which were liable to, and had deducted, tax from the dividend so paid. It is contended by the respondent that, unless such relief is given, there would be double taxation on what is, throughout its distribution, one and the same income, and that, although there is no express statutory prohibition of such double taxation, there is a principle of income tax law which forbids it.

I agree with my two colleagues, whose judgments I have had the privilege of reading, and with the commissioners and LAWRENCE, J., that there is such a principle, and that our judgment must be for the respondent.

The material facts in the appeal are these. (i) Two British companies, A and B, resident in England, and taxable here upon the profits of their respective trades, earned profits, and in 1930-31 were assessed to tax upon their assessable incomes. (ii) In distributing dividends to the holders of their ordinary shares, they deducted tax. (iii) George Henderson & Co., Ltd., a company carrying on business in India but not in England (which I will call the Indian company), was a shareholder in each of the two companies, and received substantial dividends from which tax had been deducted. (iv) It had one other source of income—namely, trade profits earned in India—the ratio between the two for the relevant period being : dividends from companies A and B 44.12 per cent. and Indian profits 55.88 per cent. (v) The respondent is a holder of 8 per cent. preference shares in the Indian company, and was paid by it his interest in full, without deduction. (vi) The Crown claimed tax under Sched. D, Case V, upon the whole of this interest, but the respondent contended that to the extent of 44.12 per cent. his income received from the Indian company had already suffered British income tax by deduction, and that to that extent he was entitled to relief. As support for his contention, he relied on *Gilbertson v. Fergusson* (1). The commissioners upheld his contention, holding that they were bound by *Gilbertson's* case (1). *Gilbertson's* case (1), although helpful on the general principle, is not conclusive on the present appeal, because the foreign company there—the Ottoman Bank—had a branch business in England, where it earned a large part of its profits, and was directly taxed upon them under Sched. D, and the dividends paid by the company to shareholders resident in England were at least partly attributable to that English income. There

is a statement of what I think is the true principle in a passage in the judgment which CLAUSON, L.J., is about to deliver, and to the language of his statement I respectfully subscribe. The broad principle is that income tax law of to-day still thinks of a company as a body of persons, and of the shareholders as corporators having a direct interest in the capital and income of their corporation, almost as if the Income Tax Act had been passed in 1818 and not 1918. A consequence of this legislative outlook is that dividend is really dividend—a division of the profits—and, when a payment is made to shareholders, it is a mere distribution, for which the shareholders incur no tax liability. If the company is, in respect of the dividend, amenable to British income tax law, having paid tax for itself and its corporators, it naturally is given the right of deducting each corporator's share of the tax. If the distribution, instead of being direct, is made indirect, by the intervention of a foreign holding company not amenable to British income tax law, and the foreign company as a shareholder receives a distribution of tax-paid profits from English companies in which it holds shares, and then, not having any other income, passes on what it receives—less only expenses, reserves, etc.—to an English shareholder, the process is still in essence distribution of the income of the British operating companies, although, so to speak, there are two pipes, instead of one, through which the stream of profits has to flow, and there has been some leakage, perhaps, at their junction. The onus of proof, however, must always rest upon the British shareholder, who is assessed under Case V, to prove that the dividend he has received did come, directly or indirectly, from a British source which had paid tax on the income distributed. If he can prove that fact, the principle, in my opinion, applies.

The principle was considered in *Gilbertson's* case (1), and further in *Bradbury v. English Sewing Cotton Co.* (2), especially by LORD PHILLIMORE, but it is dealt with fully in the opinions in the House of Lords in *Neumann v. Inland Revenue Comrs.* (3), and especially those of LORD TOMLIN and LORD WRIGHT. It is unnecessary, in my view, to add anything further, as I entirely agree with my colleagues' judgments.

CLAUSON, L.J.: Mr. Hely Hutchinson, whom I will call the taxpayer, is resident in England, and holds certain 8 per cent. cumulative preference shares in an Indian company. The Indian company is in a position to pay, and has paid, his dividends in full. On the footing that these dividends are (as they admittedly are) income arising from possessions out of the United Kingdom, he has been assessed to tax upon that amount. It appears that 44.12 per cent. of the Indian company's income arises from investments in shares in English companies, the dividends upon which they receive, of course, less British tax. The rest of their income is earned in India, and is not amenable to British taxation. It is agreed that, if these two classes of income are treated as applied *pro rata* towards the provision of the dividends on the tax-payer's shares in the

Indian company, those dividends are provided to the extent of 44.12 per cent. from the taxed dividends, and, as to the balance, out of the Indian company's untaxed income. The tax-payer admits that he must pay tax on so much of his dividends as are, in this sense, provided out of the Indian company's untaxed income, but he claims that he must be treated as free of liability to tax on such part of his dividends as is, in this sense, A provided out of the portion of the Indian company's income which has already suffered British tax.

The tax-payer cannot point to anything in the Acts which modifies in his case the clear charge *prima facie* falling on him under Sched. D, Case V, but he says—and says rightly—that the court recognises the principle B that the Acts do not impose double taxation, and that, if he be called upon to pay tax on that part of his dividends which is (by the process I have indicated above) traced to its origin in the taxed dividends received by the Indian company, this principle will be infringed.

The principle is stated by BRETT, L.J., in *Gilbertson v. Fergusson* (1), C at p. 570 :

Now it may be true that there are no specific words in this statute which point out that the government are not to receive the tax twice over, but it would be so clearly unjust and obviously contrary to the meaning of the statute that the government should have the tax payable twice over by the same person in respect of the same thing, that I should say it was a necessary implication that that could not be D right.

The first matter for investigation is whether, if tax be paid by the tax-payer, as claimed by the Crown, tax will be paid more than once in respect of some part of the tax-payer's income. The Indian company suffered British tax on part of its income, which is the fund which provides E the tax-payer's dividend, and the question which arises is whether or not this payment can be said to be a payment of British tax in respect of the dividend paid to the tax-payer out of that income. An employer pays tax on his income, and out of the fund which has so borne tax he pays wages to his chauffeur. It obviously cannot be suggested that to tax the F chauffeur on his wages is to infringe the principle against double taxation. The employer's income is one taxable subject, the chauffeur's income is another, though it is true that the chauffeur's wages are found out of the employer's income. In the same way it is suggested that the Indian company's income arising from its shares in English companies G is one subject of taxation, and that the preference dividend paid to the tax-payer is another, and separate, subject of taxation, though it is true that a part of the latter is provided out of the former. If this suggestion be well-founded, the Crown's claim will be justified.

There is, however, a familiar principle, enshrined in the All Schedule H Rules, rr. 1, 20, and fully explained in the opinions of the Lords in *Neumann v. Inland Revenue Comrs.* (3), that, for the purposes of the Acts, the profits or gains of a company, even though it be a corporation, and, as such, an entity separate from its shareholders, are to be treated as the profits or gains of the members of the corporation, with the result

that taxation of the company's profits or gains franks the dividends paid out of them to the shareholders from further tax. Machinery is provided by the latter part of r. 20 which enables those who administer the concerns of the company to throw the tax upon the shareholders by deduction from the dividends, but that machinery is permissive only.

- A** Whether or not the company deducts tax from the dividend, no further tax can be charged by the Crown against the shareholder in respect of the dividend. In his hands it is franked from tax, since the profits of the "body of persons" of whom he is one have already borne tax. The dividend is regarded as merely the individual shareholder's part of the
- B** profits or gains of himself and the other members of the "body of persons," and is not a taxable subject separate and apart from those profits or gains. If this be a true view of the position, it follows that, in the present case, tax having already been paid by the Indian company (by suffering deduction) on 44.12 per cent. of the dividend in respect of
- C** which tax is being claimed, tax will be paid twice over upon that portion of the dividend if the Crown's claim be allowed.

There are, however, certain points to which I must refer. It is too late to argue that the phrase "body of persons" in r. 20 applies only to a body of persons associated together under the law of this country. It

- D** is well-settled that the regulation applies to a "body of persons" associated under foreign law, if chargeable to tax under the Income Tax Act. It may be suggested that an Indian company not directly charged to tax under the Act, but merely in receipt of income from which British tax has been deducted, is outside r. 20. I can see no reason for differentiating between the position of a "body of persons" the subject of direct assessment and a "body of persons" reached by way of deduction of tax, and accordingly I see no escape from the conclusion that the Indian company and its shareholders are, in respect of any question of taxation under the Income Tax Act, a "body of persons" within the
- E** meaning of r. 20. It may be, and indeed has been, suggested that no body of persons comes within the meaning of r. 20 which is so associated—e.g., under the laws of a foreign state—as to be precluded from enforcing against such of its shareholders as are not subject, by residence or otherwise, to the laws of this country the right of deduction of tax conferred
- G** by r. 20. I doubt whether, as the authorities stand, such a construction of the regulation is open to this court. However that may be, I can feel no doubt that the suggestion cannot be supported. The machinery of r. 20 is aimed at enabling the tax on a "body of persons" to be adjusted as between the body and its constituent members, but I can find no
- H** indication in the rule that it is to be inapplicable to a "body of persons" because the machinery of adjustment may, owing to the operation of foreign law, happen to be unenforceable as against some of the constituent members.

There is still one further point for consideration. If the tax-payer succeeds in his contention, the result in this particular case does un-

doubtedly follow that the tax-payer himself bears only 55.8 per cent. of the full tax on his dividend, so that he at all events cannot say that he has suffered double taxation in his own pocket. Indeed, he personally has suffered less than full taxation. Owing to the facts (a) that the Indian company's profits are sufficient to pay his dividend in full, and (b) that, as between himself and his fellow-shareholders, owing to the fact that the Income Tax Act is not law in India, the latter cannot throw on him his share of the tax which the funds of the company have borne in respect of the English assets, he has been fortunate enough to be able to escape part of the tax, so far as concerns his own pocket. The fact remains, however, that the Crown will, in the sense already explained, have the full tax, though not more than the full tax, on the dividend which he receives. As I understand the "principle against double taxation," it is a principle which operates against the Crown, and not a principle which can be invoked against the tax-payer. It does not lay down that every tax-payer shall bear tax on all his income, and, if he does so bear tax, he cannot be charged with more. It is grounded on the position that Parliament has granted the Crown a tax payable once, and not more than once, in respect of the same subject of taxation, even if the tax-payer who enjoys the subject of taxation has been so fortunate as to have had some portion of his tax provided to the Crown from some source other than his own pocket.

In deference to the course which the arguments took in this court, I have thought it right to express my judgment with some elaboration, but my reasons do not, I think, differ in substance from those which have been far more succinctly expressed by LAWRENCE, J., below. In my judgment, the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *Sanderson, Lee & Co.* (for the respondent).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

AHMED ANGULLIA BIN HADJEE MOHAMED SALLEH
ANGULLIA v. ESTATE & TRUST AGENCIES (1927), LTD.

[PRIVY COUNCIL (Lord Wright, Lord Romer, Sir Lancelot Sanderson, Sir Sidney Rowlatt and Sir George Rankin), **February 3, 4, March 7, 1938.**]

Privy Council — Straits Settlements — Executors — Contracts of deceased — Executor making payments in respect of contract — Probate subsequently revoked — Right of executor who has acted reasonably to set off payments made in estate accounts.

In Jan., 1927, K. conveyed certain lands in Singapore to his wife, the second respondent and himself upon trust for himself for life and after his death upon trust for his son, the fourth respondent, if he should attain the age of 21, and in default upon trust in favour of his wife and daughter. In July, 1927, K. entered into a contract with a building

contractor for the erection on part of the settled land of six shops at a cost of \$44,572. The contractor proceeded with the work, and had completed about three-quarters of it, when, in July, 1928, K. died intestate. At that time the contractor had been paid over \$28,000 of the contract price, leaving a balance due of some \$16,000 partly represented by work completed but not paid for at K.'s death, and the balance subject to the due performance of the contract. After K.'s death a document which purported to be his will was admitted to probate in Sept., 1928, a grant being made to the appellant, who had been thereby appointed the sole executor. The appellant, acting as such executor, paid \$17,276, the sum due to the contractor, who had in the meantime completed his contract. In order to provide this sum, the appellant as executor mortgaged some property forming part of the estate, and in respect of this mortgage a sum of \$3,702.96 was paid by the appellant by way of interest. In Jan., 1932, probate of the alleged will was revoked by order of the court, on the ground that the will had not been properly executed, and the respondent company, Estate and Trust Agencies (1927), Ltd., was appointed administrator of K.'s estate. The appellant, in submitting to the registrar of the court his account of K.'s estate which came into his hands, credited himself with the two sums of \$17,276 and \$3,702.96 as being properly payable out of the estate, and, on an objection by the administrator and the next of kin, the registrar referred the question to the Supreme Court for determination. The court directed the registrar to disallow, in the appellant's account, the \$17,276, except so much of it as it would have been fair to pay the contractor as compensation for the breach of contract, if the contract had been broken at K.'s death, and disallowed so much of the sum of \$3,702.96 as represented interest on the part of the above sum disallowed :—

HELD : it was the duty of the appellant, as K.'s apparent legal personal representative, to honour K.'s obligations under the contract, unless another arrangement could have been made which would have been of advantage to the estate that he was administering. The appellant could not, in the circumstances, have prevented the contractor from completing the contract, had the latter wished to do so, for the land on which the shops were being erected was the land of the fourth respondent, nor would he have benefited the estate by repudiating the contract, unless the contractor accepted such repudiation, which was unlikely, and in any case he owed no duty to the estate that he was administering to commit such an unlawful act. The appellant was therefore entitled to credit himself in the estate accounts with the amounts disallowed.

[EDITORIAL NOTE.] This case corrects a wrong view of the decision of LORD ROMILLY, M.R., in *Cooper v. Jarman* (1) which appears in the headnote to that case. The legal personal representative is bound to honour the contracts of the deceased, and, where a building contract, in which the deceased is the building owner, remains uncompleted at the time of the death, the personal representative must in the ordinary way allow the builder to complete, or compromise the matter in some way with the builder. If no opportunity for compromise occurs, the personal representative is entitled to complete the contract at the expense of the estate.

AS TO CONTRACTS BY THE DECEASED, see HALSBURY, Hailsham Edn., Vol. 14, p. 406, para. 759; and FOR CASES, see DIGEST, Vol. 23, p. 477, Nos. 5459-5461.]

Cases referred to :

- (1) *Cooper v. Jarman* (1866), L.R. 3 Eq. 98; 23 Digest 477, 5460; 36 L.J.Ch. 85.
- (2) *Holt v. Holt* (1694), 2 Vern. 322; 24 Digest 619, 6492.
- (3) *Re Rownson, Field v. White* (1885), 29 Ch.D. 358; 23 Digest 366, 4343; 54 L.J.Ch. 950; 52 L.T. 825.

- (4) *Re Midgley, Midgley v. Midgley*, [1893] 3 Ch. 282; 23 Digest 356, 4248; 62 L.J.Ch. 905; 69 L.T. 241.
- (5) *Re Day, Sprake v. Day*, [1898] 2 Ch. 510; 23 Digest 477, 5461; 67 L.J.Ch. 619; 79 L.T. 436.
- (6) *Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162; 24 Digest 660, 6864; 67 L.J.Ch. 118; 77 L.T. 508; *affg.*, [1897] 1 Ch. 422.
- (7) *Wentworth v. Cock* (1839), 10 Ad. & El. 42; 24 Digest 618, 6483; 8 L.J.Q.B. 230.
- (8) *Re Stuart, Smith v. Stuart* (1896), 74 L.T. 546; 24 Digest 786, 8175.

APPEAL from a judgment of the Court of Appeal of the Straits Settlements (Settlement of Singapore), (SIR WALTER CLARENCE HUGGARD, C.J., WHITLEY and TERRELL, JJ.), dated Jan. 18, 1936, dismissing an appeal by the appellant from a judgment of the Supreme Court (BURTON, A.C.J.), dated Oct. 10, 1935, given upon a reference to him by the registrar. The facts of the case are set out in the judgment of their Lordships delivered by LORD ROMER.

A. F. Topham, K.C., and *J. Leonard Stone* for the appellant.

C. D. Myles and *H. E. Francis* for the respondents.

Topham, K.C. : It is the duty of an executor or administrator to complete the contract of his testator or intestate. If the appellant had come to the court and asked for directions as to the building contract, he would have been (or ought to have been) directed to complete the contract, and not to break it. The court below failed to appreciate that, if the intestate's contract had been broken, damages would have had to have been paid by the intestate's estate for waste and breach of trust, as well as damages to the building contractor. The course which these proceedings have taken has not given the appellant an opportunity to raise statutory and other defences open to an executor charged with *devastavit* and breach of duty. *Cooper v. Jarman* (1) was rightly decided, and is a decision directly applicable to the facts of this case. [Counsel referred to *Holt v. Holt* (2), *Re Day, Sprake v. Day* (5), *Wentworth v. Cock* (7) and *Re Stuart, Smith v. Stuart* (8).]

Myles : It is the duty of the executor to do his best for the estate, and he must not make any payment out of the estate unless he is compelled to do so. The cost of building the six houses must have been in excess of the damages which would have been payable for breach of contract. The principle underlying *Re Day, Sprake v. Day* (5) applies to this case, and not the principle underlying the decision in *Cooper v. Jarman* (1). [Counsel also referred to *Re Midgley, Midgley v. Midgley* (4).]

Francis followed on the same side.

Topham, K.C., in reply, referred to *Re Rownson, Field v. White* (3).

LORD ROMER : This appeal raises an interesting question as to the duties of an executor in relation to the testator's contracts remaining uncompleted at his death.

The facts that give rise to it are, so far as material, as follows. On

Jan. 3, 1927, Kavena Hadjee Mohamed Yoosuf, hereinafter referred to as the intestate, conveyed certain lands in Singapore to his wife the respondent Fatimah and himself upon trust for himself for life and after his death upon trust (subject to certain provisions as to maintenance) for his son the respondent Kader Ebrahim if he should attain the age of 21, and in default upon trust for the said son's children as therein mentioned, with an ultimate trust in favour of the intestate's said wife and a daughter. On July 15, 1927, the intestate entered into a contract with one Tan Peck Hood, a building contractor, which provided (as subsequently modified) for the erection on part of the settled land of six shops at a cost of \$44,572. Hood proceeded with the work and had completed about three-quarters of it, when on July 18, 1928, the intestate died. At that time Hood had been paid over \$28,000 of the contract price, and a balance of some \$16,000 accordingly remained due to him, subject to his due performance of the contract. Their Lordships have no precise information as to how much of the \$16,000 represented work completed but not paid for at the death of the intestate.

As, however, three-quarters of the work had been done, about \$5,000 out of the \$16,000 would appear to have already been earned by the contractor. After the death of the intestate, a document which purported to be his will, and which was dated May 25, 1928, was admitted to probate, probate being granted on Sept. 10, 1928, to the appellant, who had been thereby appointed the sole executor. The appellant proceeded to administer the intestate's estate, and, in his capacity of executor, paid \$17,276 to Hood, who had in the meantime completed the erection of the six shops. It is not disputed that this was the sum due to Hood upon such completion. In order to provide this sum, the appellant, as executor, mortgaged some property forming part of the intestate's estate, and, in respect of such mortgage, a sum of \$3,702.96 was paid by the appellant by way of interest.

On Jan. 7, 1932, probate of the alleged will was revoked by order of the court, on the ground that the same had not been properly executed, and thereupon the respondent company, Estate and Trust Agencies (1927), Ltd., was appointed administrator of the intestate's estate. The respondent is hereinafter referred to as the administrator.

On May 16, 1934, the administrator issued an originating summons in the Supreme Court of the Straits Settlements (Settlement of Singapore) for the determination of the question whether the sum of \$17,276 paid to Hood ought to be borne by the settled property or ought to be paid out of the intestate's estate, and asking for general administration of such estate, so far as might be necessary. The summons came on for hearing before PRICHARD, J., who declared that the cost of completing the six shops ought to be paid out of the settled property, and made an order for the administration of the intestate's estate, including an account in the usual form of the intestate's personal estate come to the hands of the appellant. The respondent Kader Ebrahim appealed to

the Court of Appeal from so much of this order as declared that the settled estate should bear the costs of completing the six shops, and such appeal was allowed, the court declaring that such costs were not recoverable out of the settled properties, without prejudice to any question that might arise as to how such costs should be borne as between the present appellant and the intestate's estate.

A

Neither in the order of PRICHARD, J., nor in that of the Court of Appeal does any distinction appear to have been drawn between the cost of the work done on the shops after the death of the intestate and the cost of that done but not paid for in his lifetime, and it must be taken that the costs referred to in the two orders consisted of the whole of the

B

\$17,276 and the \$3,702.96 interest. The appellant's account of the intestate's estate come to his hands was in due course brought in before the registrar of the court, and in that account the appellant credited himself with the two sums in question as being properly payable out of the estate. The administrator and the next of kin objected, and thereupon the registrar, pursuant to R.S.C., 1934, Ord. 51, r. 20, referred the question to the judge for determination.

C

The reference came on for hearing before BURTON, A.C.J., and, by an order dated Oct. 10, 1935, he directed the registrar to disallow in the appellant's account the \$17,276, except so much of it as the registrar should consider would have been fair to pay to Hood as compensation for the breach of the contract to build the shops if the contract had been broken at the death of the intestate, and also to disallow so much of the \$3,702.96 as represented interest upon such part of the \$17,276 as was directed to be disallowed. He further ordered the appellant to pay the administrator's costs of this reference, and also those of the five other respondents to this appeal, such respondents being the persons entitled beneficially to the property of the intestate.

D

E

In support of his claim to be allowed the whole of the two sums in question, the appellant relied upon the decision of LORD ROMILLY, M.R., in *Cooper v. Jarman* (1). That case, in some respects, bears so close a resemblance to the present one that it must be examined in some detail. The facts were these. An intestate had entered into a contract with some builders for the erection of a house on some freehold land belonging to him. At the time of his death, the house was in course of erection, but had not been finished. Letters of administration were in due course granted to two of his children, one of whom happened to be his heir-at-law. The house having been completed by the builder after the intestate's death, the heir-at-law, as one of the intestate's legal personal representatives, paid to the builder out of the intestate's personal estate the cost of such completion. According to the headnote of the report, it was held that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate. In point of fact, LORD ROMILLY, M.R., held nothing of the sort. It had, indeed, been laid down in the case of *Holt v. Holt* (2) that the heir-at-law had such

F

G

H

a right in the like circumstances, though on what grounds the decision in that case was founded is not at all apparent. It is true, too, that *Holt v. Holt* (2) was cited in the arguments on behalf of the heir-at-law in *Cooper v. Jarman* (1). The question in the last-mentioned case, however, was whether the heir-at-law, in his capacity of legal personal representative of the intestate, ought to be allowed, in taking the account of the personal estate come to his hands, the cost of completing the house. The decision was in favour of the heir-at-law, but it was not in any way based upon any rights he possessed as heir-at-law. The case of *Holt v. Holt* (2) is not even mentioned in the judgment of LORD ROMILLY, M.R. His judgment was based solely upon the rights and duties of a legal personal representative in such circumstances, and would have been precisely the same if the administrator had not been the heir-at-law himself. It had been argued that the duty of the administrator was to commit a breach of the contract entered into by the intestate, inasmuch as it was one of which equity would not have decreed specific performance, and to pay the builder the damages occasioned by that breach. LORD ROMILLY, M.R., would have none of this. He said, at p. 101 :

I think it cannot be good law that an administrator is bound to do an injury and inflict damages upon a person with whom the intestate had entered into a contract, and to prevent that person from completing his contract because, by so doing, he would increase the personal estate of the intestate.

He then rejected the contention that the duty of a legal personal representative in this connection depends in any way upon the question whether or not the contract is one of which specific performance can be enforced, and proceeded as follows, at p. 102 :

. . . it cannot, in my opinion, be law, that the next of kin should be entitled to call upon the heir-at-law to resist the Messrs. Lawrence [the builders in question], and hinder them from coming on the land, and prevent them from completing the contract because, in the opinion of the next of kin, the damage sustained by the contractor would possibly be less than the amount to be paid for the fulfilment of the contract.

He then pointed out that, in any case, the administrator, if he paid the contractor damages without suit, might be charged by the next of kin with having paid more than a jury would have awarded, and that, if he went to law, the amount of damages found by the jury, together with the costs of the suit, might exceed the cost of completing the contract. He concluded as follows, at p. 102 :

The administrator has, in my opinion, a clear duty to perform. The moral duty is distinct. It is to perform the contract entered into by his intestate. The legal duty in this instance, as I believe it is in all cases where it is fully understood and examined, is identical with the moral duty.

All of which appears to their Lordships to be both good law and good sense. *Prima facie* it is the duty of a legal personal representative to perform all contracts of his testator or intestate, as the case may be, that can be enforced against him, whether by way of specific performance or otherwise. If the contract be one that cannot be enforced against

him for any reason, such as the Statute of Frauds, and be one that it would be disadvantageous to the estate to perform, it is a different matter (*Re Rownson, Field v. White* (3)), though it seems to be settled that he is not bound to plead the Statute of Limitations, and may pay a statute-barred debt unless it has been judicially declared to be so : *Re Midgley, Midgley v. Midgley* (4). Nor, in the case of an enforceable A
onerous contract, ought he to neglect any opportunity that may present itself of coming to terms with the other contracting party that may benefit the estate. The breaking of an enforceable contract, however, is an unlawful act, and, in their Lordships' judgment, it can never be the duty of an executor or of an administrator to commit such an act. B
It is this principle that lies at the root of the decision in *Cooper v. Jarman* (1).

However, BURTON, A.C.J. thought that *Cooper v. Jarman* (1) was distinguishable from the present case, in that Kader Ebrahim was not the heir-at-law of the intestate. He was, said BURTON, A.C.J., a stranger C
to the intestate's estate, and, unlike the heir-at-law in *Cooper v. Jarman* (1), had no claim to have the contract carried out. In saying this, he seems to have been misled by the headnote in that case, and to have failed to notice that the decision in no way turned upon any rights the heir-at-law might possess, but solely upon the rights and D
duties of the administrator. He also thought that he was justified in refusing to follow *Cooper v. Jarman* (1) by the decision of NORTH, J., in *Re Day, Sprake v. Day* (5). It cannot be denied that this latter decision fully justified the statement of BURTON, A.C.J., that Kader Ebrahim had no claim to have the intestate's contract with the builder E
carried out, but it is no authority for the proposition that the cost of completing it was not proper to be allowed to the appellant in taking his account. The facts of that case were substantially as follow. A testator by his will had devised certain land to his wife for life. Shortly before his death, he had entered into a contract with some builders for F
the erection of some cottages on the land. He had also entered into a contract with the same builders for the erection of a house on some land that belonged, not to him, but to his wife in her own right. At the time of his death, neither of these contracts had been completed, and after his death his executors prevented the builders from finishing G
the work. The wife thereupon claimed to be entitled to have the two contracts completed at the cost of the testator's personal estate. NORTH, J., acceded to the wife's claim in respect of the first contract, but rejected it in respect of the second. He thought that *Cooper v. Jarman* (1) was an authority in her favour, so far as the land devised H
to her was concerned, treating a devisee as being in the same position as an heir-at-law. If no distinction is to be drawn between a devisee and an heir-at-law for this purpose, *Holt v. Holt* (2) was no doubt an authority in favour of the judge's decision, but, with all respect to him, and for the reasons already given, *Cooper v. Jarman* (1) was not. As

to the second contract, he held that the wife, being a stranger to the testator's estate, had no right to have it carried out at the expense of his personal estate. Whether *Re Day, Sprake v. Day* (5) was rightly decided or not is a question upon which it is unnecessary for their Lordships to express any opinion. It is sufficient to say that it has no bearing

A upon the present case.

An appeal from the decision of BURTON, A.C.J., was taken to the Court of Appeal, and in due course came before HUGGARD, C.J., WHITLEY and TERRELL, JJ., who, by order dated Jan. 18, 1936, dismissed the appeal with costs. They were unanimous in holding that the appellant

B could not be allowed the two payments in question. Before considering the reasons given by them for this decision, reference must be made to an argument advanced before them by the appellant, which was in the nature of a preliminary objection. He contended that the items relating to the erection of the shops could only be disallowed on the footing

C that a breach of trust had been committed by the appellant, and that, as a breach of trust on his part had not been specifically pleaded, he could not be charged with one in taking the ordinary account of the personal estate of the intestate come to his hands. This contention was rejected by the Court of Appeal, and, in their Lordships' opinion, was

D rightly rejected. In taking the account, the appellant could not, of course, be charged with damages occasioned to the estate by a breach of trust, but it was incumbent upon him to justify his payments, and those that he could not justify would necessarily have to be disallowed. As was said by CHITTY, L.J., in *Re Stevens, Cooke v. Stevens* (6), at

E p. 172 :

On taking the common account of their receipts, executors can properly be, and are often, charged with a *devastavit* arising on the accounts themselves. On taking the account they stand charged with their receipts ; and if they seek to discharge themselves by unlawful payments, their discharge is disallowed.

F Turning now to the reasons given by the judges in the Court of Appeal for thinking that the two sums in question ought to be disallowed as being unlawful payments, their Lordships find that HUGGARD, C.J., and each of his colleagues considered the case to be covered by the decision of NORTH, J., in *Re Day, Sprake v. Day* (5), a decision which was not,

G of course, binding upon them, but was one from which they said they were not prepared to dissent. HUGGARD, C.J., in referring to *Cooper v. Jarman* (1), said this :

H It was held by LORD ROMILLY, M.R., that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate. Now, when one reads the judgment of LORD ROMILLY, M.R., in that case, it would appear to support strongly the appellant's contention in the present case. But the judgment of LORD ROMILLY, M.R., was considered in the later case of *Re Day, Sprake v. Day* (5), and it is clear from the decision of NORTH, J., that the observations of LORD ROMILLY, M.R., in *Cooper v. Jarman* (1) must be read in the light of the facts of that particular case.

He then referred to the facts in *Re Day, Sprake v. Day* (5), and the

reasons there given by NORTH, J., for distinguishing between the two contracts in that case, and proceeded as follows :

It appears to be clear from the decision in *Re Day, Sprake v. Day* (5) that the distinction drawn by NORTH, J., between the two contracts was based on the fact that one property belonged to the testator and passed under his will, whereas the other property . . . belonged to a stranger. In other words, in one case the completion of the contract benefited the estate of the testator ; in the other case there was no such benefit. In the former case the decision in *Cooper v. Jarman* (1) therefore applied ; in the latter it did not. The test to be applied in each case is whether the completion of the contract is for the benefit of the deceased's estate.

The judgments of WHITLEY and TERRELL, JJ., proceeded upon the same line of reasoning, and upon the same view of the cases of *Cooper v. Jarman* (1) and *Re Day, Sprake v. Day* (5). They also thought that they found in those two decisions authority for the proposition that, in such a case as the present, the test to be applied is whether the completion of the contract is for the benefit of the estate of the intestate. Applying that test, the court very naturally dismissed the appeal. It was impossible to say, upon the evidence, that the estate of the intestate was benefited by the completion of the shops.

Their Lordships are unable to agree that the test to be applied is that adopted by the Court of Appeal. If the appellant were seeking to justify the two payments on the ground that Kader Ebrahim had a right to have the contract for the erection of the shops completed at the cost of the intestate's estate, the decision in *Cooper v. Jarman* (1) would not assist him, and the decision in *Re Day, Sprake v. Day* (5), as regards the second contract in that case, would be an authority against him. However, the appellant does not seek to justify the payments on any such ground. He merely seeks to justify them on the grounds stated by LORD ROMILLY, M.R., in *Cooper v. Jarman* (1), the headnote in which case would seem to have misled the Court of Appeal just as it had misled BURTON, A.C.J., in the court below.

In their Lordships' judgment, it was the duty of the appellant, as the apparent legal personal representative of the intestate, to honour the intestate's obligations under the contract in question, unless an opportunity presented itself of coming to some arrangement with the builder that would be of advantage to the estate that he was administering. There is no evidence that any such opportunity did in fact present itself, and the onus of proving the existence of such an opportunity lay, in their Lordships' opinion, upon the respondents. BURTON, A.C.J., no doubt in the course of his judgment said that the contractor would have been perfectly satisfied with a sum sufficient to compensate him for loss of expected profits, and that he would have been satisfied by a payment which must have been substantially less than the \$17,276 paid to him, but, in making these observations, he would appear to have been merely hazarding a guess, for there was no evidence before him as to the intentions or desires of the contractor. If a guess is to be indulged in, it would seem more probable that the contractor would have preferred to complete the contract, for, apart altogether from any loss to his reputa-

tion by leaving the shops in an unfinished state, the sudden breaking off of the work might have involved the temporary unemployment of members of his staff and the loss of the building material already on the site, seeing that he would have had no right, as against Kader Ebrahim, to enter upon the land for the purpose of removing it. Even
A if he had been willing to agree to leave the work unfinished upon the terms of being paid compensation, all such matters would have come into his calculations, and there seems no reason to suppose that he would have been content to receive merely his loss of profit, or any sum less than the amount actually paid to him by the appellant. Nor could
B the appellant have prevented the contractor from completing the contract if the contractor wished to continue the work, for the land on which the shops were being erected was the land of Kader Ebrahim. Therefore, had the appellant purported to repudiate the contract, he would not have benefited the estate unless the contractor accepted such
C repudiation, which seems unlikely ; and, if the contractor had accepted such repudiation, and sued the appellant for damages, it is impossible to tell how much such damages, together with the costs of the action, would have amounted to. In any case, the appellant owed no duty to the estate that he was administering to commit the unlawful act of
D repudiating the contract, and he is not shown to have had any opportunity of coming to a friendly arrangement with the contractor that would have been more beneficial to the intestate's estate than paying the balance of the contract price unpaid at the intestate's death.

Their Lordships are accordingly of opinion, and will humbly advise
E His Majesty, (i) that the appeal should be allowed and the orders of Oct. 10, 1935, and Jan. 18, 1936, should be discharged, and (ii) that the registrar should be directed to allow in the appellant's account the sums of \$17,276 and \$3,762.96.

As regards the costs, the order should be as follows : (i) that the
F respondents ought to pay to the appellant his costs as between party and party on the higher scale of the hearing before BURTON, A.C.J., on Oct. 10, 1935, and before the Court of Appeal on Jan. 18, 1936 ; (ii) that all costs already paid by the appellant under those orders ought to be repaid to him by the respondents respectively ; (iii) that the costs of
G the appellant of the order of Sept. 25, 1935, and his costs made costs of the cause by order of the Supreme Court dated Aug. 28, 1936, ought to be paid and dealt with in all respects in the manner herein directed with reference to the costs of this appeal ; (iv) that the costs of the appellant as between solicitor and client on the higher scale of the hearing
H of Oct. 10, 1935, and in the Court of Appeal on Jan. 18, 1936, and of this appeal hereinafter referred to, after giving credit for the party and party costs ordered to be paid by the respondents and recovered by him from the respondents in these proceedings, ought to be his costs in the cause ; (v) that this order ought to be without prejudice to any claim of the respondents, or any of them, to be allowed their costs of all the

above-mentioned proceedings out of the estate of the intestate; (vi) the appellant's costs of this appeal as between party and party will be paid by the respondents.

Appeal allowed with costs.

Solicitors: *Emmet & Co.* (for the appellant); *Peacock & Goddard* (for the respondents).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

PERKINS v. PERKINS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **May 23, 1938.** B

Divorce—Maintenance—Review—Application for reduction—Voluntary settlements by husband on child by previous marriage—Re-marriage of wife.

On Mar. 13, 1934, an order by consent was made that the husband should pay to the wife during their joint lives and until further order such a sum by way of maintenance as after deduction of income tax should amount to £500 per annum. At the time the decree absolute was made, the husband had an income of £3,000 per annum and the wife one of less than £100 per annum. The husband claimed that his position had become worse by reason of the fact that he had made two voluntary settlements upon his daughter by a previous marriage. The wife had re-married and her present husband had an income of £580 per annum after deduction of tax, and a furnished house, and would in 4 years be due to retire on a pension of £400 per annum:—

HELD: (i) the husband's financial position could not be considered as having become worse by reason of the voluntary settlements made by him.

(ii) the wife's financial position had been improved, as she was saved the expense of maintaining a separate establishment of her own, and the maintenance ought on that ground to be reduced to £350 per annum free of tax.

[EDITORIAL NOTE. Until the present decision it was felt that the question of the effect of the re-marriage of the wife upon the amount of maintenance was not free from difficulty, and it was not generally thought that it was a good ground upon which a reduction could be sought. The matter is one in which all the circumstances of the case must be considered, but it is now clear that, in a proper case, the court will make an order for reduction.

AS TO REVIEW OF MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 798-800, paras. 1269-1273; and FOR CASES, see DIGEST, Vol. 27, pp. 505, 506, Nos. 5404-5417.]

Cases referred to:

- (1) *Bennett v. Bennett* (1934), 103 L.J.P. 38; Digest Supp.; 150 L.T. 460.
- (2) *Turk v. Turk*, *Duffy v. Duffy*, [1931] P. 116; Digest Supp.; 100 L.J.P. 90; 145 L.T. 331; *subsequent proceedings* (1932), 147 L.T. 18.
- (3) *Hall v. Hall*, [1915] P. 105; 27 Digest 506, 5410; 84 L.J.P. 93; 113 L.T. 58.
- (4) *Sharpe (otherwise Morgan) v. Sharpe*, [1909] P. 20; 27 Digest 528, 5710; 78 L.J.P. 21; 99 L.T. 884.
- (5) *Hulton v. Hulton*, [1916] P. 57; 27 Digest 503, 5382; 85 L.J.P. 137; 114 L.T. 449.
- (6) *Fisher v. Fisher* (1861), 2 Sw. & Tr. 410; 27 Digest 501, 5362; 31 L.J.P. M. & A. 1; 5 L.T. 364.

- (7) *Sidney v. Sidney* (1865), 4 Sw. & Tr. 178; 27 Digest 503, 5333; 34 L.J.P. M. & A. 122; 12 L.T. 826; *on appeal* (1866), L.R. 1 P. & D. 78; (1867), 36 L.J.P. & M. 73.
- (8) *Lister v. Lister* (1889), 15 P.D. 4; 27 Digest 507, 5440; 62 L.T. 90.
- (9) *Wood v. Wood*, [1891] P. 272; 27 Digest 506, 5424; 60 L.J.P. 66; 64 L.T. 586.

A SUMMONS adjourned into court for the reduction of maintenance payable to a wife upon the ground of the improvement of her financial position on re-marriage.

Noel Middleton, K.C., and *J. S. Watts* for the wife.

Norman Daynes, K.C., and *Acton Pile* for the husband.

B

BUCKNILL, J.: This is an appeal from an order of Mr. Registrar PEREIRA dated Feb. 8, 1937, dismissing the petition of Hew Brazier Perkins (hereinafter called the husband) for reduction of maintenance payable to his wife, Millicent Brenda Perkins (hereinafter called the wife).

C The appeal first came before me on Feb. 22, 1937, when it was adjourned by consent into open court, in order that the husband might give evidence of his interest under his father's will.

In 1922, the husband married the wife. He was at that time a widower with one child, Rosalind, then 9 years of age. A son, Anthony, was, in

D 1924, born of his second marriage. In 1933, the wife obtained a decree *nisi* for the dissolution of her marriage, on the ground of the husband's adultery, and this was made absolute in Feb., 1934. The suit was undefended, and no charge of any kind was made against the wife. In Dec., 1933, the wife filed a petition for maintenance, and on Mar. 13,

E 1934, an order by consent was made that the husband should pay to the wife during their joint lives and until further order as from the date of the decree absolute such a sum by way of maintenance as after deduction of income tax should amount to £500 per annum. The husband's evidence shows that, at the time when the consent order was made, he had a

F gross annual income of nearly £3,000 a year. At the time when the decree absolute was made, the wife had small private means of her own, sworn by her to be much less than £100 per annum.

On Mar. 4, 1936, the husband filed his petition for reduction of maintenance. He put forward his claim on the basis that his own financial

G position was worse, and his wife's financial position was better, than at the date of the order. It is unnecessary to set out the details of the change in the husband's financial position. It is sufficient to say that, on his own evidence, it is clear that his position has not become worse, apart from the fact that he has seen fit to make two voluntary settlements on

H Rosalind, the child of his first marriage. It was said on his behalf that he was under a moral obligation to effect one of these settlements, but he is also under a moral obligation to make proper provision for the wife, whom he has greatly wronged by his adultery. I therefore find that his financial position has not become worse since the consent order was made. It was admitted by counsel on behalf of the wife that, having regard to the

fact that the original order was made until further order, the court had jurisdiction to review it, although the husband's means had not, in fact, diminished, and the only ground for review was that the wife's fortune had increased. This follows from the decisions in *Bennett v. Bennett* (1), *Turk v. Turk* (2) and *Hall v. Hall* (3).

The substantial point in the husband's petition is that since the decree absolute the wife has married again, and it was argued on behalf of the husband that her financial position has thereby substantially improved. A

The problem as to the principle to be adopted by the court when considering the effect of the re-marriage of the wife upon orders for maintenance is not free from difficulty. The question whether the husband ought to continue to provide maintenance for his wife after she has remarried has been considered in various cases. BARGRAVE DEANE, J., in *Sharpe (otherwise Morgan) v. Sharpe* (4), when ordering the husband to secure maintenance for the wife at the rate of £100 per annum, said, at p. 23 : B

Then comes the question, for what length of time should it be payable ? In my opinion it should be for the life of the petitioner *dum sola vixerit*, because, if she marries again, there is no reason why the payment of this money should be continued to her. C

On the other hand, SHEARMAN, J., in *Hulton v. Hulton* (5) made an order for permanent annual maintenance to the wife of £5,000, to be reduced on her re-marriage to £3,500, thereby indicating that the court considered that the husband in that case had a duty to maintain the wife after re-marriage, although at a lower rate than before her re-marriage. D

The statutory provisions on the subject are these. The Matrimonial Causes Act, 1857, s. 32, empowered the court, when pronouncing a decree of divorce, to order the husband to secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it should deem reasonable. E

In 1861, SIR CRESSWELL CRESSWELL, in *Fisher v. Fisher* (6), when considering an application for permanent maintenance by the innocent wife, said, at p. 414 : F

The next point is the period for which the payment to the petitioner shall be continued . . . if she avails herself of the freedom conferred by the decree of this court and marries again, it would be unreasonable to compel the former husband to maintain her. G

In that case, the court ordered an annuity of £100 per annum to be secured upon the wife.

Again, SIR CRESSWELL CRESSWELL, in 1865, in *Sidney v. Sidney* (7), where a similar application by the innocent wife was made, indicated that the order for maintenance would continue so long only as the wife remained chaste and unmarried. H

In 1866, an Act was passed which empowered the court to make an order on the husband for payment to the wife during their joint lives of a reasonable monthly or weekly sum for her maintenance and support

in cases in which the husband had no property on which the payments to the wife could be secured. The proviso to the section enacted that, if the husband afterwards from any cause became unable to make such payments, it should be lawful for the court to discharge or modify the order. The section was silent as to the right of the husband to ask for
A discharge or modification of the order on the ground that the wife had re-married.

In 1889, in *Lister v. Lister* (8), the question arose as to whether the *dum sola* clause should be inserted in an order for permanent maintenance. In that case, the registrar had ordered one-third of the respondent husband's income to be secured to the innocent wife, and it was argued that
B this proportion of one-third was excessive if the maintenance was to continue in the event of the wife's re-marriage. BUTT, J., in his judgment, said that the court ought to have absolute discretion according to the facts of each case, that in the case before him the husband had behaved
C badly, and that therefore the *dum sola* clause ought not to be inserted, but that there were cases in which, if the *dum sola* clause were eliminated, he would not think it right to give so large an amount. The Court of Appeal upheld the decision. FRY, L.J., in the course of his judgment remarked that it must be inferred (from the words of the statute) that
D the legislature was clearly not unfavourable to the grant of the maintenance being for the whole life of the innocent wife, and said, at p. 7 :

... the effect of the section is to leave an unfettered discretion in the judge in each case, and it would be wrong to lay down any *prima facie* rule whether the annual sum should be payable during the wife's whole life or until her second
E marriage. It is the duty of the judge to exercise his discretion according to the particular circumstances of each case.

In *Wood v. Wood* (9), an innocent wife obtained a decree for the dissolution of her marriage on the ground of the adultery and cruelty of her husband. An order for permanent maintenance of £60 per annum
F was made, and the registrar reported that the order should be made without a *dum sola et casta* clause. On appeal, SIR FRANCIS JEUNE, P., expressed the view that the clause ought to be inserted. The wife appealed to the Court of Appeal, and LINDLEY, L.J., in the course of a written judgment with which KAY, L.J., and BOWEN, L.J., concurred,
G said, at pp. 276, 277 :

The least that a man ought to do for the maintenance and support of his wife, when he so disregards his own duties to his wife as to drive her from her home without any fault on her part, and practically force her to obtain a divorce, is to do what he can, consistently with his means, to maintain her in reasonable comfort, having regard to her age, health, and position in society. . . . If, as in this case,
H the husband's means are such that he can only allow his wife a bare subsistence, and she has nothing, it seems to us unjust to her that even this subsistence money should cease merely because she may marry again. The continuance of the allowance may conduce very materially to her marrying, and to her future comfort and happiness. On the other hand, justice to him does not, in our opinion, require the cessation of so small an allowance on her marrying again.¹ Under the circumstances therefore, of this case—viz., the innocence of the wife, the misconduct of the husband, the fact that the wife has no property, and the smallness of the allowance made to her—it appears to us that the clause *dum sola et casta vixerit* should be struck out.

Applying the tests laid down by LINDLEY, L.J., to the facts of this case, the husband has broken up the marital home by his misconduct, while the wife, at the age of 35, after the dissolution of her marriage had no material means of support, apart from such maintenance as her former husband supplied. In these circumstances, it was considered fair and proper by the husband that he should provide the sum of £500 a year free of tax to the wife, and, in my view, in the present circumstances, he should continue to make such provision to her, subject to a proper deduction due to the improvement in her financial position by her re-marriage. A

The re-marriage of the wife in this case is a factor which must be taken into account when the court considers whether or not the fortune of the wife has increased. From this point of view, the second husband is in the nature of a pecuniary asset to her. What the value of that asset is depends on the circumstances of each case. The present husband of the wife holds the rank of captain in the Royal Marines, and is aged 41. At the present time, he has a government appointment abroad, which he holds for two or four years, and the emoluments of his appointment are about £580 per annum, after deduction of tax, and a furnished house, in which the wife is now living with him. He is due to retire in about four years, on a maximum pension of about £400 per annum. B C

The result to the wife of the re-marriage is that she is saved the expense of maintaining a separate establishment of her own, and therefore to some extent she saves on rent and food and household expenses. In my view, the proper order to make in this case is that the figure of £500 per annum free of tax be reduced to £350 per annum free of tax, until further order, and to that extent the appeal is allowed. D E

Solicitors : *Campbell, Hooper & Todd* (for the wife) ; *Evill & Coleman* (for the husband).

[Reported by J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

FREEMAN v. DARTFORD BREWERY CO. LTD.

[KING'S BENCH DIVISION (du Parcq, J.), **March 29, 1938.**]

Practice—Reference to referee—Form of report—Landlord and Tenant Act, 1927 (c. 36)—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 88 (2). G

In a reference to one of a panel of referees, the report of the referee must show the evidence given before the referee, the facts he found to be proved, what inferences he drew from those facts and the result at which he arrived, having applied his view of the law. Such a referee has not merely to make such an award as an arbitrator would make, or give a verdict such as a jury might give. H

[EDITORIAL NOTE.] This case is of considerable importance in dealing with applications under the Landlord and Tenant Act, 1927. It is not, however, restricted to references under that Act, but applies generally to references to referees. The report must be such that it will save the time of the court, and it will do so if it sets out the conclusions of fact and the evidence upon which they are based, followed

by any necessary conclusions of law. If it does this, the judge is in a position to say at once whether he agrees with the findings of the referee.

AS TO FORM OF REPORT, see YEARLY SUPREME COURT PRACTICE, 1938, pp. 1702, 1703; and FOR CASES, see DIGEST, Practice, pp. 568-570, Nos. 2252-2274.]

Case referred to :

- A (1) *Simpson v. Charrington & Co., Ltd.*, [1934] 1 K.B. 64; Digest Supp.; 103 L.J.K.B. 49; 150 L.T. 103; *on appeal*, [1935] A.C. 325; 104 L.J.K.B. 226; 152 L.T. 469.

B APPLICATION under R.S.C., Ord. 53D, r. 17, for the adoption by the court of the report of one of the panel of referees under the Landlord and Tenant Act, 1927. This application had by agreement and under the Landlord and Tenant Act, 1927, s. 21, been transferred from the Croydon County Court to the High Court for the purpose of obtaining an authoritative decision. The report had been made upon a reference made C upon an application for a new lease in accordance with the provisions of the above Act. The facts of the tenancy and the business are not material to the point here raised, namely, the sufficiency of the report. The material paragraphs of the report were as follow :

(14) After careful consideration of the whole of the evidence and D submissions thereon by both sides, and having had regard (i) to the various extraneous circumstances which affected the question of goodwill, and (ii) to the provisos contained in sect. 4 of the Act, I am satisfied that, as a direct result of the way and manner in which the plaintiff and his predecessors in title have carried on the said business, goodwill has E become attached to the said premises by reason whereof the premises could be let at a higher rent than they would realise had no such goodwill been attached thereto.

(15) I also find as facts that the plaintiff is a suitable tenant, and that the sum which could be awarded him under sect. 4 would not compensate F him if he removed to and carried on his trade or business in other premises : see sect. 5 (3).

(18) The rent actually paid (apart from the said premium of £1,000) under the said lease of 1895 was £100 per annum. This rent was increased after the alterations in 1925 to £220 per annum. And although the tenant G paid for the greater part of the said alterations, I am of opinion that the landlords are entitled in law to the benefit of these alterations at the expiration of this current lease, and thus are entitled to have the value of the said alterations taken into consideration when fixing the amount of the rent payable under the new lease. This I have done. I have H also had regard to the fact that premiums of £1,000 and £700 were paid by the lessees in 1895 and 1898 respectively as further consideration for the said leases.

(19) After consideration of the whole of the circumstances I am of opinion that a new lease should be granted to the plaintiff for a term of 10 years, determinable at the option of the tenant at the end of the

7th year, that the rent should be £400 per annum, and that the tie and the covenants should be the same as in the present lease so far as they are applicable. This rental of £400 per annum is to include the 2 lock-up shops which have been built on the site of the old livery stables. But if the tenant elects to deliver up possession of these 2 shops to the landlords at the expiration of this lease then the said rent of £400 for the new lease is to be reduced by the sum of £80 per annum, as was agreed at the end of the hearing. A

The last paragraph incorporated in the report the transcript of the shorthand notes of the evidence. It was contended that the report was insufficient as not finding the facts and not saying upon what findings of fact the conclusions of law were based. B

R. C. Vaughan for the applicant.

R. M. Wilson for the respondents.

DU PARCQ, J. : I think that the report must go back to the referee in order that he may set out generally his findings of fact, referring in each case to the evidence supporting those findings of fact and on which they are based, and stating also the inferences which he drew from those findings of fact. That will apply to his statement that he has considered the extraneous circumstances, and in particular I direct that he should state what extraneous circumstances he thought affected this case, and, as to those, he will of course state his findings of fact with the inferences which he drew therefrom in the manner I have just indicated. C D

With regard to the question of compensation, I think that he ought to say how he arrived at the figure which could be awarded under sect. 4 and what figure he thought should have been awarded, and on what he bases the view that that amount would not compensate the tenant if he removed to, and carried on his trade or business in, other premises. E

I think it is right that I should say this, and say it at this stage in these proceedings, with regard to the function of the judge in them, because it may be that there has been some misunderstanding about such function. In *Simpson v. Charrington & Co., Ltd.* (1), SCRUTTON, L.J., said, at p. 76 : F

It was argued before us that to some extent the county court judge was bound by the findings of the referee, at any rate on the findings of fact, which depend partly on the credibility of witnesses. In my opinion the relation of the county court judge to the referee for inquiry and report only is the same as that of a High Court judge to such a referee. A motion to vary the report is necessary if it is to be challenged. On such a motion each judge is at liberty to adopt, vary, or disregard a finding of the referee, or to hear fresh evidence on any point. This may make the procedure very expensive and dilatory and cause, as in the present case, the question whether there should be any and what fresh lease to be still undetermined 18 months after the old lease has expired. The judgment is to be of the tribunal, the county court judge [in this case it is the High Court judge], in a "cause or matter." G H

A little later he said, at p. 77 :

A finding as to goodwill, which turns partly on the correct construction of the statute, appears to be a mixed question of fact and law, and a proper subject for appeal.

It has not been questioned in the House of Lords that this is an accurate statement of the duty of the judge, and it seems to me that one has only to realise that to see that it is essential that the referee should put his report in a form which makes it possible and, so far as may be, not unreasonably difficult for the judge to review the referee's findings.

A What the referee has done in this case (and I am not to be taken in any way as blaming him, because I dare say he is following precedent) is to say that he had regard to the various extraneous circumstances—they are not specified—which affected the question of goodwill, and that he is satisfied :

B that, as a direct result of the way and manner in which the plaintiff and his predecessors in title have carried on the said business, goodwill has become attached to the said premises by reason whereof the premises could be let at a higher rent than they would realise had no such goodwill been attached thereto.

C He goes on to find as facts that the plaintiff was a good tenant and that the sum which could be awarded to him would not compensate him if he removed to, and carried on his trade or business in, other premises.

I need not go further into the report. The referee later adopts the transcript of the shorthand notes taken at the hearing as a note of the evidence, and makes the whole transcript—that is to say, the record of eight days' proceedings before him—part of his report. What that means

D is this. There come before me bare findings of fact ; not any statements as to the evidence which supported those findings. There is nothing to show me which evidence was accepted and which evidence was rejected except by a process of investigation, supposing I choose to read every word of these shorthand notes. It would put an intolerable strain on a judge (and I speak, of course, no less of the county court judge than I do of a judge of the High Court) to say that he must read through the whole of the transcript containing a great deal of unnecessary evidence—I would add, unnecessary and inadmissible evidence—in order to find

E out whether he would have arrived at the same conclusion as that at which the referee has arrived. That is not what is meant by the words “stand referred for inquiry and report” within the meaning of the Landlord and Tenant Act, 1927, s. 21 (2). The referee is not merely

F to make an award as would an arbitrator, or to give a verdict as would a jury. He must have reasons for his conclusions. It would be perfectly possible to have an inquiry without shorthand notes—there might be merely the note which a judge is in the habit of taking for his own assistance—but it would still be quite possible for the referee to put before the court a report which made it clear what evidence was before

G him, what facts he found proved, what inferences he drew from those facts and the result at which he arrived, having applied his view of the law.

H It must be quite evident that the legislature never intended that an inquiry by a referee should be very nearly fruitless in this sense, that, when he has made his inquiry, he should send to the court the shorthand

notes with his report and say: "Now come to your conclusion without knowing what led me to mine by reading these notes. You will be in as good a position as that in which I was, except that you will not see the witnesses. Now come to your decision." The object of the legislature clearly was that the time of the judge should be saved by getting a referee of experience to go over the ground, form his conclusions and report on them. If the report is in proper form, it will have the result that for the most part the judge will be able to say: "I agree with this," or "I am doubtful about this," or even sometimes "I certainly disagree with this."

In the present condition of the report in this case, the judge's task is hopeless. He must either begin all over again with no guidance from the referee which is of any value, or he must accept the report whole, which he is not entitled to do. I think it is desirable that in future the practice should be that which I have indicated, and I should be obliged, therefore, if the referee will observe that on this occasion. As I have already said, nothing which I have said must be taken as a criticism of the referee, who, I have no doubt, has followed the practice which has hitherto prevailed. I think it is a mistaken one.

Solicitors: *Sprinz & Sons* (for the applicant); *Winch & Winch* (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Re SINCLAIR'S LIFE POLICY.

[CHANCERY DIVISION (Farwell, J.), June 1, 1938.]

Insurance—Policy moneys—Child's endowment policy—Godchild of assured—Right of assured's estate—Law of Property Act, 1925 (c. 20), s. 56.

S. took out a policy of life insurance upon his own life for the benefit of his godchild. The proposal form was headed "Special Child's Endowment" and it was therein stated that the policy was to be for the benefit of the godchild, who was called "the nominee." In the event of the death of S., the policy was to be continued until maturity without further payment of premiums. In the event of the death of the nominee, all premiums paid were to be returned to S. or his estate. At the end of the endowment term, the policy moneys were to be paid to the nominee. The policy itself was in the same terms, and was expressed to be for a period of 17 years. Before the policy matured, S. died. Upon the maturity of the policy, the nominee being still an infant, the insurers paid the policy moneys into court, and this summons was taken out to determine whether such policy moneys were payable to the nominee or formed part of the estate of S. :—

Held: (i) the policy moneys formed part of the estate of S., as the circumstances were insufficient to prove any trust for the nominee.

(ii) the provisions of the Law of Property Act, 1925, s. 56, did not put the nominee in a position in which he could require the insurers to pay the policy moneys to him.

[EDITORIAL NOTE. Upon the first point, this decision follows the decision in *Re Engelbach's Estate* (1), holding that the facts were not sufficient to render the

money in the hands of S.'s executors money held on behalf of, or in trust for, the nominee. The second point was an attempt to bring the case within the provisions of the Law of Property Act, 1925, s. 56. This section has recently been discussed in cases concerning restrictive covenants, but it is here held not to apply in any way to the facts of this case.

A AS TO PERSONS ENTITLED TO POLICY MONEYS, see HALSBURY, Hailsham Edn., Vol. 18, p. 531, para. 842; and FOR CASES, see DIGEST, Vol. 29, p. 422, Nos. 3288, 3289.]

Cases referred to:

- (1) *Re Engelbach's Estate, Tibbetts v. Engelbach*, [1924] 2 Ch. 348; 29 Digest 422, 3288; 93 L.J. Ch. 616; 130 L.T. 401.
- B** (2) *Cleaver v. Mutual Reserve Fund Life Assn.*, [1892] 1 Q.B. 147; 29 Digest 369, 2969; 61 L.J.Q.B. 128; 66 L.T. 220.
- (3) *Re Clay's Policy of Assurance, Clay v. Earnshaw*, [1937] 2 All E.R. 548; Digest Supp.
- (4) *Re Ecclesiastical Comrs. for England's Conveyance*, [1936] Ch. 430; Digest Supp.; 105 L.J. Ch. 168; 155 L.T. 281.
- C** (5) *White v. Bijou Mansions, Ltd.*, [1938] Ch. 351 [1938] 1 All E.R. 546; Digest Supp.; 158 L.T. 338, *affg.*, [1937] 3 All E.R. 269.

ADJOURNED SUMMONS. The terms of the summons and the facts are fully set out in the judgment.

G. P. Slade for the plaintiff.

D *E. J. Heckscher* for the defendant.

FARWELL, J. : This was a summons which was taken out by Hervey Cecil Rowan Hopwood, an infant, by his father and next friend Hervey Hopwood, against the executors of James Graeme Sinclair, asking for
E the determination of the question whether certain moneys which were paid into court to the credit of this matter under a policy, by the Sun Life Assurance Co. of Canada, belong to, and are payable to, the applicant infant, or whether they form part of the estate of James Graeme Sinclair. James Sinclair's executors, of course, are here in a representative capacity,
F and they are bound, whatever their feelings may be in the matter, to take the strict line, and to claim that they are entitled, as executors, to this money which, if they are entitled to it, forms part of James Sinclair's estate.

The facts are few in number, and are these. The infant Hervey Cecil
G Rowan Hopwood was born on Apr. 13, 1919, at Nuwara Eliya, in Ceylon. Mr. Sinclair, who was then alive, was an old friend of the family, and he was asked by Mr. Hopwood, the father of the infant, whether he would act as one of the infant's godfathers. That seems to have pleased him, and he said he would. It was the first occasion on which he had acted in
H that capacity. On Nov. 1, 1919, Mr. Hopwood learned for the first time that Mr. Sinclair was proposing to take out a policy of insurance on his own life for the benefit of the infant child. He learned of it because on Nov. 1, 1919, Mr. Barlow, an insurance agent, telephoned to Mr. Hopwood asking him to confirm the full names of his son, and then told him that Mr. Sinclair had completed a proposal for a policy of insurance with the

Shanghai Life Assurance Co. for the benefit of his godchild. I may say here that the Shanghai Life Assurance Co. are now represented by the Sun Life Assurance Co. of Canada.

I must look at the proposal form and the policy in a moment, but it appears that Mr. Hopwood took occasion to thank Mr. Sinclair, when he saw him, for his generosity in making such provision for his boy. Mr. A Sinclair subsequently handed the policy to Mr. Hopwood, and told him to retain it, so that he, Mr. Hopwood, could in due course collect payment of the money. When Mr. Hopwood thanked him, Mr. Sinclair said that he was very pleased to be able to do it, as it would provide the child with a definite sum of money at a time when it would probably be most useful B to him. The policy remained in the custody of Mr. Hopwood until Mr. Sinclair's death. There is evidence that a somewhat similar conversation took place between the mother of the infant and Mr. Sinclair, in which she expressed her gratitude. On two occasions also, he said that he was very glad to be able to help the boy, and that the money would come C in very useful at a convenient time in his life, or words to that effect.

The form of the proposal, and the policy itself, are, of course, most relevant, and I must look at them. I might, before referring to them, say that the policy was actually taken out on Nov. 29, 1919. The proposal made was on Nov. 1, and the policy which was taken out would D mature in 17 years from Nov. 1, 1919—that is, the date of the proposal. Mr. Sinclair died before its maturity, on May 17, 1924, and on Nov. 1, 1936, the policy matured. The insurance company would, I gather, have paid the infant if he had not been an infant, but, in the circumstances, the insurance company did what they were entitled to do—they paid the E money into court under the Life Assurance Companies (Payment into Court) Act, and thereby got a complete discharge. The money is in court, and now the question I have to determine is whether the money is the money of the infant or that of the executors of Mr. Sinclair. The proposal form is headed: "Special Child's Endowment." Then the F particulars supplied are: "Name, address and occupation in full of applicant and the relationship to the child named in Question 6." The answer is, "James Graeme Sinclair," giving the address and occupation, and the relationship is stated to be "Godfather." Then follows the phrase "Place and date of birth of applicant." That is, of course, G Mr. Sinclair. Those are provided, together with the age of the applicant on the nearest birthday. Then I need not refer to the next two or three particulars supplied. The sixth is, "Name and age of child (to be referred to in the policy as 'the nominee')." The answer given is "Hervey Cecil Rowan Hopwood," and the date and place of his birth H are given. Then there occurs the phrase "Detail of policy desired: endowment for £750 to mature in 17 years," and the premium is stated:

In the event of the death of the under-signed applicant, the policy is to be continued to maturity, except as provided in provision B, without further payment of premiums. In the event of the death of the child named in Question 6, whether occurring before or after the death of the applicant, all premiums paid, together

with simple interest, shall be payable to the said applicant if living, or if not living, to his legal representatives and the policy shall cease to be in force.

Then there is a provision for participating in profits, and then (d) provides :

- A The policy shall, at the termination of the endowment period, be payable either to the applicant signing the application, or the child named in Question 6.

Then the question is asked :

Is the policy to be payable at the end of the endowment term to the applicant signing this application, or to the child named in Question 6 ?

- B In the answer, the word " applicant " is struck out, and the words " to the child " are put in. There is nothing else in the proposal form, I think, to which I need make reference.

When I turn to the policy itself, it provides :

- C Know all men by these presents that the Shanghai Life Insurance Co., Ltd., Shanghai, China, relying upon the statements contained in the written and printed application for this policy and on the medical report, and in consideration of various other things, promises to pay on Nov. 1 in the year 1936 to the assured's godson Hervey Cecil Rowan Hopwood (hereinafter referred to as " the nominee ") the sum of £750 sterling together with any profits which may be apportioned to this policy. In the event of the death of the nominee before the maturity of this policy, whether before or after the death of the assured, the company will return to the said assured if living, otherwise to his executors, administrators or assigns, the gross amount of D premiums paid. In the event of the death of the assured before the maturity of this policy, provided same is then in force, no further premiums except any unpaid portion of the premiums for the then current policy year, shall be payable thereunder, but the policy shall continue.

Then the conditions, so far as they are relevant, provide :

- E That the policy and the application therefor, together with the statements made in connection therewith by the assured to the medical officer acting on behalf of the company constitute the entire contract between the parties hereto.

Then there is a provision that the company shall incur no liability under the policy until the first premium is paid and the policy delivered to the assured during his continued good health. Then there is a provision as F to the premiums to which I do not think I need refer, and there is an option provided under which, after three full year's premiums shall have been paid, the assured may, upon giving written notice to the company at its head office within two months after any default in payment of premium, but not later, surrender the policy to the company and receive G its cash value or a non-participating paid-up assurance. I do not think that there is anything else in the policy to which I need refer.

- H The claim to these policy moneys on behalf of the infant is put in two ways. It is said, first of all, that the effect of this insurance by Mr. Sinclair on behalf of the infant, in all the circumstances under which it was done, having regard to the terms of the proposal and the policy itself, is sufficient to establish a trust in favour of the infant. That is to say, it is said that Mr. Sinclair did declare himself a trustee of the policy moneys, if and when he received them, for the benefit of the infant, and that the infant is therefore now entitled to claim as against the legal personal representatives of Mr. Sinclair that they hold the same

on trust for him, the infant. In my judgment, the circumstances in this case are not sufficient to enable me to say that any such trust has been proved. There is no doubt, I think, on the evidence, that Mr. Sinclair was desirous of making some sort of provision for his godson, and that he did contemplate doing it by means of this policy on his life, but that is a very long way from saying that he thereby constituted himself a trustee A of the moneys which would be paid under the policy. I think that the evidence falls short of that which would be necessary to constitute such a trust.

I have been referred to two cases which are not dissimilar to this on the question of a policy taken out for the benefit of another person. One B of them is the decision of ROMER, J., as he then was, in *Re Englebach's Estate, Tibbetts v. Englebach* (1). In that decision of ROMER, J., the headnote is :

An endowment policy taken out by a person in his own name for the benefit of his daughter, to mature on her attaining a specified age, creates no legal estate in the daughter, and she cannot sue on the contract, nor does the assured thereby constitute himself a trustee for his daughter of the policy and of the moneys payable thereunder. If, therefore, the assured dies before the policy matures, the policy C moneys belong, not to the daughter, but to the estate of the assured, and must be paid to his executors.

In that case, ROMER, J., followed the decision in *Cleaver v. Mutual Reserve D Fund Life Assn.* (2). Of course, the facts in the present case are not exactly similar to those in the case before ROMER, J. It seems to me that, applying the principle of that decision, I am bound to hold that there is not here enough to entitle the infant to succeed on the ground that a trust was created in his favour.

The other decision, *Re Clay's Policy of Assurance, Clay v. Earnshaw* (3), E is a recent decision of my own. The real question, or one of the main questions, to be considered there was whether an adopted child came within the provisions of the Married Women's Property Act, 1882, s. 11. I held that an adopted child did not come within the word "children" F as used in that section of that Act, and on that footing, and following the decision of ROMER, J., in *Re Englebach's Estate* (1), I held that the infant child was not entitled to succeed.

In the present case, I can see nothing which would have obliged Mr. Sinclair, for instance, to keep up the policy. Had he allowed the G policy to lapse, by failing to pay the premium at any time, I can see no possible ground upon which the infant, or anyone on behalf of the infant, would have been entitled to sue him for damages, or require him to continue to keep up the policy. Indeed, had Mr. Sinclair changed his mind and surrendered the policy, and received the money in consideration H of the surrender—as, so far as I can see, he was amply entitled to do—that money would have been his money, and the infant would have had no sort of claim to it. Having regard to those circumstances, it seems to me to be impossible to say that there was any such trust as would render the money in the hands of Mr. Sinclair's executors

trust money on behalf of the infant. I regret to have to come to that conclusion, because I have no doubt that, had Mr. Sinclair lived till the policy matured, the money would in fact have got into the possession of the infant, if Mr. Sinclair received it. Although I have no doubt that Mr. Sinclair did intend, by this method of taking out a policy, to benefit the infant, that is not enough to justify me in saying that the executors, who must do their duty to their own estate by protecting their own beneficiaries, and are therefore bound to challenge this, are under any obligation to hand it over to the infant, and, accordingly, on the question of it being a trust, in my judgment, this application fails.

The other question is whether this comes within the Law of Property Act, 1925, s. 56. That section provides :

(1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.

It is material to notice that the word "property" is defined in the Act as including "any thing in action and any interest in real or personal property." It is quite obvious that that section, if it were read quite literally, giving the words their ordinary, wide meaning, would have

an overreaching effect, which was never the intention, and could not have been the intention, of the legislature. As has been pointed out by LUXMOORE, J., in *Re Ecclesiastical Comrs. for England's Conveyance* (4), and by SIMONDS, J., in *White v. Bijou Mansions, Ltd.* (5), and by SIR WILFRID GREENE, M.R., in the latter case in the Court

of Appeal, some reasonable limiting construction must be put upon this section. It is said that in this case the infant is entitled to take advantage of the section because he is a person who takes an immediate or other interest in land or other property, although he may not be named as a party to the conveyance or other instru-

ment. It is said here that the infant, although not one of the contracting parties, and therefore not one of the parties who could enforce the covenant—that is to say, as against the insurance company or as against Mr. Sinclair—nevertheless is a person who gets a benefit under the contract, because he is the person who is named as the person to whom

the money is to be paid. In my judgment, whatever the section does mean, and to whatever form of contract it is to apply, it does not apply in this case. The infant is no doubt a person named in the policy as a person to whom the money may be paid, but, in my judgment, once one has got rid of the question of trust, there is nothing to make it obligatory

upon Mr. Sinclair to see that the money was paid to the infant, or to disentitle him from claiming the money, or, as I said, from allowing the policy to lapse, or from surrendering the policy and taking its surrender value. Although no doubt the infant is a person who might receive the money if Mr. Sinclair had lived till the policy came to maturity, or if Mr. Sinclair's executors made no claim to it, he is not a person who, as

between himself and Mr. Sinclair, or Mr. Sinclair's executors, is entitled to require payment of the money to him. This section cannot, in my judgment, put him in a position where he could require the policy moneys to be paid to him by the insurance company, notwithstanding that Mr. Sinclair, or Mr. Sinclair's executors, made a claim to the money. In those circumstances, I do not think that this section assists the applicant, and, in my judgment, this application fails, and must be dismissed.

Summons dismissed. Costs as between solicitor and client to be paid out of the policy moneys.

Solicitors: *Bartlett & Gregory* (for the plaintiff); *Summerhays & Co.* (for the defendant).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

R. v. COLLINS.

[COURT OF CRIMINAL APPEAL (Branson, Humphreys and du Parcq, JJ.),
May 10, 1938.]

Criminal Law—Indictable offence—Plea of guilty before justices—Witnesses bound over conditionally—Plea of not guilty at trial—Depositions read as only evidence for prosecution—No reference in summing up to plea of not guilty—Criminal Justice Act, 1925 (c. 86), s. 13.

The appellant was charged before justices with having broken into the pavilion of a bowling club and stolen 11s. After the evidence for the prosecution he reserved his defence. The justices then decided to commit him for trial, whereupon he said that he pleaded guilty, and that it would be unnecessary to call witnesses at the trial. The justices committed him for trial, and, acting under the Criminal Justice Act, 1925, s. 13, bound the witnesses over to attend the trial conditionally. At the trial at quarter sessions the appellant pleaded not guilty, and asked that his trial might be postponed till the next session, in order that he might prove an alibi. The chairman refused the application, and then the depositions, after being first proved in accordance with the Act, were read to the jury, and upon these depositions alone they were invited to convict, and did convict, the appellant. Further, the chairman, in his summing up to the jury, reminded them that the appellant had pleaded guilty before the justices but failed to remind them that he had pleaded not guilty at the trial and gave no further direction to the jury:—

HELD: (i) though evidence offered by depositions alone is undesirable, this course is not contrary to the language of the Act, and, on this alone, the court could not quash the conviction.

(ii) the case was one requiring a careful direction to the jury, but here there was no summing up at all, and for this reason the conviction should be quashed.

[EDITORIAL NOTE. Although the prisoner pleads not guilty at the trial at assizes or quarter sessions, the case may proceed upon the depositions only; but, if this course is adopted, there must be a most careful presentation of the case to the jury, fully explaining the law on the matter and the onus of proof. The general principle is that, if the jury are to give a verdict, they are entitled both to see and hear the witnesses.

AS TO WHEN DEPOSITIONS MAY BE READ, see HALSBURY, Hailsham Edn., Vol. 9, pp. 165, 166, para. 234; and FOR CASES, see DIGEST, Vol. 14, pp. 270, 271, Nos. 2770-2780.]

A APPEAL by leave against a conviction for breaking into the pavilion of a bowling club and stealing 11s. at the Chester County Sessions, held at Knutsford before the deputy chairman. The sentence passed was one of 18 months' imprisonment with hard labour.

Daly Lewis for the appellant.

J. F. Marnan for the Crown.

B HUMPHREYS, J. [delivering the judgment of the court]: What happened in the case was this. When the charge had been made against the appellant, and he had been arrested upon it, he made a statement to the policeman on his arrest, admitting that charge. He was brought before the justices, who decided to commit him for trial. Before doing
C so, they administered the usual statutory caution, and in answer to it the accused said the words which one comes across so often, but which generally mean nothing: "I reserve my defence." Then, as Mr. Daly Lewis has said, though it does not appear on the document itself, the justices probably informed the appellant that they proposed
D to commit him for trial, and asked him if he wished any of the witnesses for the prosecution to attend at the trial, and the accused said:

I do not want to cause any unnecessary trouble and it will be unnecessary for the witnesses to appear as I plead guilty to the charge.

E In the opinion of this court, a more unequivocal plea of guilty could not be found, and, in those circumstances, the justices acted, as they had a perfect right to do, under the Criminal Justice Act, 1925, s. 13, which provides:

F (1) Where any person charged before examining justices with an indictable offence is committed for trial and it appears to the justices, after taking into account anything which may be said with reference thereto by the accused or the prosecutor, that the attendance at the trial of any witness who has been examined before them is unnecessary by reason of anything contained in any statement by the accused, or of the accused having pleaded guilty to the charge or of the evidence of the witness being merely of a formal nature, the justices shall, if the witness has not already been bound over, bind him over to attend the trial conditionally

G That is to say, they shall bind him over to appear if he receives notice to appear at the sessions or assizes. The section goes on to provide that, after the accused has been committed for trial, he should be informed that, if he desires witnesses to appear at the trial, he is entitled to have them. The section continues that, upon being committed for trial, the deposition of a witness taken at the police court, after it has been
H proved in accordance with the provisions of the Act, which require certain modes of proof, shall be read as evidence on the trial of the accused.

No criticism can properly be levelled at the procedure of the justices, who in this case bound over all the witnesses conditionally, the accused having clearly stated his intention of pleading guilty. So it was that, when, at the trial on Apr. 4, the accused was put up to plead, there were

no witnesses present except one, who was a police officer. At the trial, the accused, no doubt to the surprise of everybody in court, pleaded not guilty, and very soon made it apparent that he wanted his trial postponed to the next sessions, in order to prove an alibi. It is quite likely, as Mr. Marnam has said, that that request seemed to the chairman, having regard to the accused's previous statement, to be not a *bona fide* request at all. Nevertheless, it was a request which the accused had a perfect right to make, and no possible injustice would have been done if it had been granted. He would have remained in custody, the witnesses for the prosecution would have been notified, and, if the accused had given the names of the witnesses he wished to call, they would be called if they could be found, and the trial would have taken place in the ordinary course, in the way in which one is accustomed to try criminal cases in this country. The chairman refused the application of the accused, and then what happened was that, upon the depositions being proved in accordance with the Act, the depositions were read to the jury. That was the case, and, upon those statements, and without seeing or hearing a single witness in the witness-box, the jury were invited to convict, and did convict, the accused.

It is quite true that the language of sect. 13 appears, at all events, to contain no words which render such proceedings improper, since, dealing with the deposition of each witness, the section provides that the deposition may be read as evidence. It seems to follow that, upon the conditions laid down in the section being complied with, the depositions of all the witnesses may be read to the jury, but this court is quite satisfied that such a course as this was not intended by the statute and that it could never have been contemplated by Parliament. The result of it was to deprive the jury of the inestimable advantage—the one great advantage to which those who uphold the system of trial by a jury always point—of the opportunity, not only of seeing the witnesses who give evidence, and of hearing what they have to say, but also of observing their demeanour in the witness-box, and of themselves exercising the right, if they chose, to ask the witnesses questions, and, further, of hearing the witnesses cross-examined by the accused, if he so desires. Nothing of the sort took place here.

In our view, it was never contemplated by this Act, which was passed simply with the object of saving time and expense in cases where no possible injustice could be done to anybody, that it should be used to abolish in such a case as this the ordinary methods of trial by jury. It may well happen in another case, if this procedure is allowed, that the accused himself may go into the witness-box and may call witnesses before the jury in support of his defence, and it is difficult to imagine anything more embarrassing for a jury than to be asked to decide upon such a serious matter as the conviction of a fellow-being when they have, on the one hand, merely the sworn statements of persons they have never seen or heard, and, on the other hand, evidence given before them in

the witness-box. In our opinion, it is eminently undesirable that in future such a course as this be followed, and it is with a view to assisting those who may have to try these cases that we express the view given to-day.

In our opinion, in cases of a plea of not guilty, where the accused has pleaded guilty in the court below, the court ought to adjourn the case until some day when the witnesses who have been bound over conditionally can be brought together. If they can be brought together and the case tried at the same sessions or assize, so much the better, while if it involves the accused remaining in custody for a substantially longer period, no hardship is done to anyone, inasmuch as the accused has brought his prolonged incarceration upon himself, by his own failure to make up his mind whether he is guilty or not guilty, by saying, on one day, "I do not want witnesses called," and, on another day, "I do want to call witnesses." In this case, it would have been far better if the chairman had exercised what is no doubt a discretionary matter in favour of the accused, and had granted an adjournment of the case, when notice could have been given to at least those witnesses for the prosecution who cannot be described as formal witnesses, in order that, on the trial, the prosecution could prove the facts of the case.

The court has already said that what was done here cannot be said to be contrary to the language of the Act, and therefore on that matter alone this court would not find itself in a position to quash the conviction. It is only necessary to deal with the ground upon which leave to appeal was granted, and which has been argued to-day—that is, the question of the summing up in this particular case. If ever there was a case which required a careful direction from the presiding judge, it was surely this case, where the jury had not had the advantage of hearing the witnesses, but had merely had statements of the witnesses read to them. The chairman thought that it was only necessary to remind the jury that the appellant had pleaded guilty when he was before the magistrates, and thought it was unnecessary to remind them that he had pleaded not guilty at the trial. Not one word, however, was said about the onus of proof, or the law on the matter, in these few lines which have been dignified with the term "summing up." In the opinion of this court, it was no summing up at all. Every accused person has the right to have his case presented to the jury by the presiding judge. This appeal is allowed, and the conviction is quashed.

Appeal allowed and conviction quashed.

Solicitors : Registrar of the Court of Criminal Appeal (for the appellant) ; Haslewood, Hare & Co., agents for Lake, New & Ellis, Stockport (for the Crown).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

R. v. HARRISON.

R. v. WARD.

R. v. WALLIS.

R. v. GOODING.

[COURT OF CRIMINAL APPEAL (Branson, Humphreys and du Parcq, JJ.),
May 10, 1938.]

Criminal Law—Unlawful carnal knowledge—Girl under 16—Reasonable grounds for belief as to age—Actual belief as to age—Criminal Law Amendment Act, 1922 (c. 56), s. 2—Criminal Law Amendment Act, 1928 (c. 42), s. 1. A

Upon the trial of four youths all under the age of 23 years upon a charge of having had carnal knowledge of a girl under 16 years of age, a doctor and a police officer giving evidence for the prosecution stated that the girl appeared to be over 16 years of age, and the jury found that the youths were ignorant of the law and gave no thought to the age of the girl at the time of the offence. The jury were directed that the point was whether the youths' minds were directed to the question of the girl's age :— B

HELD : it is necessary in such a case for the defence to prove that the prisoners had reasonable cause to believe, and did in fact believe, that the girl was over 16 years of age. The prisoners were therefore rightly convicted. C

R. v. Banks (1) followed.

[EDITORIAL NOTE.] The court here have reaffirmed the decision in *R. v. Banks* (1). We understand that an application to have the matter reviewed in the House of Lords has been refused. D

AS TO OFFENCES AGAINST GIRLS UNDER 16, see HALSBURY, Hailsham Edn., Vol. 9, pp. 481, 482, para. 826; and FOR CASES, see DIGEST, Vol. 15, pp. 846-848, Nos. 9308-9323.]

Case referred to :

(1) *R. v. Banks*, [1916] 2 K.B. 621; 15 Digest 848, 9323; 85 L.J.K.B. 1657; 115 L.T. 457; 12 Cr. App. Rep. 74. E

APPEALS from convictions at the Central Criminal Court.

The four appellants, who were all youths between the ages of 16 and 18 years, were convicted at the Central Criminal Court of having had carnal knowledge of a girl under the age of 16 years, and they were each bound over. F

The evidence was to the following effect. The girl herself stated that the prisoners had never asked her her age. A doctor called by the prosecution and a police officer both stated that the girl seemed to be over 16. Each of the appellants gave evidence that he thought the girl was over 16 years, but that at the time of the offence he did not trouble about her age one way or the other. G

The jury were directed that the point was whether these youths' minds were directed to the question whether the girl was 16 or over. The jury found that the youths were ignorant of the law and gave no thought at all to the age of the girl at the time of the offence. H

A. Crew for the appellants.

G. G. Raphael for the Crown.

BRANSON, J. [delivering the judgment of the court]: The question which this court is asked to consider is whether the appellants can bring

themselves within the proviso to the Criminal Law Amendment Act, 1922, s. 2, as amended by the Criminal Law Amendment Act, 1928, s. 1, which says :

Reasonable cause to believe that a girl was of or above the age of 16 years shall not be a defence to a charge under the Criminal Law Amendment Act, 1885, ss. 5, 6, . . . provided that in the case of a man of 23 years of age or under the presence of reasonable cause to believe that the girl was over the age of 16 years shall be a valid defence on the first occasion on which he is charged with an offence under this section.

These youths were under the age of 23 years, and sought to bring themselves within that proviso. The evidence which they gave, however, made it quite clear that, though in fact there might have been evidence that they had a reasonable cause to believe that the girl was over the age of 16 years, none of them had in fact directed his mind to the question at all, and none of them in fact could say that he believed the girl was over 16 years of age.

What has been decided in *R. v. Banks* (1) does not help the accused. AVORY, J., in the judgment of the court in that case said at p. 622 :

. . . the phrase " had reasonable cause to believe " means " had reasonable cause to believe, and did in fact believe," i.e., that the person charged believed on reasonable grounds that the girl was at least 16 years of age.

His Honour JUDGE BEAZLEY in summing up to the jury put the law to them perfectly clearly in the language of *R. v. Banks* (1).

In our opinion, not only are we bound by the decision of *R. v. Banks* (1), but we all think, with all respect to our predecessors, that that decision was correct. The result is that this appeal must be dismissed.

Appeal dismissed.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellants) ;
Director of Public Prosecutions (for the Crown).

[Reported by REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

F W. J. TATEM, LTD. v. GAMBOA.

[KING'S BENCH DIVISION (Goddard, J.), **May 27, 30, 1938.**]

Contract—Impossibility of performance—Frustration—Charterparty—Seizure of ship by forces not recognised as belligerents.

By a charterparty in " Baltimore " form, dated June 25, 1937, it was agreed between the plaintiffs, the owners of the *Molton*, and the defendant, the charterer, that the ship should be hired for a period of 30 days from the date of delivery at Santander at the rate of £250 per day, which was about three times the market rate then prevailing for vessels of that size not trading with Spanish ports. The hire was to be payable until the vessel was returned to the owners at a selected port in France. The object of the transaction was the evacuation of civilian refugees from Santander to French Bay ports. The hire for the 30 days was paid in advance, in accordance with the charterparty, and the ship was taken over by the charterer on July 1. The *Molton* made one trip with refugees to France, and returned for more. On July 14, in endeavouring to enter the port, she was stopped within territorial waters by a nationalist cruiser, and taken to Bilbao, where she was detained

until Sept. 9. She was then allowed to go, and arrived at Bordeaux on Sept. 11. In accordance with the charterparty, various arrangements had to be made before re-delivery to the owners, which was alleged in the points of claim to have been made on Sept. 16. The Spanish nationalist forces have never been recognised as belligerents, and they have not established any prize court. It was alleged that the defendant failed to pay hire in respect of the period from July 31 to Sept. 16. The defence was that the contract was frustrated as from July 14, the date the vessel was seized by the nationalists, and that from that date the contract became impossible of performance. To this contention the plaintiffs replied that the risk of capture was known to the parties when the charterparty was entered into, and that consequently the doctrine of frustration did not arise:—

HELD: the further performance of the contract became impossible upon the seizure of the ship, and the doctrine of frustration applied.

[EDITORIAL NOTE.] The question here is whether the doctrine of frustration is dependent upon the parties having had the matter giving rise to the supervening impossibility of performance in contemplation at the time of making the contract, or whether it is dependent upon their having made express provision in the contract for the contingency. The question is decided in favour of the latter view. The case also considers the position arising upon the seizure of a ship by forces which have not been accorded belligerent rights and have not established a proper prize court for the condemnation or release of seized ships.

AS TO FRUSTRATION, see HALSBURY, Hailsham Edn., Vol. 7, pp. 215-217, para. 296; and FOR CASES, see DIGEST, Vol. 12, pp. 386-392, Nos. 3175-3200.]

Cases referred to:

- (1) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 12 Digest 371, 3093; 32 L.J.Q.B. 164; 8 L.T. 356.
- (2) *Jackson v. Union Marine Insurance Co., Ltd.* (1874), L.R. 10 C.P. 125; 12 Digest 386, 3175; 44 L.J.C.P. 27; 31 L.T. 789; *affg.* (1873), L.R. 8 C.P. 572.
- (3) *Krell v. Henry*, [1903] 2 K.B. 740; 12 Digest 385, 3168; 72 L.J.K.B. 794; 89 L.T. 328; *affg.* (1902), 18 T.L.R. 823.
- (4) *Clark v. Lindsay* (1903), 88 L.T. 198; 12 Digest 369, 3080.
- (5) *Herne Bay Steam Boat Co. v. Hutton*, [1903] 2 K.B. 683; 12 Digest 385, 3170; 72 L.J.K.B. 879; 89 L.T. 422.
- (6) *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 12 Digest 390, 3194; 85 L.J.K.B. 1389; *sub nom. Re F. A. Tamplin S.S. Co., Ltd., & Anglo-Mexican Petroleum Products Co., Ltd.*, 115 L.T. 315; *affg.*, [1916] 1 K.B. 485; [1915] 3 K.B. 668.
- (7) *Larrinaga & Co., Ltd. v. Société Franco-Américaine des Phosphates de Médulla, Paris* (1923), 39 T.L.R. 316; 12 Digest 389, 3189.
- (8) *Countess of Warwick S.S. Co. v. Nickel Société Anonyme, Anglo-Northern Trading Co. v. Emlyn Jones & Williams*, [1918] 1 K.B. 372; 12 Digest 390, 3195; 87 L.J.K.B. 309; 118 L.T. 196; *affg.*, 33 T.L.R. 291; *affg.*, [1917] 2 K.B. 78.
- (9) *Bank Line, Ltd. v. Capel (A.) & Co.*, [1919] A.C. 435; 12 Digest 391, 3198; 88 L.J.K.B. 211; 120 L.T. 129.
- (10) *Nickoll & Knight v. Ashton, Edridge & Co.*, [1901] 2 K.B. 126; 12 Digest 382, 3153; 70 L.J.K.B. 600; 84 L.T. 804.
- (11) *Hirji Mulji v. Cheong Yue S.S. Co.*, [1926] A.C. 497; Digest Supp.; 95 L.J.P.C. 121; 134 L.T. 737.
- (12) *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] A.C. 524; Digest Supp.; 104 L.J.P.C. 88; 153 L.T. 425.
- (13) *Re Comptoir Commercial Anversois & Power, Son & Co.*, [1920] 1 K.B. 868; 12 Digest 396, 3218; 89 L.J.K.B. 849; 122 L.T. 567.

ACTION upon a charterparty in "Baltime" form claiming hire. *Sir Robert Aske, K.C., and C. T. Miller* for the plaintiffs.

H. U. Willink, K.C., and W. L. McNair for the defendant.

Willink, K.C. : It is not correct to say that the doctrine of frustration does not apply if the cause of the contract becoming impossible of performance is in contemplation of the parties. The question is what the parties, as fair and reasonable men, ought to have contemplated and provided for. In this case, it is not reasonable to hold that charterers could agree to pay at the rate of £91,000 per annum while the vessel was detained, so that they could not re-deliver to the owners. In view of the very high freight, the owners should take the risk of capture. [Counsel referred to *SCRUTTON ON CHARTERPARTIES*, 13th Edn., p. 110, *Nickoll & Knight v. Ashton, Edridge & Co.* (10), *Taylor v. Caldwell* (1), *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (6), *Anglo-Northern Trading Co. v. Emlyn Jones & Williams* (8), *Hirji Mulji v. Cheong Yue S.S. Co* (11), *Countess of Warwick S.S. Co. v. Nickel Société Anonyme* (8), and *Larrinaga & Co., Ltd. v. Société Franco-Américaine des Phosphates de Médulla, Paris* (7).]

Aske, K.C. : There is here no room for any question of frustration. Both parties knew that there was a risk of capture. The cases which arose during the Great War, when the government requisitioned ships, are different from the present case. There was no indication that the British government was going to requisition a particular ship. [Counsel referred to *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.* (12) and *Re Comptoir Commercial Anversoïs & Power, Son & Co.* (13).]

GODDARD, J. : In June, 1937, Gamboa, who was acting for the republican government of Spain, was chartering ships for the purpose of evacuating the civil population from such of the northern ports of Spain as still remained in government hands during the civil war and conveying them to a port, or ports, in France. By this charterparty, it was provided that the ship should be chartered for a month, that she should be delivered at Santander, and that the limits of the charterparty were the North Spain government ports and French bay ports. It was expressly stated that the object of the charterparty was the evacuation of civil population from North Spain. It was then also provided :

Charterers at port of delivery and owners at port of re-delivery to take over and pay for all coal remaining in steamer's bunkers at 30s. per ton. Steamer to be re-delivered with a sufficient quantity of bunkers on board to return to the Bristol Channel. Charterers to pay hire at the rate of £250 British sterling per day, commencing in accordance with cl. 1, until her re-delivery to owners.

It is upon those words that the case principally turns. It is then provided that she should be re-delivered at a port at charterers' option in North France :

Charterers to give owners not less than ten days' notice at which port and on about which day steamer will be re-delivered.

It was further provided :

Should steamer be lost or missing, hire to cease from the date when she was

lost. If date of loss cannot be ascertained, half-hire to be paid from the date steamer was last reported until the calculated date of arrival at destination. Hire paid in advance and not earned to be returned to charterers.

There is only one other clause to which I need refer, and that is cl. 26 :

Steamer must not carry arms, munitions, contraband of war or any description of cargo prohibited by the British government, or naval or military persons. Steamer to comply with any Acts and/or regulations of the British government which are in force during the currency of this charter, regarding navigation and shipment of cargoes and no deduction to be made from hire owing to the steamer having to comply with any such Acts and/or regulations and/or orders or directions from British naval authorities or any British naval vessel. A

What happened as giving rise to this action may be briefly stated. The ship sailed, and duly arrived at Santander by the contract date. B She made one voyage, evacuating refugees and conveying them to France. She arrived off Santander on July 9, but refrained from entering the port because of the threat of hostile action from an insurgent battle-ship or cruiser, which had by this time appeared off the port. On July 14 she was seized inside territorial waters. She was taken to Bilbao, C and there she remained until Sept. 7, when the port authorities released her. Meanwhile, on July 18, the charterers had given orders that she should proceed to Bordeaux, but she was unable to do so as she had already been seized by General Franco. On July 29 notice of abandonment was given to the underwriters, to take effect at the end of the charter. D It is a notice given under cl. 10 of the policy, which may be said to be a notice given without prejudice. The notice of abandonment did not become effective until six months had elapsed. If during that time the ship had been returned, she was not to be treated as a constructive total loss, and the underwriters would have to pay certain E charges. If at the end of six months she had not been restored, then she was to be regarded as a constructive total loss, and, in giving the six months' notice to the underwriters, I do not think that the ship-owners in any way prejudice or alter their position. On Aug. 18, the defendant wrote to the plaintiffs declining to have any further concern F with this steamer, which was still detained by the insurgents.

On Sept. 7 her master was informed by the port authorities at Bilbao that the ship and crew were released. She sailed on Sept. 9, and on Sept. 11 she went to Bordeaux, apparently as being the place for which the master had last received any order from the charterers. She bunkered G at Bordeaux on Sept. 13. She dry-docked on Sept. 14, and remained in dry-dock till the evening of Sept. 15, having her bottom cleaned. On Sept. 16 she sailed, and she sailed back to Bilbao, because in fact the owners had managed to re-charter her for the purpose of taking in a cargo of ore at Bilbao. The claim is brought because the owners say H that the ship was not re-delivered to them until she came to Bordeaux in September. If the owners are entitled to hire, it seems to me that they would be entitled to hire down to Sept. 11 when the ship arrived at Bordeaux. It is true that it was not a North of France port, but they re-took possession of her there. They re-chartered her. I do not think

that they could in any event claim hire for a date later than Sept. 11. In addition to that, there are two small sums, which I mention so that, if this case goes higher, the Court of Appeal will be able to deal with them. There are some small items, amounting to £22 7s. 8d., which it is not disputed the plaintiffs are entitled to recover in any event, and

A there is a claim for the difference in the cost of bunkers, as the plaintiffs had to buy bunkers abroad and the defendant did not, and had to pay more than the 30s. per ton provided in the contract. It is agreed that, if the plaintiffs are entitled to succeed, they would be entitled to £70 in respect of bunkers.

B One other fact that I ought to mention is this. It was proved before me that the rate of hire in this case—£250 a day—was about three times the market rate of hire prevailing for ships of that size on time charter if trading with Spanish ports had been excluded. It is quite obvious that the plaintiffs were receiving a very large consideration because of

C the hazardous nature of the enterprise in which this ship was to be engaged.

I think that, for the purpose of deciding this case, one has to consider circumstances existing at the time, and the risks in addition to the ordinary perils of the sea to which the ship was exposed. It has been

D proved that, on the insurgents' side of the civil war in Spain, General Franco's ships had been seizing the ships of various nations. I have no evidence before me, and I should not hold without evidence, that what I may call any lawful blockade had been established. I doubt whether any lawful blockade could be established. I do not know of any doctrine

E in international law which enables one side in a civil war to establish a blockade, or to declare a blockade, unless, of course, the other governments recognise them, and grant belligerent rights. There are two things which I think must be necessary before a legal blockade can be established, without pretending that what I am saying is exhaustive.

F First, it must be established by a belligerent, and not merely in the course of civil war—that is, it must be established by a person or a side which has been granted belligerent rights—and, secondly, it must be an effective blockade. This country, and perhaps most other civilised countries, has always refused to recognise as a blockade an ineffective

G blockade—that is to say, a blockade which is not carried out by the requisite number of ships, so that people may know the exact extent of the blockade. It does not recognise as a blockade a mere paper blockade, which means that a ship may cruise up and down and seize anything it can seize in the course of its voyage, although no effective

H blockade at any particular port or coastline is established. So far as the evidence here goes, and so far as anything I have seen in the case would indicate, the only thing that had happened at this time was that, along the whole of the coastline of Spain, General Franco had at his disposal a ship of war, the *Almirante Cervera*, and some armed trawlers. I do not think that it could be maintained—certainly I have not enough

evidence to say it could be maintained—that, even if this country had recognised General Franco as a belligerent, there was anything in the shape of an effective blockade on the north coast of Spain, although no doubt the ships which were cruising about would try to seize anything which they thought was engaged in any un-neutral service.

For the defendants, it is said that, as soon as this ship was seized, A there was a frustration of the contract, that the contract then became impossible of performance, and therefore that all rights and liabilities under the contract ceased. They admit they cannot re-claim any part of the hire paid in advance, but they contend that they are not liable B to pay any hire in respect of the time during which the ship was in the hands of the insurgents. Sir Robert Aske has, on the other hand, argued, and argued very strongly, that the enterprise in this case cannot be said to have been frustrated, because both sides must be taken to have contemplated, when they made this contract, that the ship might be seized, C that the risk of seizure was plain and obvious to everybody, and that it must be taken that that was one of the risks—and a risk which was much more than an ordinary risk of perils of the sea, for instance—which this ship was running. He does not quarrel for a moment with the fact—in fact, I think he prays it in aid—that the rate of hire shows that this must have been in the contemplation of the parties. In D the view I take of the case, it is not necessary that I should decide, and I do not know that the law entitles me to decide, what was actually in the minds of the parties, because, if it did, I should have to hear evidence about negotiations which took place before a written document was entered into. However, if I had to decide, merely looking at the E surrounding circumstances, I do not feel by any means convinced that I should decide that this possibility of capture and detention for any length of time was in the minds of the parties. It is true that they contemplated that the ship might be lost. It is true that they contemplated, I think, that the ship, in view of the service in which she F was engaged, might be sunk, either by a mine or by other enemy action, either from the land or from the sea, and, indeed, they have provided for that, by providing that the hire is to cease, and advance hire to be returned, for any period of the charter, if the ship is lost. With regard to the question of capture, or rather seizure—I think that one G should avoid the word “capture” in this case, because I think that “capture” implies legal capture, that is, seizure followed by condemnation. I do not know that I can hold as a matter of fact, or that it is open to me to hear evidence about it, that that must have been in the contemplation of the parties. If there had been a war in existence H between two opposing states, and a blockade had been proclaimed (whether it was an effective or any other blockade), or if the ship during the course of the war was engaged in service of any sort which could be regarded, or could be liable to be regarded, as un-neutral, such as the carrying of contraband, and possibly the evacuating of civil population from

a beleaguered town, which, of course, has the effect of making the capture of a town more difficult, there being fewer mouths to feed—if that sort of thing had happened during the course of a war in which the parties were recognised belligerents, the ship would have been taken before a prize court, and then, if condemned as good and lawful prize, the condemnation would have dated back to the date of seizure, and the ship would have been lost as from a certain date. There really would be no difficulty then in bringing into effect the clause in the charterparty which deals with the ship being lost.

- In the nebulous and very uncertain state of affairs which exists in the war in Spain, it seems to me that, if Sir Robert Aske's contentions are right, if the ship is seized, the charterers are liable to go on paying this daily hire for her for an absolutely indefinite period. The one witness who gave evidence before me, who has been much concerned in chartering ships for the republican government, told me that there were some ships which had been seized by the insurgents and which had not been released up to now. They have not been condemned, because there is no prize court to condemn them, as far as we know, and I do not suppose that, in the circumstances, His Majesty's government would recognise the decree of any prize court which might be set up in this civil conflict in Spain, considering that they have not recognised General Franco as having belligerent rights. I do not know how, in those circumstances, it could ever be said that the ship was lost. The ship is still afloat, or would be still afloat at the present day if she were still interned in Bilbao harbour. She was lost to the charterers, which is really why the charterers say that the performance of the contract has been frustrated, but the ship was not, in fact, lost, and I do not see how, in those circumstances, it would be possible to bring into effect cl. 15 of the charter. On the other hand, while on a matter relating to a conflict of this description, I do not think that the court can have any judicial knowledge—I think that there was some evidence by the witness to whom I have referred, and I think that it is common knowledge, although one is perhaps not entitled to act upon it—that there have been many cases in which a ship has been seized and released after quite a short time. She may have had the cargo taken out of her. She may have been examined, and released when it was found that she had not any cargo upon her. The witness did say, so far as it is material, that he was very surprised at the length of time for which this ship was detained, and it does seem to have been a matter of surprise to both parties.
- I should feel a considerable difficulty in holding—at any rate on the evidence and the facts which I have before me—that a risk of seizure of the description which took place here, and the detaining of the vessel, not only for the period of her charter, but for a long period thereafter, was a risk which was being contemplated by the parties in this case. It may well be that they thought that General Franco might seize the

ship and hold it for the chartered period so long as it was under charter to the republican government. It may well be that it might have been contemplated by both parties that he or his naval commander might well have hesitated, after the charter had come to an end, to seize and detain a British ship which had no contraband on board, and which, after the period for which it was chartered, would be most unlikely to be engaged in the work, however humanitarian that work may have been, of evacuating civil population. The shipowners, having got the month's hire in their pockets, would not be at all concerned as to what the fate of the ship might be during the charter. What the fate of the ship might be after the charter, however, was another matter. However, I do not think that these are the matters which I really have to consider in applying the doctrine of frustration. I doubt whether it is possible to reconcile all the judgments and opinions which have been given on this difficult subject, which, of course, was a subject which was very little discussed in the books before the War. There are the well-known cases of *Taylor v. Caldwell* (1), *Jackson v. Union Marine Insurance Co., Ltd.* (2), *Krell v. Henry* (3), *Clark v. Lindsay* (4), *Herne Bay Steam Boat Co. v. Hutton* (5), but no one would contend that before the War the subject of frustration was a subject which came often before the courts, and the development of this doctrine occurred through the many incidents which happened in the course of the War. Its whole history, I think, may really be said to be found in the various judgments which have been delivered since 1916, to most of which reference has been made in the course of the argument. Whatever be the true doctrine of frustration, I prefer to rely, if I may, on the passage in the opinion of VISCOUNT HALDANE in *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (6), which was cited with approval by LORD SUMNER in *Larrinaga & Co., Ltd. v. Société Franco-Américaine des Phosphates de Médulla, Paris* (7). I will just read one passage from the opinion of LORD SUMNER before I read the passage in which he describes the doctrine of frustration. He said, at p. 321 :

So far as the ships are concerned [the ships in that case], this is not a contract *de certo corpore* at all.

I read that because this seems to me to be eminently a case *de certo corpore*. The *certum corpus* is this particular ship, the Molton, chartered for a particular service. LORD SUMNER continues, at p. 321 :

Nor can it be said that [quoting from VISCOUNT HALDANE] "the foundation of what the parties are deemed to have had in contemplation has disappeared and the contract itself has vanished with the foundation."

If I may respectfully say so, that seems to me to be the surest ground upon which to rest the doctrine of frustration, and I rather prefer it. I find it easier to follow than founding it on implied terms. I think that perhaps it is worth reading a whole passage from the opinion of VISCOUNT HALDANE in *Tamplin's* case (6). Although he differed in the result from the majority of the House, the tests which he gave have always

been regarded as authoritative, and, in the passage I have just read, were cited with approval by LORD SUMNER. He says, at p. 406 :

There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary suspension of certain of its obligations, should some event (such, for instance, as in the case of the charterparty under consideration, restraint of princes) so happen as to impede performance.

- A In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation.

In other words, something must be the subject-matter of every contract. If that something has disappeared, the contract disappears with that on which it was founded.

- C To the same effect, I think, is what VISCOUNT FINLAY says in the *Larrinaga* case (7), at p. 318 :

When certain risks are foreseen the contract may contain conditions providing that in certain events the obligation shall cease to exist. But even when there is no express condition in the contract, it may be clear that the parties contracted on the basis of the continued existence of a certain state of facts, and it is with reference to cases alleged to be of this kind that the doctrine of "frustration" is most frequently invoked. If the contract be one which for its performance depends on the continued existence of certain buildings or other premises, it is an implied condition that the premises should continue to be in existence, and their total destruction by fire without fault on the part of those who have entered into the contract will be a good defence. Such a contract does not as a matter of law imply a warranty that the buildings or other property shall continue to exist.

- E Sir Robert Aske meets this point by saying that one cannot have frustration where the circumstances must have been contemplated by the parties. By "circumstances," I mean circumstances which are afterwards relied upon as frustrating the contract. I have said that I do not feel that I can hold, merely upon the evidence I have here, that the parties must have contemplated this happening, but I will assume that they must. One can well understand that other minds might take a different view. Is that enough? It is perfectly true that in many of the cases—I need not go all through them—one finds the expression "unforeseen circumstances," and it is argued that "unforeseen circumstances" must mean circumstances which one could not have foreseen. It seems to me, with respect, that, if the true doctrine be that laid down by LORD HALDANE—the absolute disappearance of the contract—or if it be as VISCOUNT FINLAY put it—"the continued existence of a certain state of facts"—then whether circumstances are foreseen or not makes very little difference. If the foundation of the contract goes, if something is swallowed up in an earthquake, it goes, whether or not the parties have made a provision for it. Whether or not the parties contemplated, or must be taken to have contemplated, that the foundation of the contract would be destroyed cannot alter the position at all. If it comes about, it comes about, although the parties may or may not

have agreed as to what is to happen if there is this destruction. Therefore it seems to me that, when one is using the expression "unforeseen circumstances" in relation to the frustration of the performance of a contract, one is really dealing with circumstances which are unprovided for, circumstances for which (and in the case of a written contract one has only to look at the document) the written contract makes no provision. A

In support of that, I think that I need cite only one further authority, and that is again the words of VISCOUNT HALDANE, in *Tamplin's case* (6), which were cited by PICKFORD, L.J. (as he then was), in *Countess of Warwick S.S. Co. v. Nickel Société Anonyme* (8). PICKFORD, L.J., said, at p. 376: B

Putting it in other words, does it come within the doctrine laid down by VISCOUNT HALDANE early in his judgment in *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (6), in these words [p. 406]: "When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is *prima facie* regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made. The principle applies equally whether performance of the contract has not commenced or has in part taken place. There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary suspension of certain of its obligations, should some event (such, for instance, as in the case of the charterparty under consideration, restraint of princes) so happen as to impede performance. In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation" ? C

I hope I am not wrong, but I regard VISCOUNT HALDANE as saying there that, unless one makes the contrary intention plain, the law imposes this doctrine of frustration in the events which have been described. One makes the intention plain by saying that, if the foundation of the contract goes, either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, parties can if they wish (and no doubt they often do) provide for what in that event is to happen, but, if they do not, then the performance of the contract is regarded as frustrated. D

To the same effect, I think, are the cases, one of which was in the House of Lords, which deal with this doctrine in relation to the requisitioning of ships. When the War had proceeded but a very short time, one knows that the Admiralty Requisitioning Board was set up. One knows that ships were requisitioned freely. I suppose that it is not putting it too high to say that no shipowner knew when his ship would be requisitioned. Accordingly, one finds, in such a case as, for instance, *Bank Line, Ltd. v. Capel (A.) & Co.* (9), that the charterparty actually provided for requisition. It provided that the charterers were to have E

- the option of cancelling the charterparty should the steamer be commandeered by the government during the charter. Nevertheless, for reasons which appear in the opinions in the House of Lords, it was held that, although the charterparty had made this provision, it did not prevent the doctrine of frustration of performance from applying.
- A** seems to me that there the parties—the shipowners and the charterers, in that case—must have had before them the possibility—or the probability, if you will—of requisitioning every bit as much as the parties had before them the possibility of seizure in this case, and therefore I think that that case and other cases, one of which perhaps I might cite
- B** —*Anglo-Northern Trading Co. v. Emlyn Jones & Williams* (8), which was also the case of a charterparty, made after the outbreak of war—show in effect that, though the parties may have had, or must be deemed to have had, the matter in contemplation, it does not prevent this doctrine of frustration from applying.
- C** To apply the doctrine as I understand it—I have endeavoured, I am afraid very imperfectly, to explain it—to this case, what do we find? We find that there is a charter for a month only, a charter at a very high rate of freight. Although it is a time charter, the limits within which the ship is to trade are very narrow—from the northern ports in
- D** the hands of the republican government of Spain to ports in France—and the specific purpose of the charter, the evacuation of the civil population from North Spain, is made plain. It must be obvious, therefore, that the foundation of that contract was destroyed as soon as the insurgent war vessel had seized the ship, which it did after it had performed one
- E** voyage, and when the period of the charter had but half-expired. No more could be done with the ship at all. The owners were unable to leave it under the control of the charterer. The charterer was unable to make use of it. The charterer had paid his month's hire, and that he not only cannot get back, but also does not seek to get back. In my
- F** opinion, the performance of the charter was frustrated from the time of the seizure, and consequently the reasoning of the cases to which I have referred applies, and it follows from that that there must be judgment for the defendant with costs.

G Solicitors: *Sinclair, Roche & Temperley*, agents for *Vaughan & Roche*, Cardiff (for the plaintiffs); *Petch & Co.* (for the defendant).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

SMITH v. CORNHILL INSURANCE CO., LTD.

H [KING'S BENCH DIVISION (Atkinson, J.), **May 11, 12, 17, 1938.**]

Insurance—Accident insurance—Accident whilst riding in, mounting into, or dismounting from car—Car accident causing concussion—Insured walking into river while in such state—Independency of accident and death.

A policy of insurance was expressed to be payable on the death of the insured occurring "as the result solely of bodily injury caused by violent, accidental, external and visible means sustained by the insured

whilst riding in, mounting into or dismounting from, the insured car." The insured, a strong vigorous woman of about 31 years of age, and a motorist for many years, one evening left Bristol alone in her car to drive to Nailsworth, a distance of some 40 miles. The next morning the car was found badly damaged and lying on its side on a track some yards below the level of the road. A very wavy track, which had been forced through bushes near the car, finally led to a river, and there the insured was found standing almost upright with the water a few inches over her head. There was a strong overhanging branch quite close to her, by which she could have pulled herself out of the water. A post-mortem examination showed that there was no water in her lungs or stomach, and that she died before or at the moment her face reached the surface of the water. It was found as a fact that she had suffered from severe mental and physical shock as a result of this injury to the brain, and that in a state of mental confusion she had wandered aimlessly through the bushes into the water. It was contended that death was not due to any cause covered by the terms of the policy :—

HELD : the real cause of death was the accident, as each subsequent event was due to the brain injury resulting from the accident. The plaintiff was therefore entitled to recover under the policy.

[EDITORIAL NOTE. In order that the plaintiff may recover under the policy, the death must be shown to be due to the accident, the accident being one of the kind mentioned in the policy. In order to prove that death is due to the accident, it must be shown that there is no break in the chain of causation connecting the accident and the death. In other words, death must result directly from the accident and "independently and exclusively of any other cause."

AS TO CONSTRUCTION OF ACCIDENT POLICIES, see HALSBURY, Hailsham Edn., Vol. 18, pp. 533-535, paras. 846-848 ; and FOR CASES, see DIGEST, Vol. 29, pp. 395-398, Nos. 3147-3160.]

Cases referred to :

- (1) *Winspear v. Accident Insurance Co.* (1880), 6 Q.B.D. 42 ; 29 Digest 399, 3168 ; 50 L.J.Q.B. 292 ; 43 L.T. 459.
- (2) *Dunham v. Clare*, [1902] 2 K.B. 292 ; 34 Digest 341, 2759 ; 71 L.J.K.B. 683 ; 86 L.T. 751 ; 4 W.C.C. 102.
- (3) *Marriott v. Malby Main Colliery Co.* (1920), 90 L.J.K.B. 349 ; 34 Digest 352, 2833 ; 124 L.T. 489 ; 13 B.W.C.C. 353.
- (4) *Dixon v. Sutton Heath & Lea Green Colliery, Ltd. (No. 2)* (1930), 23 B.W.C.C. 135 ; Digest Supp.
- (5) *Coyle (or Brown) v. Watson (John), Ltd.*, [1915] A.C. 1 ; 34 Digest 268, 2284 ; 83 L.J.P.C. 307 ; 111 L.T. 347 ; 7 B.W.C.C. 259.
- (6) *Isitt v. Railway Passengers Assurance Co.* (1889), 22 Q.B.D. 504 ; 29 Digest 400, 3172 ; *sub nom. Re Isitt & Railway Passengers Assurance Co.*, 58 L.J.Q.B. 191 ; 60 L.T. 297.
- (7) *Re Etherington & Lancashire & Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591 ; 29 Digest 396, 3148 ; 78 L.J.K.B. 684 ; 100 L.T. 568.
- (8) *Fidelity & Casualty Co. of New York v. Mitchell*, [1917] A.C. 592 ; 29 Digest 394, 3140 ; 86 L.J.P.C. 204 ; 117 L.T. 494.

ACTION by the plaintiff, the executrix of Christine Alice Edith Davies, to recover from the defendants the sum of £1,000 under a policy of insurance taken out by the deceased, whereby the defendants undertook to pay the estate of the deceased £1,000 in the event of her death by accident in the circumstances stated in the policy. The facts and terms of the policy are fully stated in the judgment.

G. R. Blanco White, K.C., and P. Malcolm Wright for the plaintiff.
Gilbert Paull for the defendants.

ATKINSON, J. : In this case the plaintiff is claiming as executrix of Miss Christine Alice Edith Davies against the Cornhill Insurance Co., Ltd., the sum of £1,000, which is said to be owing on a policy of insurance taken out by the deceased. It was a policy which, amongst other things, secured to her or to her estate the sum of £1,000 in the event of death :

A provided that death occurs within six weeks from the date of the accident and as the result solely of bodily injury caused by violent accidental external and visible means sustained by the insured whilst riding in mounting into or dismounting from the insured car.

The facts as I find them are these. The deceased was a vigorous, strong, well-made young woman of about 31. She was a school-mistress at Bristol. She had had a motor car for years, which she drove and looked after herself. She played lawn tennis and other games, and was in perfect health. She had a sister who lived at or near Gloucester, some 30 or 40 miles away, and she used frequently to go and stay with her sister, a Mrs. Smith, for the week-end.

C On Friday, July 9, 1937, the deceased left a garage near her home in the early evening, I think somewhere about 6.30 p.m., and that was the last time that she was seen alive. She filled up at the garage at about 6.30 p.m., and, as it is thought, and as her sister thinks, she started off to go to stay with her. What happened during the evening nobody

D knows. There is a road running from Bristol to Gloucester other than the main road, a road which goes *via* Tetbury and Nailsworth, and which the deceased would know well, as she had once been employed for some months at Nailsworth. The road is a winding road, and at one place it was—though I am told that it has been changed now—a very unsafe

E road. The camber was the wrong way. There was quite a substantial curve in the road against the camber, and there was a footpath with a high kerb, and then a bit of a hedge, and then a drop, quite a steepish drop, about 10 yds. long. There was then a rough track. One could not call it a path, but a sort of track, about 10 yds. wide. About 10 yds.

F away, according to the plan, there was a stream or river, and in between this track and the river the ground was covered with high bushes and shrubs of a very thick description. To get through them, one would have to force a way, and the stream or river, at any rate near the land, was more or less stagnant, with very little current, and a muddy bottom.

G At 11.30 p.m. on the Friday night, two different women, living in different houses some 200 yds. away from where the accident happened, heard a very unusual noise—as one of them described it, the squeaking of brakes—followed almost immediately by a sort of rolling, crashing sound, as of something heavy forcing its way through these little shrubs

H and the like. I think everybody accepts the view that that noise was caused by the deceased's car.

Early the next morning a man going to his work noticed a car lying on its side some 10 yds. from the road, about where this small track was. He took very little interest in it, and it did not seem to occur to him that somebody might have been hurt. He went on to his work. It

may be that he discussed it, but at any rate it occurred to somebody later on to ring up the police and tell them about it, and during the morning the police sergeant went to see for himself what had happened.

He found the car in the position which he indicated on the map. He found the car lying on its offside and facing Bristol, somewhere round about this path or track. It was badly damaged, and it had obviously rolled down the hill. He proceeded to the road and examined the ground, and found wheel-tracks on the footpath, running along the footpath from the road for some 22 ft. He said that it was quite clear that the car had run off the road and along the path, and then gone through the hedge. As it went down the hill, it would, of course, go round, and become upset, and it had rolled over, and come to rest in that position. The engine was off and the lights were off. The only door available—that is to say, the nearside door—was open, and he proceeded to look round for the person or persons who had been in the car. He then noticed a sort of track through the bushes, as if somebody had forced a way through the bushes, and he proceeded to follow it. It departed from the rough track at once, and it went away first towards the west—that is to say, towards the Nailsworth direction—for some way, and then it turned back again round to the road, going in a nearly opposite, direction. He said that it was not a clean-cut track, but very wavy as if the person making the track had been wandering in an aimless sort of way. It led finally to the river, and, looking into the water, he there saw the deceased.

She had her feet in the mud. The water was about 5 ft. deep—or at least the water and mud were about 5 ft. deep—and her feet certainly were well lodged in the mud. He did not know how far her legs were in the mud, because when he got her out the mud was everywhere, even over the knees. There she was, in an upright position, not standing straight and stiff, but a little bent, perfectly rigid, with the water a few inches over her head. There was an overhanging bush quite close to her, within easy reach, and of a strong description, by which she could have pulled herself out, or anyone could have pulled themselves out if they had had the strength and the wit to do it. Of course she was taken out of the water, and there was a post-mortem examination.

There are certain things about which there is no dispute. The unfortunate woman had not been drowned. There was no water in her lungs or stomach, and she had died before or at the moment of her face reaching the surface of the water. The policeman said that, in his view, if she had been conscious and standing straight up, her mouth would have been out of the water. At any rate, everybody agrees that she was not drowned, and that death must have come instantaneously when she went into the water, so that she was dead by the time her mouth reached the water, or at that precise moment. There was no sign whatever of any struggle, or of any effort to save herself.

The post-mortem examination further showed, apart from two or three bruises, which are unimportant, that the woman had had a very severe head injury. There was a wound some 4 ins. long by 2 ins. broad covering both the parietal lobes, and, when the skull bone was removed, the two doctors who conducted the examination were able to see and speak to the fact that the brain itself had been definitely seriously injured.

The examination was conducted by Sir Harry Waters, and he said that there was definitely a serious injury to the brain and to the membranes of the brain. He said that there were patches of blood extending over the edges of both parietal lobes, and that, speaking for himself, in his view the cause of death was injury to the head. He said that, if the water had any effect, it was merely a terminal shock, which finished the serious results following upon this head injury, and which brought about death at that precise moment.

In considering the circumstances of the accident, it is important, of course, to realise first the place where it happened, the potential danger of the bushes and shrubs and the river just beyond, which was not visible. One has to consider the conditions at the time—the darkness, and the fact that it was raining.

There is no dispute about this serious injury to the brain, and I have not the slightest doubt, and I find as a fact on the medical evidence, that she suffered from serious mental and physical shock as a result of this injury to the brain. I paid particular attention to the evidence of Sir Harry Waters and of the general practitioner who watched the post-mortem examination. The latter did not pretend to be an expert on these matters, but Sir Harry Waters is, and of course he had an opportunity of seeing the precise extent of this injury to the brain. I accept his evidence and the evidence of Dr. Taylor. Nobody can doubt, I think, the evidence of those two gentlemen. It comes to this. They are quite certain that she suffered from concussion, and must have suffered from concussion, that that concussion would be followed for a period which they cannot measure at all by insensibility, and that that insensibility would inevitably be followed by a period of mental confusion, or semi-consciousness, or dazedness—call it what you will, but at any rate a period of mental confusion—during which she would not be fully conscious, or possibly not conscious at all, of what she was doing, and that, while she was in that state, she got out of the car and switched off the lights and the engine. Possibly she switched off the lights by mistake, because one would have thought that she would have kept them on, but she may have switched them off by mistake. At any rate, she got out of the car in that semi-conscious state, and in that state she proceeded to wander aimlessly through these bushes. As a result of this state of helplessness in which she was, she stepped or fell into the water, and the shock of going into the water caused her death.

I share Sir Harry Waters' view that that shock of going into the water

would have been something quite insignificant if it had not been for the serious state in which she was already. He could not conceive of her stepping into the water like that, of her stepping into stagnant water in July, with this branch close to it, which anybody could grip. He could not conceive of that having any serious effect upon a woman of this kind, a woman whom he saw and examined, if she had been normal. He said : A
 "She would have laughed at it, treated it as a joke, and hauled herself out." At any rate, I have not the slightest doubt in my own mind that the result of her going into the water was rendered serious only because of the very serious condition in which she was already.

Those are the facts as I find them, and I do not think that there can B
 be any serious dispute about them. Then there arises the question whether this death or this accident occurred as a result solely of the bodily injury caused by the accident. It must be realised, in considering the cases, a number of which were cited, that they all turn upon the language of the document which the court was construing, and one case C
 is an authority for another only if the language is the same, or if one can extract from it some principle which may help to interpret other policies.

Apart from the cases, let us consider the language of the policy. The phrase is : "As the result." It does not say "the immediate result," and indeed one is given six weeks in which to die without stepping out- D
 side this policy. It does not say "as the *immediate* result," but it says "as the result." What is the definition of "result" ? A result is something which follows as an actual consequence. Then did this death follow as an actual consequence of the bodily injury ? Of course, nobody but a lawyer could suggest anything to the contrary. Any man in the E
 street, bringing his ordinary intelligence to bear upon that, would, I should have thought, say at once : "Of course it followed as an actual consequence upon this brain injury." However, I suppose lawyers try to be more exact, and it is seriously urged here that this death was not the result solely of this bodily injury, but was the result, at any rate in part, F
 of a second accident—that is to say, the accident of going into the water.

I should have thought, myself, quite apart from the cases, but seeing how far what I suggest is a guide is supported by the cases, that, if one has a chain of causation starting with the accident, each cause the result of a preceding cause, leading up to the death, then to my mind death G
 results solely from the primary cause. Of course, if one has, intervening, a cause which is not also a result of a previous cause forming part of this chain, then it is not so, because one has then a new act intervening, an act which is independent of the chain of causation set up by the accident, and then one could properly say that death was not the result solely of H
 the bodily injury. I should have thought that that was the true principle, independently of authority.

I repeat that one has got to be careful in applying one case to another. I will illustrate that by reference to a case which was strongly and repeatedly urged by Mr. Paull, *Winspear v. Accident Insurance Co.* (1).

I am not going to trouble with the wording of that particular policy, but the question was this. A man had had an epileptic fit whilst crossing a bridge, and had fallen into the water and been drowned, and the question was whether this drowning was an accident giving rise to a claim under the policy which he held, or whether the accident was
A excluded by a proviso excluding liability for
any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease.

In that case it was urged : " Here there was the disease, the epileptic fit, which was the cause of the man being thrown into the water, and
B therefore there is no liability." It was held that there had been an accident, and that the fall into the water was an accident. I was told that it was like this case, and I was urged to pay regard to it, but I asked Mr. Paull this question : " Supposing you substitute for the fit a motor accident, and supposing that there was a collision on the tow-
C path of the Thames, which runs close to the water in many places, and the insured person was thrown into the river and was drowned, could you possibly suggest that upon this policy ? " Those facts would be exactly analogous, and he frankly admitted that he could not. That
D case with which I have to deal, which shows that one has to consider very carefully the policy with which one has to deal.

However, I do think that I can find two reliable guides as to how these cases ought to be dealt with, and the first is the way in which the cases have been dealt with under the Workmen's Compensation Act.
E I know that it has been said—and I will come to it later on—that cases under that Act are not always a reliable guide to cases under policies of insurance, and that is quite true, because the language is very different ; but, as it happens in this particular policy, the language, except for the one word " solely," is the language of sect. 8 of the Act of 1925 : " Com-
F pensation under this Act where death results from the injury." There you have the same words—" results from the injury "—as we have in the policy, and I do not see why the cases under that Act, without being taken as conclusive, should not be considered as helping one to arrive at the proper construction of this policy.

G The principle which has been laid down in these cases is quite clear. In *Dunham v. Clare* (2) SIR RICHARD HENN COLLINS, M.R., said, at p. 296 :

The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is
H a new act which gives a fresh origin to the after-consequences.

That principle has been applied in various suicide cases. I dare say that there are more than two of them, but I will refer to *Marriott v. Maltby Main Colliery Co.* (3) and to *Dixon v. Sutton Heath & Lea Green Colliery, Ltd.* (No. 2) (4), cases where there was an accident, not necessarily very serious in itself, an accident which no one would have supposed would

have led to death, but which caused the injured workman to become insane, and, while insane, to commit suicide.

The line of cases is quite clear that, in circumstances of that kind, the death is the result of the accident, because of this chain of causation. Each step and each cause in the chain was the result of the preceding cause, which actually led up to the death. It was pointed out in *Dunham v. Clare* (2) that death need not be the natural or probable cause of the accident—that is immaterial—but the question is: Was it in fact? To take the last few lines from the judgment of SIR RICHARD HENN COLLINS, M.R., in that case, at p. 296:

It is quite consistent to say that death resulted from the injury and yet that it was neither the natural nor the probable consequence of it. If no new cause *novus actus*, intervenes, death has in fact resulted from the injury.

There is a perfectly clear authority upon that, a case under the Workmen's Compensation Act, *Coyle (or Brown) v. John Watson, Ltd.* (5). I think that case is very striking. There, the deceased was working in a mine. Something went wrong, and the men had to ascend to the surface by a certain shaft, which was the shaft through which the air current for ventilating the mine went. They were kept waiting at a middle landing for an hour-and-a-half until the men who usually ascended by the shaft had been raised, and they were exposed to a cold down-draught, as a result of which exposure the deceased caught a chill which brought on pneumonia, from which he died. That was held to be due to the result of the accident, and having to stand in the cold. LORD DUNEDIN in that case said, at p. 5:

It seems to me that here . . . you have an accident interfering with the normal working of the mine, a consequential exposure of the workman to rigorous climatic conditions for a prolonged period, which exposure would not have been his fate but for the accident.

Upon those words, this woman would never have been wandering about this wood in this aimless way but for the accident. LORD DUNEDIN continues, at p. 5:

and a finding in fact that the supervening illness was due to this prolonged exposure. There is no intervening circumstance depending on some cause other than the accident which occurs to break that chain of causation.

That, I think, is putting in precise language, as LORD DUNEDIN so frequently did, the principle that one ought to have in mind.

Then there is a passage from the opinion of LORD ATKINSON which I think is worth reading. He said, at pp. 6, 7:

By way of illustration I put to [counsel] during the progress of his argument the following question: Suppose an employer is, during very cold weather in mid-winter, driving in his motor car with two servants in front—his chauffeur and another—and suppose that when crossing a bridge over a river a tyre bursts, the car skids and comes into collision with one of the battlements of the bridge with such force and violence that both servants are precipitated into the river below, the one being drowned and the other rescued, but rescued so tardily as to be thoroughly chilled, and that an attack of pneumonia is thereby induced, of which disease he dies, would the dependants of the first man be entitled to compensation under sect. 1 of the Act of 1906? The learned Lord Advocate answered in the affirmative, that they would be so entitled. I then asked him, Would the dependants of the

second servant be similarly entitled? and as I understood him, he answered, as indeed the necessities of the case obliged him to answer, in the negative. But can there be any real distinction between these two supposititious cases in relation to this statute?

To me, the wording there might be used with reference to this clause. Supposing one has an accident, either on a bridge as there referred to, or on the tow-path of the River Thames, and one of the insured persons, a husband and wife being both insured, is thrown into the river and drowned, while the other is thrown on to the surface of the road and sustains concussion, and is unconscious for a time, and on regaining consciousness, in a half-dazed state staggers to his or her feet and falls into the river and is drowned, then Mr. Paull would be driven to say: "In the case of one, there was a second accident—namely, the falling into the river—and therefore the death would not have resulted solely from the accident to the motor car." Yet can there really be any distinction between those two cases? To my mind, there can not.

At any rate, that is the guidance that one gets from cases decided on the language of the Act, which is the language of this policy except for the word "solely," and it seems to me that the judgments to which I have referred treat this section as if it had the word "solely" in it. I do not think for a moment that the interpretation would have been different even if the word had not been there, because, the moment one gets another cause, it is not *solely* the result of the accident, and there is no liability. Nevertheless, it is not another cause unless it is, as I say, a cause intervening, not as the result of a preceding cause, but one arising independently.

Then I think that one also gets some help from three other cases. There is first of all *Isitt v. Railway Passengers Assurance Co.* (6). There, a man fell and dislocated his shoulder, and he was put to bed, and died in less than a month, having been in bed all the time. The assured died from pneumonia caused by cold, and the arbitrator found that he would not have died as and when he did if it had not been for the accident, that as a consequence of the accident he suffered from pain, and was rendered restless, unable to wear his clothing, weak, and unusually susceptible to cold, and that his catching cold and the fatal effects of the cold were both due to the condition of health to which he had been reduced by the accident. It was held:

That the death of the assured was due to the "effects of injury caused by accident" within the meaning of the policy.

I think that one gets guidance from the judgment of WILLS, J., in that case, at p. 512:

Was, then, the death of the assured under the circumstances stated the natural consequence of the injury? I think it was. I think it idle to suggest that there is anything in these circumstances which tends to show that the cold which led to the fatal attack of pneumonia was caught by the assured in some manner independent of the injury. The umpire seems to me to have found that the assured caught cold owing to his having been made an invalid by the injury and having in consequence to live as an invalid, and that the cold was due to some slight cause

impossible to specify, but incident to the conditions of such a life, and which would not, apart from the debility produced by the injury, have caused his death.

Why do not those words apply to this case ?

Then there is the case which was relied upon by the plaintiff—*Re Etherington & Lancashire & Yorkshire Accident Insurance Co.* (7)—where the language was really very strongly in favour of the insurance company. A The policy there was in these words :

If . . . the insured should sustain any bodily injury caused by violent, accidental, external, and visible means, then, in case such injury should, within three calendar months from the occurrence of the accident causing such injury, directly cause the death of the insured, to pay to the legal personal representatives of the insured the capital sum of £1,000, . . . “ provided always and it is hereby as the essence of the contract agreed as follows : that this policy only insures against death where accident within the meaning of the policy is the direct or proximate cause thereof, but not where the direct or proximate cause thereof is disease or other intervening cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby.” B

These were many provisions intended to protect the insurance company C from liability, and which find no place in the policy with which I have to deal. Even so, in that case the court held that the deceased's estate was entitled to recover. He had had a fall while hunting. He had broken nothing. It had merely shaken him badly. He had to ride home in the rain, and he got soaked to the skin, contracted pneumonia and D died. I suppose that, had he gone into some neighbouring house, waited till the rain stopped, and dried his clothes, nothing would have happened. However, he rode home in the ordinary way, and he got soaked, and, his vitality being reduced by the shaking and the fall that he had had, what happened was the result of his lowered vitality, and E the one and only cause of that death was the accident which happened. It was said by VAUGHAN WILLIAMS, J., at p. 599 :

The truth is that the accident itself is ordinarily followed by certain results according to its nature, and, if the final step in the consequences so produced is death, it seems to me that the whole previous train of events must be regarded as the proximate cause of the death which results. F

It seems to me that that was a very strong case, and I think that it was in that case that FARWELL, L.J., reminded us, at pp. 600, 601 :

The words “ within three calendar months from the occurrence of the accident ” show that the company's liability was not intended to be confined to sudden death, or death occurring immediately upon the accident. In cases where a man lingers for two or three months after the accident, I believe that it is never the case that he dies from the accident pure and simple ; but in all of such cases there would be some malady supervening upon the accident, such as heart failure, pneumonia, blood poisoning, hæmorrhage, or paralysis. G

Here there was heart failure supervening upon this accident owing to this slight shock of going into the water, which I am sure would have been insignificant but for the state in which the assured was. H

Finally, there is *Fidelity & Casualty Co. of New York v. Mitchell* (8), which is very helpful. There it was not a case of death, but of bodily injury, which, under the policy, had to be sustained through accidental means, and resulting “ directly, independently and exclusively of all other

causes"—those words seem fairly equivalent to the word "solely"—"exclusively of all other causes," in total disablement from performing the duties of his occupation. After the issue of the policy, the plaintiff, the claimant, had severely sprained his wrist. He was laid up for some time, and received payment under the policy, and then the insurance
A company stopped paying. It appeared that ten or fifteen years before the date of the policy he had suffered from a tubercular affection of a small part of his left lung, which had caused a lesion which had then healed. There were concurrent findings that at the date there was no
B system tuberculosis which was latent, and which would have remained harmless had it not been for the accident, and that, apart from tubercular infection, the wrist would have recovered within six months of the accident. It was held:

C That there was no breach of warranty, that the disablement resulted "directly, independently and exclusively of all other causes" from the accident. . . .

There is just one passage from the opinion of LORD DUNEDIN in that case that I should like to read. He said, at p. 596:

What is insured against is, first, bodily injury sustained through accidental means. As to that, there is no difficulty. The wrist has been injured by an accidental fall.
D Then, secondly, this bodily injury must result in immediate continuous and total disability that prevents the assured, etc. This, also, is clear. The wrist was disabled at the moment of the fall, and has been disabled ever since. The point as to preventing the assured from doing work has been already dealt with. But then comes the third condition, which is the critical point. This bodily injury, sustained through accidental means, and resulting in disability, must so result "directly, independently and exclusively of all other causes." Now the expression "other causes" postulates a cause already specified. The word "cause" has not, so far, been used in the
E sentence, and it must therefore be found in the words "accidental means." Therefore there must be independency between cause 1 (the accident) and cause 2, whatever that may be.

Applying those words here, there must be independency between the brain injury and the result of falling into the water, the shock of falling
F into the water and what it brought about. LORD DUNEDIN continues, at p. 597:

But in this case, on the view of the facts taken by both courts—with which their Lordships agree, and which in any case they would be slow to disturb—there is no independency between the alleged second cause (the tuberculous state) and the first cause (the accident). Prior to the accident there was only a potestative tuberculous tendency; after it, and owing to it, there was a tuberculous condition. In
G other words, the accident had a double effect—it sprained the tendons and it induced the tuberculous condition. These two things acted together, and were the reason of the continuing disability; but while they are both ingredients of the disabled condition, there has been and is, on the true construction of the policy, only one cause, namely, the accident.

H I think that the principle of that applies here. There was only one cause here—namely, the injury sustained in the accident. There was no independency between anything that followed and that accident, so that the causation of events, each one the result of the preceding event, leads back to the accident, and, in my opinion, that was the sole cause of this death. Therefore, the insured was covered in respect of

this death, and I think that the plaintiff is entitled to recover the sum of £1,000, with costs.

Judgment for plaintiff for £1,000, with costs.

Solicitors: *Hancock & Willis*, agents for *Wellington & Clifford*, Gloucester (for the plaintiff); *Stanley & Co.* (for the defendants).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

LURIE v. LURIE.

[CHANCERY DIVISION (Crossman, J.), May 24, 25, 26, 1938.]

Husband and Wife—Separation—Reconciliation agreement—Provision for future separation of spouses—Validity—Proceeding “founded on” adultery with named woman.

By a deed dated Oct. 23, 1936, a husband covenanted, in consideration of his wife discontinuing divorce proceedings then pending and brought against him on the ground of his alleged adultery with a named woman, and of his wife's returning to live with him, that, if at any time thereafter she should bring further divorce proceedings founded on acts of adultery committed with the same woman after the date of the deed, he would, upon his wife requiring him so to do, assign to two trustees all his interest in certain business premises, together with the goodwill of the business, upon trust, with the consent of the husband and the wife, to sell, and until sale to allow the husband to occupy the premises and conduct the business. The husband further agreed that, should the wife obtain a final decree against him, he would, if required by her, assign the premises to her or her nominees absolutely, and enter into a covenant not to enter into a similar business for a period of 5 years within a distance of 10 miles from the boundary of the county borough wherein the business was situated. It was also stipulated that, if a final decree was not obtained within two years from the commencement of the proceedings, or the wife did not call for an assignment within three months from the making of a final decree, the premises were to be reassigned to him. The petition was dismissed by consent on Oct. 30, 1936, and the wife returned to live with her husband. On Aug. 24, 1937, she presented a further petition for divorce alleging adultery with the same woman. On Sept. 17, 1937, she called upon him to assign the property to trustees in accordance with the terms of the above deed, and, upon his refusing to do so, commenced these proceedings for specific performance:—

HELD: (i) the question of the legality of the restriction upon the husband carrying on business did not arise in these proceedings, and would only arise when the wife called for a transfer from the trustees.

(ii) the words “founded on” an act of adultery did not require actual proof of that adultery, but meant that proceedings were commenced on the basis of such adultery having been committed.

(iii) the deed did not impose a penalty upon the husband, but made provision for the wife upon the happening of the event stated.

(iv) the deed was not an agreement for the future separation of husband and wife living together, but one providing for reconciliation of a husband and wife living apart, and the addition of a provision for future separation in the latter class of deed is not against public policy.

[EDITORIAL NOTE.] A distinction has been taken between an agreement for future separation where the husband and wife are living together and such an agreement which forms part of a reconciliation agreement between a husband and wife living apart. The facts of the present case are rather different from previous cases arising upon reconciliation agreements, and the judgment will be of considerable help to those drafting documents dealing with such a reconciliation.

AS TO RECONCILIATION AGREEMENTS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 715, 716, para. 1163; and FOR CASES, see DIGEST, Vol. 27, pp. 223, 224, Nos. 1942-1945.]

Cases referred to :

- A (1) *MacMahon v. MacMahon*, [1913] 1 I.R. 154, 428; 27 Digest 224, case *k*.
 (2) *Re Meyrick's Settlement, Meyrick v. Meyrick*, [1921] 1 Ch. 311; 27 Digest 224, 1944; 90 L.J.Ch. 152; 124 L.T. 531.
 (3) *Purser v. Purser*, [1913] 1 I.R. 422, 428; 27 Digest 223, case *h*.
 (4) *Fender v. Mildmay*, [1937] 3 All E.R. 402; Digest Supp.; 106 L.J.K.B. 641; 157 L.T. 340.
 (5) *Putsman v. Taylor*, [1927] 1 K.B. 637; Digest Supp.; 96 L.J.K.B. 315; 136 L.T. 285; *affd.*, [1927] 1 K.B. 741.
- B (6) *Vandergucht v. De Blaquiére* (1839), 3 My. & Cr. 229; 27 Digest 223, 1942.
 (7) *Harrison v. Harrison*, [1910] 1 K.B. 35; 27 Digest 224, 1943; 79 L.J.K.B. 133; 101 L.T. 638.
 (8) *Davies v. Elmslie*, [1938] 1 K.B. 337; [1937] 4 All E.R. 68, 471; Digest Supp.
- C (9) *Bryant v. Herbert* (1878), 3 C.P.D. 389; 42 Digest 969, 12; 47 L.J.Q.B. 670; 39 L.T. 17.
 (10) *Cromie v. Moore*, [1936] 2 All E.R. 177; Digest Supp.
 (11) *Clarke v. Clarke* (1925), 42 T.L.R. 132; 27 Digest 332, 3126.
 (12) *Carmichael v. Carmichael* (1925), 42 T.L.R. 133; 27 Digest 332, 3125.
 (13) *Hyman v. Hyman*, [1929] A.C. 601; Digest Supp.; 98 L.J.P. 81; 141 L.T. 329.
- D (14) *Egerton v. Brownlow (Earl)* (1853), 4 H.L. Cas. 1; 12 Digest 240, 1971; 23 L.J.Ch. 348; 21 L.T.O.S. 306.
 (15) *Clydebank Engineering & Shipbuilding Co. v. Yzquierdo y Castaneda (Don Jose Rams)*, [1905] A.C. 6; 12 Digest 434, 3514; 74 L.J.P.C. 1; 91 L.T. 666.
- E (16) *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd.*, [1915] A.C. 79; 17 Digest 138, 426; 83 L.J.K.B. 1574; 111 L.T. 862.

ACTION for a declaration that a deed of covenant between the parties hereto was an agreement valid in law and for specific performance thereof.

D. Ll. Jenkins, K.C., and *J. Pennycuick* for the plaintiff.

F *Constantine Gallop* for the defendant.

Jenkins, K.C. : It is common ground that the grounds for the relief claimed are acts of adultery alleged to have been committed since the date of the agreement. It is the policy of the law that separated spouses should be brought together again. If the means of bringing them together again includes an agreement for future separation in certain circumstances, that will not be an agreement contrary to the policy of the law. In circumstances such as those existing at the date of the deed, there is nothing whatever illegal or against public policy in a covenant whereby a husband is to make provision for his wife in the event of further proceedings for divorce being instituted by her against him. In the first instance, the transfer is to two trustees nominated by the wife to hold the property *in medio* pending the result of the divorce proceedings. [Counsel referred to *Re Meyrick's Settlement, Meyrick v. Meyrick* (2), *MacMahon v. MacMahon* (1), *Fender v. Mildmay* (4), *Putsman v. Taylor* (5).]

Gallop : The document provides that, if the husband commits adultery, he shall at once be penalised. The document only operates if an act of adultery has been committed. One would be reluctant to read the document literally, for that would be to defeat the clear intention of the parties. The document should be read in accordance with the intention of the parties gathered from its terms. An act or acts of adultery committed after a certain date cannot be read as meaning an act or acts of adultery alleged to have been committed. It cannot be said that the words "founded on" are ambiguous. If the parties had wanted to say "founded on" allegations of adultery, they could have said so. It is proper to have an arrangement during the separation of spouses to make provision for the wife in the event of a further separation. That is an exception to the general rule that contracts which provide for future separation are void. The agreement in the present case, however, is not a provision for maintenance, but a provision for the transfer of property to the wife, or the making of a gift to her. Such an agreement is *in terrorem*, and has the vice of being a monetary pre-arrangement. [Counsel referred to *Re Meyrick's Settlement*, *Meyrick v. Meyrick* (2), *MacMahon v. MacMahon* (1), *Vandergucht v. De Blaquiere* (6), *Harrison v. Harrison* (7), *Davies v. Elmslie* (8), *Bryant v. Herbert* (9), *Cromie v. Moore* (10), *Clarke v. Clarke* (11), *Carmichael v. Carmichael* (12), *Hyman v. Hyman* (13), *Egerton v. Brownlow (Earl)* (14), *Clydebank Engineering & Shipbuilding Co. v. Yzquierdo y Castaneda (Don Jose Rams)* (15), *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.* (16).]

Jenkins, K.C., in reply.

CROSSMAN, J. : In this action, the plaintiff, Miriam Lurie, claims :

A declaration that under a deed of covenant dated Oct. 23, 1936, and made between the defendant of the one part and the plaintiff of the other part and in the events which have happened the defendant is bound to assign to two persons nominated by the plaintiff as trustees upon the trusts mentioned in the said deed of covenant all the interest of the defendant in his business premises at 90 Western Road and/or elsewhere in the county borough of Brighton together with the goodwill of the business or businesses carried on by him on such premises and the right to use the name and the trade name or names used by him in connection with the said business or businesses and all the trade and other fixtures fittings utensils and effects belonging to and used by him in connection with the said premises and business or businesses.

The plaintiff also claims :

An order that the defendant specifically perform his said obligation by executing an assignment of the said interest goodwill right and chattels to Simon Sirkin [the father of the plaintiff] and the plaintiff as such trustees.

The plaintiff and the defendant were married on Dec. 26, 1922, and there are three children of the marriage. On July 7, 1936, the plaintiff commenced divorce proceedings against the defendant, on the ground of the adultery of the defendant with a named woman. In Oct., 1936, the plaintiff and the defendant came to terms, and on Oct. 23, 1936, a deed of covenant was executed by them. After stating the parties, the deed of covenant witnesses :

(1). That in consideration of the discontinuance by the wife [the plaintiff] of pro-

ceedings commenced by her against the husband [the defendant] for dissolution of the marriage of the wife with the husband and of her returning to reside with the husband it is hereby agreed as follows:—1. If at any time hereafter the wife shall commence any matrimonial proceedings against the husband founded on an act or acts of adultery committed after the date hereof with [a named woman] then if the wife shall by notice in writing require the husband so to do the husband shall forthwith assign and transfer to two persons to be at the time nominated by the wife all the interest of the husband in his business premises at 90 Western Road and/or elsewhere in the county borough of Brighton together with the goodwill of the business or businesses carried on by the husband on such premises at the date of the commencement of such proceedings and the right to use the name and the trade name or names of the husband used in connection with the said business or businesses together with all the trade and other fixtures fittings utensils and effects belonging to and used by the husband in connection with such premises and business or businesses.

(2). The assignees under any such assignment or transfer as aforesaid shall hold the property so assigned or transferred to them upon trust at the request in writing of the husband and with the consent in writing of the wife but not otherwise to sell the same and upon trust until sale to allow the husband to occupy the said business premises and conduct in his own name and for his own benefit the business or businesses carried on thereupon and to use the said trade fixtures fittings utensils and effects in the said business or businesses and the husband shall in the said assignment covenant with the assignees thereunder and by a separate deed covenant with the wife that until the absolute transfer to the wife or her nominees if such be required under the provisions of cl. 3 hereof the husband will thenceforth pay all rents reserved by or payable under every lease or tenancy agreement under which the said business premises or any part thereof may be held and all outgoings payable in respect of such premises and perform and observe all the covenants and stipulations on the part of the lessee or tenant contained in every such lease or tenancy agreement and will conduct the said business in as beneficial a manner as that in which it was theretofore conducted and will keep the said business premises and the said trade fixtures fittings utensils and effects adequately insured against loss by fire and such other risks as the wife may reasonably require and in good repair and condition.

(3). If the wife shall obtain a final decree against the husband in such matrimonial proceedings then if the wife shall require the husband so to do the husband shall use his best endeavours to procure the absolute assignment and transfer to the wife or to such person persons or company as she shall direct of the said business premises goodwill trade and other fixtures fittings utensils and effects and shall enter into a covenant with the wife or such other person persons or company as the wife may direct that during the period of five years after the date of such decree the husband will not either alone or jointly with any other person or persons directly or indirectly either on his own account or as manager or agent factor or otherwise howsoever be concerned engaged or interested in any business similar to or capable of competing with any business at the date of the commencement of the said proceedings carried on upon the said business premises within the county borough of Brighton or within an area of ten miles from the boundary thereof or allow his name to be used for the purpose of any such business.

(4). If the said matrimonial proceedings do not result in a final decree being made in favour of the wife within two years from the commencement thereof or if within three months after such decree shall have been made the wife shall not require the husband to procure such assignment and transfer to her or her nominees as aforesaid then the rights of the wife hereunder shall cease and the persons to whom the assignment and transfer shall have been made under cl. 1 hereof shall at the request of the husband re-assign and re-transfer the property aforesaid unto the husband or as he shall direct.

That is the deed of covenant which was entered into between the plaintiff and the defendant on the occasion of the withdrawal of those divorce proceedings.

It is to be observed that the effect of that rather peculiar document is to provide in a certain event—what exactly the event was I shall discuss hereafter—that the business premises and other assets are to be made over to trustees, not upon trust for anybody finally, but upon trust, pending the issue of these matrimonial proceedings, for the husband for

his own use and benefit, so that he may carry on the same. A provision is made that, at the request of the husband and the consent of the wife, the trustees may sell the premises, but, subject to that, and if that trust has not come into force—and it can only come into force on the consent of the husband and wife—the husband is to get the benefit of the business as before. It is to stand in the names of these trustees to that extent, A and to be, I suppose, protected for that disposition. The trusts upon which it is to be held finally depend upon whether or not the wife obtains a final decree in the matrimonial proceedings. If she obtains a final decree, then the trustees are to make over the business and assets to the wife. If, on the other hand, the proceedings do not result in a final B decree within 2 years—it is expressly provided how long this opportunity is to last—or if the final decree is made and within 3 months afterwards the wife does not require the husband to procure the assignment, then the property remains the husband's, and it is to be made over to him again. The result of it is, in the view I take, that it is in the nature C of something like a receivership pending proceedings, so that the property is protected, to be given to the wife or husband, according to the result of the proceedings.

On Oct. 30, 1936, the plaintiff having previously returned to reside with the defendant, an order was made in the divorce proceedings by D consent dismissing the proceedings, so that the consideration for that deed was fully executed on the part of the wife by the discontinuance of the proceedings and the return to residence with the husband. On Aug. 24, 1937, the plaintiff presented another petition in the Probate, Divorce and Admiralty Division of this court, and in that petition she E alleged that on June 3 and June 28, 1937, and on July 26, 1937, the defendant, described there as the respondent, committed adultery with the named woman, and she prayed that the marriage between the plaintiff and the defendant might be dissolved. In accordance with the divorce rules, this petition, which was presented on Aug. 24, 1937, was F supported by an affidavit by the plaintiff, verifying the facts of which she had personal cognisance, and deposing to the belief and the truth of the other facts alleged in the petition.

On Sept. 17, 1937, the plaintiff by notice in writing required the defendant to assign to Simon Sirkin, who is her father, and to herself, G the plaintiff, the interest, goodwill, right and chattels mentioned in cl. 1 of the deed of covenant. On Nov. 10, 1937, the defendant, through his solicitors, declined to execute any assignment. On Dec. 6, 1937, the writ in this action was issued, making the claim which I have already stated. On Jan. 4, 1938, the defendant filed his answer to the plaintiff's H divorce petition, which had been presented on Aug. 24, 1937, in which he admits :

that from about Sept., 1931, up to about the end of April or beginning of May, 1936, he has committed adultery with [the named woman]. (2) Save and except as above admitted he is not guilty of adultery as alleged or at all. (3) That the petitioner has condoned his said admitted adultery. . . .

On Jan. 21, 1938, the plaintiff delivered her statement of claim, substantially alleging the facts which I have stated already, most of which have been admitted, and on Feb. 9, 1938, the defendant delivered his defence. The defendant in para. 2 of his defence raises a question of construction of this deed of covenant, and contends that in cl. 1 of

A the deed of covenant the words :

"If at any time thereafter [after the date of the said deed] the plaintiff should commence any matrimonial proceedings against the defendant founded on an act or acts of adultery committed after the date thereof with" [the named woman] (which said words are in cl. 1 of the said deed and are set forth under para. 4 of the statement of claim) mean and require that the said proceedings should be founded on an act or acts of adultery in fact committed between the defendant and [the

B named woman] after the date of the said deed.

Then he alleges :

It is not alleged in the statement of claim that any such act or acts of adultery has or have been committed and the statement of claim discloses no cause of action. Alternatively, if by para. 6 of the statement of claim it is intended to allege the commission of any such act or acts of adultery, the said allegation is denied.

C That is the effect of para. 2 of the defence, which raises the question of the construction of the deed. In para. 1 of the defence, the defendant raises three points of law. He submits that :

The deed of covenant sued on is illegal and against public policy in that the said deed (a) provides for the imposition of penalties upon the defendant in the event of his adultery with [the named woman], (b) the said deed provides for future separation of the spouses, (c) the restrictive covenant mentioned in cl. 3 of the said deed is an unreasonable and unnecessary restraint of the defendant's trade and the said covenant is not severable from the remaining part of cl. 3 or from the deed as a whole.

I propose to deal first with the question of construction, because that

E seems to me to go to the root of the action. Counsel for the defendant contends that part of the condition in cl. 1 of the deed is the commission of an act of adultery. First of all, I observe in looking at cl. 1 of the deed that this is not put as part of the main "if" clause (if I may so describe it), what we used to call the protasis. The main "if" clause

F deals entirely with commencing matrimonial proceedings. The references to acts of adultery committed after the date thereof are qualifications of the proceedings, which is the main point of the "if" clause. It is not : "if the husband shall commit acts of adultery and the wife shall commence matrimonial proceedings." It is : "if the wife shall com-

G mence matrimonial proceedings against the husband founded on acts of adultery committed after the date hereof." The question is the meaning of "founded on." In my judgment, looking at this clause, first of all, standing by itself, and then as part of the whole deed, "founded on" here means "commenced on the basis of an act of adultery having been

H committed." In substance, I think that the expression "founded on" has the same effect as if the expression had been "on the ground of," or "grounded on." It defines the character of the proceedings which the wife has to commence. The character which those proceedings have to take in order to make the condition applicable is that they are proceedings founded on acts of adultery committed after the date hereof.

My attention has been called to the way the expression "founded on" has been used in reported cases, and also in R.S.C., Ord. 11, r. 1 (*ee*), which are words very familiar to lawyers. R.S.C., Ord. 11, r. 1, runs in this way :

Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (*ee*) the action is founded on a tort committed within the jurisdiction. A

That phrase is very much the same as the phrase here. I do not think that the construction of a rule of court necessarily governs the construction of such a deed as this, but I find that, as used there, it must have the meaning that I said I find this has here. It must mean in effect an action which has been commenced on the basis of an act of adultery having been committed. It is true that here, as in this particular case of divorce, there has to be an affidavit giving *prima facie* evidence of the facts alleged, but I do not think that it means to say that the commission of the tort, any more than the commission of the act of adultery, is something which has to be finally and conclusively proved before the condition takes effect. It is sufficient for the condition to take effect, in my judgment, on the true construction of this deed, if it is based upon an act of adultery having been committed. Substantially, I think that it means based on allegations of acts of adultery committed after a certain date, but, looking at the whole frame of the contract, I feel confirmed in the view which I take of the meaning here. However, when I find that the effect of the condition being fulfilled is only to place the property, as Mr. Jenkins has described it, *in medio*, and to put it in the hands of trustees pending the determination of the matrimonial proceedings, that makes me feel all the more sure that "founded on" here does not mean that the act actually must have been committed before any part of the agreement takes effect. Otherwise, cl. 2 would have no meaning at all. The only object of it is to prevent the deed taking effect until it is known whether in fact a divorce is going to be granted, and one of the conditions on which the divorce will be granted is the finding of fact of the act of adultery having been committed. The result is that I have come to the conclusion on the first point, the question of construction, that the plaintiff is right, and that the condition which is expressed in cl. 1 of the deed has taken effect. D E F G

Then comes the question, which is raised, as I have said, by para. 1 of the defence—namely, whether, assuming that is the meaning of the deed, the agreement is illegal. That has been divided by the defendant's counsel into three heads. The first head is as to the restrictive covenant being unreasonable and unseverable, because the defendant's counsel does not raise that point now. He takes the view—I think quite rightly—that it does not arise at present. That question arises only if and when cl. 3 of the deed takes effect, that is, when the wife obtains a final decree and is in a position to call upon the trustees to make the property over to her. Then will arise the question whether the clause H

requiring the husband to enter into the restrictive covenant is something that can be enforced or something which is void as being unreasonable, so that I can disregard para. 1 (c) of the defence.

The next one is subpara. (a), in which the defendant takes the view that the clause is void because it :

A provides for the imposition of penalties upon the defendant in the event of his adultery with [the named woman].

I have tried very hard to follow the defendant's contentions there, but I am quite unable to see how it can be said that this clause is void because it provides for the imposition of penalties. There is no question

B here, as in the ordinary circumstances, between penalty and liquidated damages. The only thing that can be said here is, I think, that it is an attempt—I understand that is what the defendant's counsel says—to punish the defendant for his committing adultery with a particular woman, and an agreement that he is to be punished in that way is something that cannot be enforced.

C Looking at the agreement as a whole, I think that it is not a penalty on the husband in the event of his committing adultery. It is a provision for the wife in the event of his committing adultery. It is an agreement for an express and specified provision in that particular event. The event on which the transfer is

D to take place is the dissolution of the marriage. That is the real question here, not the act of adultery. The act of adultery may not be enough to let the wife have any right at all. The only right she gets there is that, if she commences proceedings founded on the allegation of such an act, she gets the right to have the property transferred to the trustees

E by the husband. Deprivation takes effect only if a final decree is made in the suit, and, in those circumstances, I am quite unable to say that there is anything against the legality of this provision on the ground that it provides for the imposition of penalties.

That leaves me with the much more important point in the case, the

F third point, which is para. 1 (b) of the defence, that the said deed provides for future separation of the spouses.

If this case had come before me 30 years ago, it would have put me in the difficult position of having to decide a very open question which had never, as far as I know, previously been dealt with by the courts.

G Fortunately for me, the matter has been dealt with, and I am able to look at, and I think to a considerable extent be guided by, previous decisions. The first point with regard to that which I have to bear in mind is—and I think that this is an undisputed fact—that a contract between husband and wife made during cohabitation for a future separation is void.

H I do not think that there is any question as to that. However, the view which I take on the authorities is that there is an exception to that rule, and the exception is that, although a contract of that sort made during cohabitation is void, where the spouses have already separated, and the form of reconciliation is that something is to happen on further separation, that is not subject to the same objection

as a similar form would be if the parties had been together when the agreement was entered into. That, I think, is accepted in all the cases, and has been the law of England for a very long time, and is based, I think, on the rule of public policy that anything which has a tendency to weaken the marriage tie is something which it is against the interest of the state to encourage or allow. An agreement for a future separation while the parties are together would be something which would have a tendency to weaken the marriage tie. However, as I think was held in the Irish case of *MacMahon v. MacMahon* (1) :

An agreement entered into between a husband and a wife while living separate and apart, providing for their resuming cohabitation, and further that, in the event of a future separation, provision should be made for the wife, is legal and enforceable.

A question has been raised before me as to whether the decision of the Court of Appeal in Ireland in that case was the first decision upon the point, or whether it is really in accordance with the previous law. I do not think it is necessary for me at the present moment to consider that. The judgment of PALLES, C.B., which is the principal judgment, is one which I have considered carefully, and one which recommends itself to me, and, with the greatest respect, I should have come to the same conclusion. If I had only that to go upon, I should feel myself bound to come to the same conclusion as that to which PALLES, C.B., came (at p. 445) :

. . . as the law now stands, there is nothing in its policy which renders illegal a contract between husband and wife for reconciliation, although it contains a provision, such as we have here, entitling the wife to separate maintenance in the event of a future separation, although dependent solely on her own will.

Mr. Gallop, who has taken every point that he could take, and argued the case most admirably, has suggested to me that that case really applies only where the provision agreed upon is an agreement for maintenance. It is true that in the passage I have just read PALLES, C.B., alluded to separate maintenance, but the whole of the argument and his judgment apply to every sort of provision which is made for the wife in general terms. I do think that I ought not in any way to restrict the principle to the provision of maintenance in the sense of some annual or periodical payment during the life of the wife.

Fortunately *Re Meyrick's Settlement, Meyrick v. Meyrick* (2) seems to me to dispose of that. The decision of the present LORD RUSSELL OF KILLOWEN, then RUSSELL, J., is to the effect that a provision contemplating future separation of spouses in a deed executed by them while living apart with the object and result of bringing them together as man and wife is not void as being against public policy. I do not find that his judgment, which adopts—it does not follow, because he is not bound by it in any way—the reasons and judgment of PALLES, C.B., in *MacMahon v. MacMahon* (1), is restricted in any way. I think that he finds in effect—I am not reading the passage—that a provision as to a future separation contained in a deed entered into while the spouses are not living together, and as the price and condition of terminating

the separation, is not void and inoperative, as being contrary to public policy. He says at p. 319 :

There is no clear authority upon this point in the decisions of the English courts. He refers to the case before PALLES, C.B., in the Irish Court of Appeal, and says, at p. 321 :

A In the cases of *MacMahon v. MacMahon* (1) and *Purser v. Purser* (3), the Master of the Rolls, Ross, J., and the Court of Appeal all concurred in the view that a reconciliation deed executed in such circumstances is not void by reason of its containing provisions which contemplate a future separation. The weight and authority of those decisions are increased in no slight degree when I point out that the leading judgment in the Court of Appeal was delivered by the late PALLES, C.B. I need not refer in detail to the facts and judgments in those cases. They were fully discussed before me. I am aware that decisions of the Irish courts are not binding upon me ; they are however entitled to the highest respect, and none more than the judgments of the Chief Baron. I have read and considered his judgment with care. I find it quite convincing upon the point under consideration, and I am content to adopt its reasonings and conclusions.

C On that ground, he holds that the objection to the claim of the wife in that case failed. It seems to me that that decision is one, agreeing with it as I do, which I am bound to follow. It seems to me that it covers the case almost precisely. It is true that we have not the same circumstances, but I think the phrase used by the judge at p. 319 precisely applies to the case we have here :

D The question is whether a provision as to a future separation contained in a deed entered into while the spouses are not living together, and as the price and condition of terminating the separation, is void and inoperative as being contrary to public policy.

I think that one has to bear that in mind.

E This lady, the plaintiff, at the time she entered into this deed was in a position presumably to establish adultery sufficiently to entitle her to obtain a divorce from her husband. At all events, in the second case, he admits the adultery that was alleged on the first petition. She gave up her rights there. She terminates the state of separation, and throws up all the rights she had at that time, and in consideration of that she obtains this provision. It seems to me that that is a perfectly valid provision and that, the consideration having been fully paid on her part it would be a very sad thing if I had to hold that the husband, having had the advantage which he has had, is to get out of the deed by saying that that provision is void for illegality. I hold that the third objection is not a valid objection, and, having dealt with the three objections, and having found in favour of the plaintiff on the construction of the deed, I must decide in favour of the plaintiff on the whole case, and make a declaration as asked by para. 1 of the claim.

H Solicitors : *Pritchard, Englefield & Co.* (for the plaintiff) ; *Adler & Maurice Cohen* (for the defendant).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

OLYMPIA (LIVERPOOL), LTD. v. MOSS' EMPIRES, LTD.

[COURT OF APPEAL (Greer, Slessor and MacKinnon, L.J.J.), May 17, 18, June 2, 1938.]

Landlord and Tenant—Repairs—Covenant by lessee to spend £500 per annum on repairs or pay the difference between £500 and the sum actually spent—Whether failure to pay gives rise to action on the covenant or for breach of covenant—Damage to reversion—Landlord and Tenant Act, 1927 (c. 36), s. 18 (1). A

Certain premises were leased by the plaintiffs to the defendant company's assignors. The lessees covenanted to expend £500 per annum on repairs and decoration or to pay the lessors the difference between £500 and the amount actually expended. It was found as a fact that from 1933 to 1935 the lessees did not spend the stipulated sum. This action was brought by the lessors claiming damages for breach of covenant, or, alternatively, for money due on the covenant :— B

HELD (GREER, L.J., dissenting): (i) since the passing of the Landlord and Tenant Act, 1927, s. 18 (1), a covenant in the above form is illegal.

(ii) this was not an action for money due, but one founded on breach of covenant. It was, therefore, by virtue of the Landlord and Tenant Act, 1927, s. 18 (1), essential for the lessor to prove damage to the reversion. No such damage having been proved, the action ought to be dismissed. C

[EDITORIAL NOTE. The point at issue here is the legality, since the passing of the Landlord and Tenant Act, 1927, s. 18 (1), of a covenant to spend a stated sum on repairs, or, in default, to pay to the lessor the difference between that sum and the sum actually spent. The legality of this form of covenant has for some time now been questioned, and it is here decided by a majority of the Court of Appeal to be illegal. D

Cases referred to :

- (1) *Farrant v. Olmius* (1820), 3 B. & Ald. 692 ; 2 Digest 19, 109 E
- (2) *Bowers v. Nixon* (1848), 12 Q.B. 558 n. ; 2 Digest 22, 126 ; 18 L.J.Q.B. 35.
- (3) *Spencer's Case* (1583), 5 Co. Rep. 16 a. ; 31 Digest 144, 2798.
- (4) *Dyson v. Forster*, *Dyson v. Seed*, *Quinn*, *Morgan*, etc., [1909] A.C. 98 ; 34 Digest 686, 799 ; 78 L.J.K.B. 246 ; 99 L.T. 942.
- (5) *Willson v. Love*, [1896] 1 Q.B. 626 ; 2 Digest 24, 143 ; 65 L.J.Q.B. 474 ; 74 L.T. 580. F

APPEAL from a judgment of HILBERY, J., dated Jan. 25, 1938. The facts of the case and the revelant clauses of the lease are fully set out in the judgments. G

C. E. Harman, K.C., and *Hon. B. L. Bathurst* for the first appellants (the first defendants).

J. V. Nesbitt for the second appellant (the second defendant).

R. P. Croom-Johnson, K.C., and *P. B. Morle* for the respondents (the plaintiffs). H

Harman, K.C. : The object of this clause was to ensure the proper repair of the premises. The defendants have put the premises into a perfect state of repair. The covenant must be construed as an integral part of the lease. The £500 was a penalty ; there might be nothing in need of repair during a particular year.

Nesbitt : I adopt the argument put forward by the first appellants. In the alternative, this was a mere collateral agreement for the payment of money.

Croom-Johnson, K.C. : Since 1818 the rule has been that, if a lessor chooses to sue an assignee for breach of a covenant to repair, the damages recoverable are limited to the loss to the reversion : see FOA ON LANDLORD AND TENANT, 6th Edn., p. 263, and WOODFALL ON LANDLORD AND TENANT, 22nd Edn., p. 767. The parties are deemed to know the law at the time they made the agreement. In 1924, when the lease was executed, that was the state of the law. The difficulty is to assess what the lessor has lost. This was not a penalty clause, but a part of the terms on which this land was demised. The cases show that a penal rent is liquidated damages and not a penalty. [Counsel referred to HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 20, p. 163, *Farrant v. Olmuis* (1) and *Bowers v. Nixon* (2).] This covenant runs with the land and bound the assignee : *Spencer's Case* (3).

Morle, following on the same side : The £500 to be spent on repairs is about one-sixth of the rent. That is a usual proportion to spend on repairs. [Counsel referred to *Dyson v. Forster* (4).]

Harman, K.C., in reply : One can have a penalty in a lease even if it is described as "extra rent" : *Willson v. Love* (5). These premises are in perfect order, and yet it is said that the defendants should pay £700. That alone shows that this is a penalty.

GREER, L.J. : The defendants in this case appealed as assignees of a lease granted by the plaintiffs on Oct. 16, 1924, to A. E. Abrahams, Ltd. The defendants as such assignees were liable to perform the undertakings of the lessees contained in cl. 2 of the lease. These included various obligations with regard to the repairs and decorations, which the lessors required to be done by the lessees. The plaintiffs complained that, contrary to cl. 2 (vii), the defendants had, during the years mentioned in the particulars—that is to say, the years ended Mar., 1933, Mar., 1934, Mar., 1935, and Mar., 1936—committed breaches of the covenants contained in the said lease, and they claimed the sum of £1,078 in respect of the alleged breaches. It turned out that in the last year referred to the full amount that they were entitled to have expended—namely, £500—was in fact expended, and in this and other ways the amount of the claim was reduced, and for the amount so reduced HILBERY, J., gave the plaintiffs judgment—that is to say, £730 8s. 10d. From this judgment the defendants appeal. The guarantor was also included in the action, but the only claim against him was confined to the guarantee of the defendant himself, and did not include a claim against him as guarantor of Abrahams, Ltd. Any such claim may have to be considered in some future action.

The correctness of the judgment of HILBERY, J., seems to me to turn on the true interpretation of cl. 2 (vii) in the lease. In the several parts

of cl. 2, provision was made for the work undertaken to be done by way of repairs to the premises, and in subcl. (viii) provision was made with reference to certain effects upon the premises. Subcl. (vii) reads as follows :

In the performance of the covenants in subcl. (iv), (v), (vi) and (viii) herein contained to expend during each year of the said term on such repairs and decoration a sum of £500 and at the end of each year of the said term to produce to the lessors evidence of such expenditure or to pay to them at the end of each such year a sum equal to the difference between the amount so expended and £500 provided that the whole of the said sum shall not be expended on decorations alone but a proper proportion thereof shall be expended on necessary repairs to the structure of the said premises such proportion to be determined by the surveyor of the lessors provided nevertheless that the expenditure and payment by the lessees of such sum of £500 per annum shall be accepted by the lessors as full satisfaction of the covenants (iv), (v), (vi) and (viii) so that if in any one year a larger sum than £500 shall with the consent in writing of the lessors be expended by the lessees for the like purpose the amount of such expenditure in excess of £500 shall be taken in or towards satisfaction of the lessees' future liability under this subclause.

If this subclause, properly interpreted, is a mere measure of the damages flowing from the failure to perform the covenants contained in the other subclauses of cl. 2, the appellants would be entitled to succeed, on the ground that the payments there referred to are not in any way measures of the damage to the reversion, but that the clause provides for certain sums by way of penalty for the non-performance of the obligations referred to in subcl. (vii). If, on the other hand, subcl. (vii) is, as I think it is, a clause which provides in regard to certain promises made by the defendants how they would perform their obligations, then I think that the judgment of *HILBERY, J.*, was right. In my view, the subclause does mean that the lessees were covenanting in every year, including the years mentioned in the statement of claim, to perform their obligations to repair, either by providing evidence that they had expended the sum of £500, or, if they did not do so, then in lieu thereof by paying a sum equal to the difference between the amount so expended and £500. If this is the true construction of the subclause, no question can arise with regard to penalties, or on the other questions raised by Mr. Harman on behalf of the defendants.

In my view, subcl. (vii) contains two alternative promises as to the manner in which the repair obligations are to be performed by the lessees, the first being to expend in each year a sum of £500, and to produce evidence of such expenditure, and, alternatively, if no such expenditure is made, and no such evidence produced, duly to perform their obligations by paying to the lessors at the end of each year a sum equal to the difference between the amount so expended and £500. Whichever alternative the defendants adopt, they have, either by the expenditure of £500 or by the payment of the unexpended part, performed their repairing covenants during the year in question. If this be right, I think the appeal fails. The covenant is one which applies to the demised premises, and runs with the land so as to bind the assignees.

I do not see anything illegal or forbidden by the Landlord and Tenant Act, 1927, s. 18, in an undertaking by a lessee either to expend in each

year £500 or, if that is not expended, to pay to the lessor the amount so unexpended. The agreement appears to me to be an agreement expressly defining the obligations of the tenant, and it is not an agreement fixing the damage to the reversion, nor an agreement to pay a penalty in the event of non-performance of the obligations provided for in cl. 2

A of the lease.

The correctness of this view may be tested as follows. If the lessor complained that the seventh year had arrived in respect of which the undertaking contained in subcl. (vi) had to be performed, and called upon the lessee to perform it, the lessee could reply, first, that, during
B all the past seven years, he had expended £500 per annum on repairs, and that therefore he had duly performed all his obligations under cl. 2 (vii), and he was not entitled then to call upon the lessee to perform the obligations of subcl. (vi).

I think that, if, in some of the years, instead of expending £500, he
C had, where he had expended less, paid the balance to the lessor, he could equally say: "I have duly performed my contract as provided for by subcl. (vii), and therefore you are not entitled to ask me to perform the obligations imposed upon me by subcl. (vi); but I want to do the work, and I ask your consent, so that I may be entitled to attribute the
D expenditure to my future obligations under subcl. (vii)."

In my judgment, subcl. (vii) deals neither with liquidated damages nor with a penalty, but solely with an agreed method of performance of all the subclauses mentioned in subcl. (vii).

It remains to be considered whether subcl. (vii) is to be interpreted
E as a mere substitute for the performance of the subclauses therein mentioned or whether it contains express promises which are binding on the lessee, the non-performance of which gives a right of action to the lessor. In my judgment, the true meaning of the subclause is that the lessee promises (*a*) that he will expend during each year of the term
F on such repairs and decorations a sum of £500, and will produce to the lessors at the end of each year of the term evidence that he has done so, and (*b*) an alternative promise that, if he does not prove that he has expended the said sum, he will pay at the end of each year a sum equal to the difference between the amount so expended and £500. That view
G is, I think, supported by the proviso relating to the question as to whether such expenditure may be on decorations alone. If the £500 has not been expended, it seems to me clear that the lessor is entitled to sue on the alternative promise to pay to the lessor in each year a sum equal to the difference between the sum so expended and £500. HILBERY, J., has
H found what that amount is in respect of the three years on which the action was based, and I see no reason to differ from his finding that the plaintiffs had a good cause of action for those years. This means that, in my judgment, the plaintiffs' action is for a debt due under the express promise contained in subcl. (vii), and, inasmuch as it is not a claim for damages for breach of the repair covenant, the Landlord and Tenant

Act does not restrict the claim to a claim for damages to the reversion. For these reasons, I think that the decision of HILBERY, J., was right, and that this appeal should be dismissed with costs. However, I am afraid that my brethren in their judgments take a different view, and the order of the court will be in accordance with their judgments.

SLESSER, L.J. : This is an action framed upon a basis of a claim for damages for breach of covenant, or, alternatively, for money due on the covenant. The lease containing the covenant, dated Oct. 16, 1924, between Moss' Empires, Ltd., and A. E. Abrahams, Ltd., the lessees, is in respect of a building known as Olympia Theatre in West Darby Road, Liverpool, and a shop adjoining, together with the use in the theatre of various effects connected with the production of cinematographic exhibitions, for 24 years from Mar. 25, with certain provisions as to earlier termination.

The yearly rent is expressed to be £2,750 in respect of the theatre premises and £500 in respect of the effects, and the lessors are required to pay certain insurance premiums not here material. Clause 2 of the lease which here calls for particular consideration in subcl. (iv) provides an obligation to keep the demised premises externally and internally in substantial repair, condition and décoration. By subcl. (v) it is required every fourth year to paint the outside work usually painted, by subcl. (vi) every seventh year to paint the inside and decorate, and by subcl. (viii) to keep the premises in good and tenantable order, and preserve the effects from being destroyed, damaged or lost, with certain consequential provisions. So far, no difficulty arises, and an ordinary action for damages would be maintainable at common law for the breach of any of these requirements. The difficulty in this case has arisen on the construction and effect of subcl. (vii), which is in the following terms :

In the performance of the covenants in subcll. (iv), (v), (vi) and (viii) herein contained to expend during each year of the said term on such repairs and decoration a sum of £500 and at the end of each year of the said term to produce to the lessors evidence of such expenditure or to pay to them at the end of each year a sum equal to the difference between the amount so expended and £500 provided that the whole of the said sum shall not be expended on decorations alone but a proper proportion thereof shall be expended on necessary repairs to the structure of the said premises, such proportion to be determined by the surveyor of the lessors provided nevertheless that the expenditure and payment by the lessees of such sum of £500 per annum shall be accepted by the lessors as full satisfaction of the covenants (iv), (v), (vi) and (viii) so that if in any one year a larger sum than £500 shall with the consent in writing of the lessors be expended by the lessees for the like purpose the amount of such expenditure in excess of £500 shall be taken in or towards satisfaction of the lessee's future liability under this subclause.

It is found by HILBERY, J., that from 1932 to 1935 nothing very substantial was done in the way of expenditure on repairs, nor was any evidence produced to the plaintiffs' surveyor of such expenditure on repairs, nor was £500 in each year offered, nor was any sum tendered as the difference between the actual expenditure and £500, as provided in the subclause. After making deductions for amounts agreed to have been expended, the sum claimed in the action, for which judgment

was given, was £737 8s. 10d. From this judgment the defendant company appeals. At the date of the writ, it was asserted, the premises were in a good state of repair, and between Mar. 31, 1936, and that time £1,976 12s. 7d. had been spent on repairs. The present defendant company is the assignee of the lessees by an indenture of Sept. 3, 1925,

- A and the defendant Abrahams is a guarantor of the assignee and of the lessees, though here sued only in the former capacity. HILBERY, J., has come to the conclusion that subcl. (vii) is a covenant for performance of the repairing covenants in a particular way. He says that the parties have provided in subcl. (vii) a covenant, compliance with which is a
- B satisfaction of the detailed covenants to repair, and he comes to the final conclusion that the action is an action upon the covenant, and not an action for damages. He says :

It is an action for the amount due on the covenant, which there has been a failure to pay. That is a thing quite distinct from an action for damages for a breach of the covenant.

- C With this opinion I disagree. In my view, subcl. (vii) is no more than a means of quantifying the obligation to repair and replace effects set out in subcl. (iv), (v), (vi) and (viii), and provides for their full satisfaction by certain payments in lieu of their actual physical performance.
- D The fact that, if the covenantor actually repairs or replaces, and expends thereon less than £500 in any year, he need pay only the difference fortifies this view. In other words, I regard cl. 2 as containing a general covenant to repair and replace, and consider subcl. (vii) to be doing no more than provide how, in the performance of the repair covenants,
- E they may financially be satisfied. A failure, therefore, to take advantage of subcl. (vii), which may well, as Mr. Croom-Johnson says, have been inserted for the benefit of the lessees, is to produce a breach of the obligation of the provisions regarding the repairing covenants. No claim under subcl. (vii) could be framed in debt. It is, at the highest,
- F a liability for damages for breaches of covenant which have been in the instrument itself estimated in advance—a claim for liquidated damages. I think that this follows, strictly, from the judge's own finding when he comes to the conclusion that the contract is one for performance of the repairing obligations, either by the expenditure on repairs of the
- G £500, or by the expenditure on repairs of a certain amount and payment of the balance.

- If the action be one for liquidated damages, as I think it well may be, there was nothing prior to the Landlord and Tenant Act, 1927, to prevent the entertainment of such an action, provided, of course, that it would
- H have been a defence to say, in such an action, that the sum inserted in the contract was in truth a penalty, and not a genuine pre-estimate of damage. However, by reason of the Landlord and Tenant Act, 1927, s. 18 (1), such a claim as this is no longer possible, for now damages for a breach of covenant to keep or put premises in repair during the currency of a lease may in no case exceed the amount by which the

value of the reversion in the premises is diminished owing to the breach of such covenant, and the parties can no longer contract to any other effect. As, in the present case, there is no suggestion of evidence of diminution in the value of the reversion, and as the case has not been framed upon any such claim, I am of opinion that the subsection is a complete answer to the claim, assuming, as I do, that before the statute the action could in any event have been framed only for damages for breach of covenant to repair. I would add that the phrase "keep or put premises in repair" is wide enough to cover subcl. (viii), which deals with the replacement of the effects for which a special rent is to be paid, equally with the repair of the actual buildings themselves. A

On this conclusion, it is not necessary to consider whether, if action could be brought, the amount claimable under subcl. (vii) can properly be regarded as liquidated damages or as a penalty. This part of the case, did it call for decision, would, I think, be extremely difficult to determine, but, in the view which I have formed, the problem does not arise. B
 My difference from HILBERY, J., is that he is of opinion that this is not an action sounding in damages at all, but an action on the covenant or on a specialty debt. In my view, for the reasons I have stated, the case can be formulated only as one for damages for breach of covenant to repair, and as such is defeated *in limine* by the Landlord and Tenant Act, 1927, s. 18 (1). This appeal succeeds, with costs here and below. C
D

MACKINNON, L.J.: The question in this case arises upon one of the lessee's covenants in the lease of Oct. 16, 1924. By subcll. (iv), (v), (vi) and (viii) of those covenants, the lessees undertake to keep the premises in repair, and in particular to do certain painting work within and without in certain specified years. By subcl. (vii) the lessees covenant to do certain things "in the performance of the covenants in" those subcll. (iv), (v), (vi) and (viii). The plaintiffs sue the defendants for the breach of one of the things of which performance is promised by subcl. (vii). That thing is that, if in any year the defendants do not expend £500 in the cost of repairs, they will pay to the plaintiffs the difference between that sum and the lesser amount they have so spent. In making this claim, the plaintiffs do not in terms allege any breach by the defendants of the repairing covenants in subcll. (iv), (v), (vi) and (viii), nor do the plaintiffs allege that they have sustained any damage by such breach, nor did they offer any evidence in proof of any such damage. E
F
G

Subclause (vii) is one part of cl. 2 of the lease, which begins: "The lessees covenant with the lessors as follows." Among the promised things which follow are subcl. (iv), to keep the premises in repair, subcl. (v), to paint the outside every fourth year, subcl. (vi), to paint the inside every seventh year, and subcl. (viii), to preserve certain effects. Then subcl. (vii) adds another promise—namely, to do something "in the performance of the promises in (iv), (v), (vi) and (viii)." The primary promise hereunder is to spend £500 a year in such performance, with a H

- proviso that such expenditure shall be accepted by the lessors as full satisfaction of the obligations under subell. (iv), (v), (vi) and (viii). This, as was argued by Mr. Croom-Johnson, is a provision for the benefit of the lessees by way of limitation of their full obligations under subell. (iv), (v), (vi) and (viii). In some circumstances, I can well imagine that
- A** it might be so—for example, if the time for outside painting under subel. (v) and the inside painting under subel. (vi) happen to occur in the same year. The plaintiffs' claim is under that other part of subel. (vii) which provides that, if the defendants in any year do not expend £500, they shall pay to the plaintiffs the difference between that sum and what they
- B** do spend. This is part of what the defendants promise to do in the performance of the covenants of subell. (iv), (v), (vi) and (viii). If a claim is made under it, I see no escape from the proposition that it is a claim based upon a failure by the defendants to perform the obligations under subell. (iv), (v), (vi) and (viii). If a man covenants, "I will do A,
- C** and, in performance of A, I will do B," then an allegation that he has failed to do B is in truth an allegation that he has failed to do A, for he has promised that B shall be part of, if not the whole of, A, so that, if the promise as to B is broken, that amounts to the breaking of the promise as to A.
- D** I think that the result is that a claim that the covenant in subel. (vii) has been broken by the defendants is essentially an allegation of the breach of the covenants in subell. (iv), (v), (vi) and (viii), and those covenants are undeniably "covenants to repair." The Landlord and Tenant Act, 1927, s. 18 (1), provides :
- E** Damages for a breach of a covenant . . . to keep or put premises in repair during the currency of a lease . . . shall in no case exceed the amount (if any) by which the value of the reversion . . . is diminished owing to the breach of such covenant . . .
- The effect of this is that any provision of any fixed sum for breach of a covenant to repair will be of no effect. The lessor must prove the amount
- F** of the only damages which the section allows him to recover—namely, the amount by which the value of the reversion is diminished owing to the failure to repair. Thus, in this case, if the plaintiffs seek to assert a breach of the covenants in subell. (iv), (v), (vi) and (viii), and in particular by the failure to expend £500 in a year, which is specified in
- G** subel. (vii) as the manner of performance of those covenants, I think that they are not allowed by the Act of 1927 to claim any damages, except that amount which they prove to be the damage to the reversion owing to the five covenants not having been fulfilled. However, they gave no evidence of any such damages. In the result, I think that they
- H** failed to put forward any claim recoverable by law, and their action should have been dismissed. I would add only that, if the contention of the respondents were to succeed, this case would indicate for lessors an easy method in any lease of defeating the intentions of the legislature, and of perpetuating the mischief that the legislature hoped to remedy. This view makes it unnecessary to consider other interesting questions

that were debated before us, and I do not propose to do so. I think that the appeal should be allowed, and judgment entered for the defendants, with costs here and below.

Judgment for the defendants with costs in both courts.

Solicitors ; *H. S. Wright & Webb* (for the appellants, the defendants) ;
Burton & Ramsden (for the respondents, the plaintiffs).

[*Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.*]

MCCALMONT v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
May 2, 3, 4, June 2, 1938.]

Income Tax—Double taxation relief—Payment of income tax and super-tax in both United Kingdom and Irish Free State—Admissibility of claim for relief in respect of double super-tax—Finance Act, 1920 (c. 18), s. 27—Relief in respect of Double Taxation [Irish Free State] Declaration, 1923 (S.R. & O., 1923, No. 406).

The respondent was resident in both the United Kingdom and the Irish Free State. For the year 1923-24 he paid United Kingdom and Irish Free State income tax, and a claim for relief under the Finance Act, 1920, s. 27, in respect of such double income tax was admitted. For the same year the respondent had also suffered double super-tax, and he claimed relief in respect of such double super-tax :—

HELD (CLAUSON, L.J., dissenting): although the relief from income tax granted by sect. 27 could not be interpreted to include super-tax, the effect of the arrangements contained in the Relief in respect of Double Taxation (Irish Free State) Declaration, 1923, was to allow relief from income tax, including super-tax, and the respondent was entitled to the relief claimed.

[EDITORIAL NOTE. Relief from double taxation is the subject of a special order or "arrangement" in respect of the Irish Free State. Generally such relief does not extend to sur-tax (which has now replaced the super-tax here referred to), but, having regard to the terms of the "arrangement" and to the fact that it is reciprocal, such additional relief can be claimed in this case.

AS TO RELIEF FROM DOUBLE TAXATION IN IRISH FREE STATE, see HALSBURY, Hailsham Edn., Vol. 17, p. 327, para. 649 ; and FOR CASES, see DIGEST, Vol. 28, pp. 93, 94, Nos. 552-557.]

APPEAL by the Crown from an order of LAWRENCE, J., dated May 4, 1937, and reported in [1937] 3 All E.R. 51. The facts are fully stated in the judgment of SIR WILFRID GREENE, M.R.

The Solicitor-General (Sir Terence O'Connor, K.C.) and Reginald P. Hills for the appellants.

Raymond Needham, K.C., and Terence N. Donovan for the respondent.

SIR WILFRID GREENE, M.R. : For the year of assessment ending Apr. 5, 1924, the respondent was resident in both the United Kingdom and the Irish Free State, and accordingly became liable to pay income tax and super-tax in both countries. His income for the year, as assessed for purposes of income tax, was £87,728. He paid income tax on that

amount in both countries, but applied for, and obtained, relief in this country in respect of the double income tax so paid under the Finance Act, 1920, s. 27. In the same year, his statutory income for the purposes of super-tax was in both countries £129,283, that being the amount of his total income for the previous year, 1922-23. He had paid income tax on that amount for that year in this country, but not in the Irish Free State, since there was in that year no Irish Free State income tax. He paid super-tax for the year 1923-24 on this sum of £129,283 in both countries, and the present appeal arises out of a claim by him for relief in respect of the double super-tax so paid. The special commissioners rejected the claim, but their decision was reversed by LAWRENCE, J.

The case presented on behalf of the respondent falls under two heads. The first involves a proposition of general application—namely, that the relief given by the Finance Act, 1920, s. 27, extends to super-tax as well as to income tax. The second, which is an alternative to the first, is based upon an order in council directed to the special case of double taxation in Great Britain and the Irish Free State. LAWRENCE, J., rejected the contention of the respondent under the first head, and I find myself so completely in agreement with his reasoning and his conclusion on this branch of the case that I adopt them as my own, without finding it necessary to add anything to them. The contention advanced under the second head, however, was accepted by LAWRENCE, J. It raises a question which, to my mind, is not without difficulty, and I must address myself as best I can to its solution.

The order in council was made under the Irish Free State (Consequential Provisions) Act, 1922, s. 5 (1), which provides as follows :

(1) If His Majesty in Council is pleased to declare (a) that under the law in force in the Irish Free State any tax is payable in respect of . . . which a corresponding tax is payable also in Great Britain ; and (b) that arrangements as specified in the declaration have been made with the government of the Irish Free State with a view to the granting of relief in cases where there is a charge both to the British tax and to the Irish tax in respect of the same subject matter ; then, unless and until the declaration is revoked by His Majesty in Council, the arrangements specified therein shall, so far as they relate to the relief to be granted from the British tax, have effect as if enacted in this Act, but only if and so long as the arrangements, so far as they relate to the relief to be granted from the Irish tax, have the effect of law in the Irish Free State.

It is important to notice the scheme of this provision. The arrangements which are to come into force are those to be specified in the declaration. They are arrangements made :

with a view to the granting of relief in cases where there is a charge both to the British tax and to the Irish tax in respect of the same subject matter.

The expressions “ the British tax ” and “ the Irish tax ” refer back to the contents of the first part of the declaration to be made, which contemplates a correspondence between a Free State tax and a British tax. The arrangements come into force by the mere making of the declaration.

The relevant declaration is the Relief in respect of Double Taxation [Irish Free State] Declaration, 1923 (S.R. & O., 1923, No. 406). It

recites, among other things, sect. 5 (1) of the Act of 1922, and declares :

... that under the laws in force in the Irish Free State, income tax, super-tax, estate duty and stamp duties are payable in respect of subjects of charge in respect of which corresponding taxes are payable also in Great Britain ; and that the arrangements specified in Parts I, II and III of the schedule to this declaration have been made with the government of the Irish Free State with a view to the granting of relief in cases where there is a charge both to the British tax and to the Irish tax in respect of the same subject-matter. A

These declarations appear to me to be quite unambiguous. The correspondence between certain Free State taxes and their counterparts in Great Britain is asserted. There are four different taxes—income tax, super-tax, estate duty and stamp duties. The only declaration which there is power to make under the Act is a declaration of correspondence between pairs of taxes. There is no room for a declaration of such correspondence, unless it is to be followed by a declaration with regard to the arrangements made for granting relief in cases where such correspondence exists. That declaration is duly made, and it is a declaration to the effect that arrangements have been made in respect of each of the four specified taxes. When the schedule is examined, it is found that the arrangements in respect of two of these four taxes—namely, estate duty and stamp duties—are contained in Parts II and III respectively. The arrangements with regard to the remaining two taxes—namely, income tax and super-tax—are to be found in Part I, which is headed “ Income tax (including super-tax),” while para. (c) of that part provides that : B C D

this arrangement applies to income tax (including super-tax) for the year of assessment commencing on Apr. 6, 1923, and subsequent years. E

The language which I have quoted and examined appears to me to be clear. The schedule is part of the declaration, and they must be construed as a whole. The arrangements “ specified therein,” *scilicet*, in the declaration, are to have effect as if enacted in the Act of 1922 (sect. 5 (1)). It is, of course, possible to imagine that the “ arrangements,” when properly construed, might be incapable of producing the result contemplated by the body of the declaration, and that in effect is what is said on behalf of the Crown in the present case. Such a construction, however, is not one which the court should accept, unless forced to do so, since it would stultify the intention expressed in the declaration, and deprive it in part of any effective operation. It is the duty of the court to construe the document as a whole, and, so far as possible, to give effect to all the words used. F G

With these considerations in mind, I turn to the arrangements set out in Part I of the schedule. The opening words are “ Relief shall be allowed from British income tax.” Para. (c) (which I have already quoted), when read in the light of the heading and the body of the declaration, would constrain me to read this as meaning “ Relief shall be allowed from British income tax and British super-tax.” It is said, however, H

that this construction is not permissible, by reason of the following words—namely :

in accordance with and under the provisions of the Finance Act, 1920, s. 27 [subject to a certain proviso].

- The argument is that, as sect. 27 is *ex hypothesi* confined to relief from
- A British income tax, the relief to be granted under the arrangement is limited to relief from that tax, and does not extend to relief from British super-tax. In other words, no relief at all is given from British super-tax, the only effect of the arrangement being to modify sect. 27 in accordance with the proviso, which substitutes a method of determining the
- B Free State rate of tax different from that laid down in sect. 27. I do not find that the language relied on makes it necessary to accept this conclusion. The true view, in my judgment, is that the relief granted by sect. 27 must be treated as being extended and applied so as to cover not only British income tax but also British super-tax. Although the
- C language used is certainly not happy, I find no difficulty in giving effect to this view, and I prefer it to a construction which involves treating the declaration as having failed to carry out its expressed intention by giving no relief from British super-tax.

- In order to explain the reference to super-tax in the declaration, and
- D to give it a content, it was argued on behalf of the Crown that sect. 27 does in a sense give relief in respect of British super-tax, in that, in ascertaining what is described in that section as “the appropriate rate of United Kingdom tax,” the rate at which the tax-payer seeking relief has borne or is liable to bear United Kingdom super-tax for the relevant
- E year forms an element in the calculation. This is, in my opinion, fallacious. The introduction of super-tax in this connection is not for the purpose of giving relief against British super-tax, but for the purpose of defining and limiting the amount of the relief from British income tax which is to be granted under the section. In no case can the amount of
- F relief granted in respect of British income tax exceed the amount of British income tax paid. In the result, I am of opinion that the decision of LAWRENCE, J., on this matter was right, and that his judgment should be affirmed, and this appeal dismissed with costs.

- G SCOTT, L.J. : In cases turning on right to relief in respect of Dominion tax, two issues may arise for decision : (i) in respect of what payment of Dominion tax is relief given ? and (ii) from what payment of British tax is the relief to be deducted ? No question is raised by the present case as to the first issue. There is no dispute as to the measure of Irish tax
- H payment in respect of which the appellant is to have his relief. The question arises on the second issue : how can he get the relief ? If he is limited to his pure income tax debt to the British revenue department as the means by which he is to obtain relief, he cannot get the whole relief due. He can get it only if he is allowed to deduct, not only from his income tax debt, but also from his super-tax debt.

I agree with LAWRENCE, J., that sect. 27 of the Act of 1920 does not give him that right. The words in subsect. (1), "he shall be entitled to relief from United Kingdom income tax," must in that context mean from income tax proper. Subsect. (8) (b), contrasted with para. (c), is, I think, conclusive on that point. If there were any doubt left, the second half of para. (d) would remove it. It follows that the appellant can get no relief from British super-tax out of sect. 27. I also agree with LAWRENCE, J., that the whole picture is changed by the Irish Free State (Consequential Provisions) Act, 1922, s. 5, and the order in council made thereunder, No. 406 of 1923, which by the above section has effect as if enacted in the Act. A

It is clear that the statutory conditions precedent to the mutual arrangements there contemplated were duly accomplished by the declaration of His Majesty in Council contained in the order, and nothing, therefore, remains but to consider the terms of the arrangements contained in the schedule. It is to be observed that the mutual arrangements are, by the terms of the declaration, stated to extend to four taxes—income tax, super-tax, estate duty, and stamp duties. Instead of dividing the schedule into four parts, one allotted to each tax, the draftsman has dealt with income tax and super-tax together, and has included both in Part I. This course having been adopted, it is necessary, in my opinion, to regard the words of the title as part of the instrument, and as an intimation that this part deals with both the first two taxes, and where it speaks of income tax is concerned equally with super-tax. In effect, the title is a definition clause, saying: **For the purpose of construing these arrangements, the phrase "income tax" shall be deemed to include super-tax.** Clause (c) *ex majore cautela* repeats that provision in the body of the instrument. Applying that definition, we have to construe cl. (a) as if it read: "Relief shall be allowed from British income tax, which for this purpose is to be construed as meaning super-tax as well as income tax." An analogous reading will apply to the reciprocal Irish provision, cl. (b). This interpretation seems to me the natural one, but, since writing the preceding part of my judgment, I have had an opportunity of reading and considering the judgment of CLAUSON, L.J., in which he arrives at a conclusion different from mine on the interpretation of the order in council. His view is that the exegetic phrase "including super-tax" can be disregarded both in the title and in cl. (c) of the "arrangements." That construction seems to me to be wrong, for the following reasons. The statute contemplates mutual relief in the two countries, where they have agreed upon that course. It speaks of "arrangements," because, instead of a formal convention, it leaves it to the revenue authorities of the two countries to make the necessary arrangements. The operative part of the declaration which constitutes the delegated legislation enumerates four taxes in force in each country as the intended subject-matter of mutual relief, and the sentence which follows must, as it seems to me, B
C
D
E
F
G
H

be read as co-extensive with that enumeration. The intention of the declaration as a whole is to give effect to a plan of mutual relief on four named taxes. If the phrase "including super-tax" in the title to the arrangements is read as a definition, effect is given to this intention, but not otherwise. I therefore agree with SIR WILFRID GREENE, M.R.,
A that the appeal must be dismissed with costs.

CLAUSON, L.J. : Major McCalmont at the relevant dates was resident both in the Irish Free State and in Great Britain. For the year 1922-23 he paid United Kingdom income tax on a sum (in round figures) of
B £129,000. In that year there was no Irish income tax. For the year 1923-24, he paid United Kingdom income tax on £87,000, and he paid Irish income tax on the same sum. He claimed relief by way of a return of, or credit against, the United Kingdom income tax, having regard to his payment of Irish income tax for the same year, the claim being
C made under the Finance Act, 1920, s. 27. We were told, though it does not appear in the stated case, that the effect of applying the provisions of sect. 27 (1), which require a consideration not only of the income tax charge but also of the super-tax charge, resulted in his being held entitled to relief to the extent of just over 5s. in the £, with the result, as I under-
D stand the matter, that his United Kingdom income tax for 1923-24 was returned to him in full, leaving some measure of the calculated relief still unsatisfied, and, furthermore, he has borne super-tax for 1923-24 both in the United Kingdom and in Ireland without any relief, thus suffering double taxation in respect of super-tax. He now comes
E forward and claims relief in respect of this double payment of super-tax. The matter is admittedly governed by the Finance Act, 1920, s. 27, in conjunction with the provisions of the Relief in respect of Double Taxation [Irish Free State] Declaration, 1923.

It is convenient to follow the course taken by LAWRENCE, J., and to
F attack the problem first as though the only provisions to be considered were those of sect. 27 of the Act of 1920. Turning to that section, it is to be observed that the ascertainment of the rate to be applied for the purpose of calculating the measure of relief involves attention to, among other factors, the rate of United Kingdom super-tax for the year where,
G as in the present case, the claimant for relief is a super-tax payer. When the rate has been calculated, however, it is to be applied to the United Kingdom income tax paid or payable by the claimant. In the present case, in view of the fact that, if the rate is applied to this income tax (using the word in the strict sense of income tax as opposed to super-
H tax), the claimant will obtain incomplete relief even from double income tax, the claimant can obtain relief from super-tax only by establishing that the phrase "United Kingdom income tax" comprises United Kingdom super-tax. True it is that super-tax is an additional income tax, and accordingly the phrase "income tax" may in some contexts be construed to include super-tax. Nevertheless, in view of the clear

differentiation in the subsection between the three phrases "United Kingdom income tax," "United Kingdom tax," and "United Kingdom super-tax," the contention that in this section the phrase "United Kingdom income tax" can be correctly construed to cover United Kingdom super-tax appears to me to be quite unsustainable. LAWRENCE, J., took the same view of the meaning of the subsection, A and I agree with him. I have not thought it necessary to follow him into a consideration of the earlier sect. 55 of the Act of 1918, which was superseded by sect. 27 of the Act of 1920. The latter section seems to me to be free from ambiguity, and a reference to the earlier section can, in my view, throw no light upon its construction. I must not be B understood, however, to differ in any way from the views expressed by LAWRENCE, J., in regard to sect. 55.

It is necessary, however, to turn now to the Declaration of 1923. By reason of the provisions of the Irish Free State (Consequential Provisions) Act, 1922, His Majesty clearly had power by declaration in C council to give statutory effect to any arrangement for granting relief against double taxation which might be made with the government of the Irish Free State, and thus incidentally to modify the operation of sect. 27 of the Act of 1920, and the question is whether, on the true construction of the declaration, this has been done. If the heading D "Income tax (including super-tax)" and cl. (c) of Part I of the arrangements referred to in, and scheduled to, the declaration are disregarded, the matter seems to me, as a matter of construction, quite plain, and, on studying the judgment of LAWRENCE, J., I am disposed to think that he takes the same view. Reading cl. (a) and (b), I find the following E phrases used: "British income tax," "Irish Free State income tax and super-tax," and "British income and super-tax." On those cl. (a) and (b), isolating them from the heading and from cl. (c), it seems to me plain that sect. 27 is left unaffected, in so far as concerns the provision that that against which relief is to be given is income tax in the strict F sense, and not income tax in a sense which includes super-tax as well as income tax. I find nothing in the heading or in cl. (c) to induce me to modify this view. The arrangement has to do, not only with income tax, but also with super-tax, for, in the case of a super-tax payer, the rate of super-tax must be taken into consideration in computing the rate G which forms the basis of the measure of relief. This accounts, to my mind, sufficiently for the reference in the heading and in cl. (c) to "income tax (including super-tax)." The suggestion really is that the presence in the heading and in cl. (c) of the words "income tax (including super-tax)" is equivalent to a definition that in those provisions income tax H must be construed as including super-tax. This suggestion not only involves putting on the words a strain which they cannot, in my view, as a matter of English, bear, but also makes cl. (a) and (b), which otherwise seem to me to be perfectly intelligible and logical, very difficult to construe. I thus feel bound to differ from the construction placed by

LAWRENCE, J., on the declaration, a construction to which, as I gather from the language he uses, he was attracted by the consideration that no reason occurs to him why relief should not be given against super-tax where there has been double taxation to super-tax. Where there is, as I venture respectfully to think, no ambiguity in the provisions as properly interpreted, I doubt whether this consideration can be legitimately allowed any weight.

In my judgment, the order of LAWRENCE, J., should be reversed, and the decision of the special commissioners restored, but, as my brethren take a different view, the appeal will be dismissed.

B *Appeal dismissed with costs.*

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *William Easton & Sons* (for the respondent).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

C

Re LENG, DODSWORTH v. LENG.

[CHANCERY DIVISION (Simonds, J.), June 1, 1938.]

Wills—Contingent interest in income of residuary estate—Maintenance out of intermediate income—Trustee Act, 1925 (c. 19), s. 31.

D

The residuary trust fund under a will was held in trust for the testator's children who should attain the age of 21 years in equal shares, and by a subsequent provision of the will the share of each child was settled so that each child on attaining the age of 21 years would take only a life interest in his share. At the death of the testator, there were two children, who were both infants, and therefore, except for the provisions of the Trustee Act, 1925, s. 31, the intermediate income would have been accumulated and added to the corpus. It was contended that the effect of the above section was that the trustees could apply the intermediate income for the maintenance of the infants:—

E

HELD: the intermediate income was available for the maintenance of the infants.

Re Reade-Revell, Crellin v. Melling (1) distinguished.

F

[EDITORIAL NOTE.] The case of *Re Reade-Revell* (1) is here explained as being governed by the express direction to accumulate the intermediate income, and did not therefore overrule the well-established principle that infants could be maintained out of the intermediate income in such a case. It is now held that the statutory power of maintenance applies in the case of a contingent life interest, often described as a contingent interest in income—this is so, at any rate, where one is dealing with the income of the residuary estate.

G

AS TO MAINTENANCE OUT OF INTERMEDIATE INCOME, see HALSBURY, Hailsham Edn., Vol. 14, pp. 352, 353, para. 661; and FOR CASES, see DIGEST, Supp., Executors, Nos. 5251a, 5251b.]

H

Case referred to:

(1) *Re Reade-Revell, Crellin v. Melling*, [1930] 1 Ch. 52; Digest Supp.; 99 L.J.Ch. 136; 142 L.T. 177.

ADJOURNED SUMMONS asking whether certain infants, contingently entitled to the income of the residuary estate of the testator, were entitled to be maintained out of the intermediate income.

Wilfrid M. Hunt for the plaintiffs, the executors and trustees of the will.

Hon. Denys B. Buckley for the widow, Marcia Mary Leng.

T. A. C. Burgess for the infant defendants, C. A. W. Leng and D. J. T. Leng.

R. O. Wilberforce for the defendant Mrs. Mary Boyd.

A

SIMONDS, J. : Upon the true construction of this will, the residuary trust fund established thereby is held in trust for the testator's children who attain the age of 21 years in equal shares, and those shares are by subsequent provisions of the will settled upon them so that each child of the testator attaining 21 will take only a life interest in his share. The children of the testator are not yet 21 years of age. There are two infants. The result of that is that, according to the well-established principle, the intermediate income until the children attain 21 is added to the corpus of the trust fund, so that each child will take a life interest in a fund which will be increased by the addition of the intermediate income in the mean time. The question is whether or not, under the law as it now stands, the children are maintainable out of that intermediate income.

Under the law as it stood before the Act of 1925, there is, I think, no doubt that they would have been so maintainable, and the question is whether the Trustee Act, 1925, s. 31, has so altered the law that they are not now maintainable. I think that there is no doubt that sect. 31 (3) of the Act of 1925 was intended to be declaratory of the law. Unfortunately, the draftsman has to some extent varied the language of the previous Act, and it is through that variation that the present difficulty has arisen.

I have been impressed by *Re Reade-Revell, Crellin v. Melling* (1), decided by CLAUSON, J. In that case, the judge had to consider a case where there was a legacy of £40,000 given by the testatrix upon trust to pay the income to her husband during his life, and, after his death, until the beneficiary should attain the age of 21 years to accumulate the income, to add the income so accumulated to corpus, and to pay the income of that capital fund to the beneficiary for her life. Having, as I say, that disposition to consider, he held that it was not possible to maintain the beneficiary out of the intermediate income until she attained the age of 21 years. The judge came to that conclusion by reason of the fact that in that will there was a specific direction to accumulate, and he held that, having regard to that direction, it was impossible that the child should be maintained during her infancy. He did not, as I understand it, intend to decide that the old law, then well-established, in regard to the maintenance of infants out of intermediate income where those infants would, upon attaining the age of 21 years, be entitled to the income of the trust fund, was abrogated. I think he decided that case upon the particular language of the instrument which he had to construe, and I

do not feel that it is an authority which binds me to hold that in the present case the infants are not maintainable out of the intermediate income, which would eventually go to increase the capital of the shares to which they will, upon attaining 21, become entitled. Accordingly, I shall declare in this case that the intermediate income is available for
A the maintenance of the infants.

Solicitors: *Montagu's and Cox & Cardale*, agents for *Branson & Son*, Sheffield (for all parties).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

SWETTENHAM *v.* SWETTENHAM.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.),
May 24, 25, 26, 1938.]

Divorce—Insanity—Distinction between recovery and cure—Certification as evidence—Conduct conducing—Decree nisi—Matrimonial Causes Act, 1937 (c. 57), ss. 2 (d), 3.

The parties were married in 1878. Thereafter from time to time the wife was certified and recertified to be insane. She was, however, at large for considerable periods, one period extending to nine years, but she had been continuously detained for a period of 11 years immediately before the date of the hearing. The husband petitioned for divorce under the Matrimonial Causes Act, 1937, s. 3, on the ground that the wife was incurably of unsound mind and had been continuing under care and treatment for a period of five years. The wife by her guardian *ad litem* filed an answer denying that she was incurably of unsound mind:—

HELD: in spite of two considerable periods during which the wife had been restored to mental health, yet, having regard to the length of the last onset of insanity and to her advanced age, she was incurably of unsound mind.

[EDITORIAL NOTE. This is the first petition for a dissolution of marriage upon the ground that the respondent has been incurably of unsound mind for a period of five years. The case considers the meaning to be given to the words "recovery" and "cure" but in this case, as the respondent has been continually under restraint for the eleven years preceding the lodging of the petition, there was perhaps little ground for saying that she might have recovered. It will be noticed, however, that she had on two or three occasions sufficiently recovered to be released from restraint. The question of conducing to the respondent's unsoundness of mind—the conduct complained of being the breaking off of all conjugal relations with the respondent—is also touched upon.]

FOR THE MATRIMONIAL CAUSES ACT, 1937, s. 3, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 30, p. 337.]

PETITION for divorce by the husband on the ground of the wife's incurable unsoundness of mind within the meaning of the Matrimonial Causes Act, 1937, ss. 2 (d), 3. The wife by her guardian *ad litem* filed an answer denying that she was incurably of unsound mind. The parties were married in 1878, and thereafter from time to time she was certified and recertified insane. She was at one time at large for a period of

nine years, but since 1927 up to the date of the hearing of the petition she had been continuously detained.

A. Melford Stevenson for the petitioner.

William Lathey for the respondent.

SIR BOYD MERRIMAN, P. : I am going to deal with this case as shortly as possible, for one particular reason. Under the rules relating to the service of the petition, those in charge of the patient have the responsibility of deciding, on the material at their disposal, whether the contents of the petition or the fact of the petition shall be communicated to the patient, and in this case those responsible for the patient, the respondent, were considering very anxiously whether it was necessary to make the communication before this case should come on for trial, lest the patient, who is in the position of being able to read the newspapers, should first become apprised of it through the press. Most unfortunately, before the decision itself had actually been made—or at any rate before it had been acted upon in anticipation of the trial—she became aware of the fact through head-lines and paragraphs in the newspapers, and, knowing as I do that she reads the papers, I am anxious to say as little as possible, so as not to add to her trouble. For that reason, I do not propose to go through an elaborate review of the evidence.

I am concerned to find—and the onus, of course, is on the petitioner—whether it is true that this respondent is incurably of unsound mind, and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. About the fact of her care and treatment, as defined by the Matrimonial Causes Act, 1937, s. 3, for the prescribed period of five years, there is no controversy or possibility of controversy. That condition is fulfilled. It remains, therefore, to consider whether she is incurably of unsound mind. I have listened to arguments on the one side and on the other, the extreme position on the one side being that anything indicating predisposition to insanity is unsound mind. On the other side, I have been adjured to consider whether the unsoundness of mind is such as to warrant the court's breaking up the marriage tie. There is nothing about that in the section. I have to be satisfied that she is incurably of unsound mind.

I have also listened to an argument, developed with great subtlety, on the distinction between "recovery" and "cure." I remain unconvinced that there is anything in that distinction at all—at any rate for the purposes of this case, and on the facts of this case. I have been referred to the OXFORD ENGLISH DICTIONARY, and it is not necessary to say more than that "to cure" is "to restore to health," and "incurable" is that which "cannot be cured," or is "incapable of being healed by medicine or medical skill." "To recover," on the other hand, is "to regain health after sickness," and the condition of being "recoverable"

is "capable of being restored to a healthy condition." The condition of being "irrecoverable" is that of being incapable of being "restored to health," which, it will be remembered, was the definition, or one of the definitions, of "cure." Finally, "irrecoverable" is defined in terms as being "incapable of being restored to health; incurable; past recovery."

- A There may be a case in which it may be necessary to consider whether there is really any substance in the distinction between the two. All I need say is that the facts of this case do not require any further research into this particular problem. This lady has, in fact, for the last five years had done for her all that medical and nursing skill and care and
- B attention and treatment can do for her. It is common ground in this case that at her age, and after her protracted illness, any more drastic treatment than that is out of the question, but I am not prepared to draw, for the purposes of this Act, any distinction between the degrees of care and treatment which bring about cure or recovery, as the case may
- C be. At any rate, again for the purposes of this case, it is manifestly unnecessary to proceed any further with that inquiry.

I am satisfied, without saying any more, that, although this is by no means an aggravated case of unsoundness of mind, or a violent or an extreme case, it is proved on the evidence, and not merely by the fact

D of certification—which, of course, alone would not be enough—proved beyond any doubt whatever on the medical evidence, that this lady is of unsound mind, and the only question which has caused me any doubt at all is the question whether, having regard to the medical evidence, it can be said to be proved that she is incurably of unsound mind.

- E With regard to that, it is unnecessary to say more than that, on the evidence on either side, I am satisfied that, having regard to the long history of her illness, not forgetting in that connection the two very considerable periods during which she was restored—temporarily, at any rate—to health, but in particular having regard to the length of
- F the last onset, which now extends over 11 years, and above all to her age, I am satisfied that there is no prospect of cure. That being so, I find that the petitioner has proved the case.

There remains only the faint suggestion, not supported by pleadings or particulars, that there has been something in the nature of conduct

G conducing. It is clear that, at the time of the wife's pregnancy, which resulted in the birth of a still-born child in 1894, the husband, on his own admission in writing—and developed as it has been by evidence given by him in the witness-box—in effect broke off irrecoverably all conjugal relations with his wife, although he has, of course, maintained

H her. The marriage in the full sense of the word has ceased to exist from that time, by his decision. For some nine years after that she was at large, not subject to any certification, but, as is suggested on the face of the petition for certification, because of excitement due to legal processes, she was recertified on Oct. 28, 1904. During that year, the husband had filed a petition against his wife and a named

co-respondent, charging in circumstantial detail adultery over a prolonged period. That suit was dismissed at the instance of the co-respondent. It was followed by a suit for restitution by the wife against the husband, in which a decree was pronounced, in fact, only three days before this recertification. She was detained for a long time after that. There is a faint suggestion that the husband has never been served with the decree, but it is perfectly plain from his answer to me that he was fully aware of it, and made it plain that he did not intend to obey it, as, in fact, he never has. However, I say no more at this moment, and I cannot see, on the face of this history, that it would be possible for me, without much more convincing evidence than that, to be asked to find positively that it was the husband's conduct which had conduced to the wife's unsoundness of mind, and I make no such finding. A B

However, having regard to the nature of the suggestions which have been made, and to one other fact to which I must allude, it will not be a matter for surprise or resentment if the public official who is charged with these particular duties thinks it necessary to make such inquiries as he sees fit to make. C

The other consideration to which I allude is that I know nothing, I have been told nothing, nothing has been volunteered by the husband—nor is there any reason why anything should have been volunteered—of his own personal history from 1894 until this date except these facts to which I have already referred. Nor can the wife's counsel, by virtue of sect. 198 of the statute, ask him any questions about his own personal conduct. As I say, in these circumstances, it is a matter for consideration by the public officer who is charged with these duties whether he thinks it necessary to make any, and, if so, what, further inquiries into the matter. D E

Decree nisi. Order for respondent's costs to be paid by the petitioner.

Solicitors: *Gordon, Dadds & Co.* (for the petitioner); *Lowe & Co.* (for the respondent). F

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

Re AN INTENDED ACTION, SHOESMITH v. LANCASHIRE MENTAL HOSPITALS BOARD. G

[COURT OF APPEAL (Greer, Slessor and MacKinnon, L.JJ.), May 30, 31, 1938.]

Practice—Application for leave to bring an action against a hospital board—Leave granted by a judge—Jurisdiction of Court of Appeal to hear appeal—Mental Treatment Act, 1930 (c. 23), s. 16 (2).—R.S.C., Ord. 54, r. 23. H

The respondent had obtained leave from a judge to bring an action against the appellant board. At the hearing of the appeal from this order, a preliminary objection was taken by the respondent that the appeal should have been heard by the Divisional Court, this not being a matter of practice or procedure:—

HELD (GREER, L.J., dissenting): the application to the judge for leave to bring an action, and not the issue of the writ, must be taken to be the

commencement of the proceedings. This was therefore a question of practice or procedure, and the Court of Appeal had jurisdiction to hear the appeal.

[EDITORIAL NOTE.] The point here is the short one whether an application for leave to bring an action is or is not a matter of practice or procedure. Upon this the court is divided in opinion, but the majority have held that it is.

A AS TO PRACTICE AND PROCEDURE, see YEARLY SUPREME COURT PRACTICE, 1938, pp. 1076, 1077; and FOR CASES, see DIGEST, Practice, pp. 706-708, Nos. 3005-3029. See also YEARLY SUPREME COURT PRACTICE, 1938, p. 1077.]

Cases referred to :

- B** (1) *Re Withers & Co.*, [1930] 2 K.B. 192; Digest Supp.; 99 L.J.K.B. 565; 143 L.T. 347.
- (2) *Re Frost*, [1936] 2 All E.R. 182; Digest Supp.
- (3) *Moorsom v. Kymer* (1814), 2 M. & S. 303; 41 Digest 626, 4580.
- (4) *Black v. Dawson*, [1895] 1 Q.B. 848; Digest, Practice, 707, 3014; 64 L.J.Q.B. 464; 72 L.T. 525.
- C** (5) *Yonge v. Toynbee*, [1910] 1 K.B. 215; Digest, Practice, 706, 3012; 79 L.J.K.B. 208; 102 L.T. 57.
- (6) *Poyser v. Minors* (1881), 7 Q.B.D. 329; 13 Digest 505, 562; 50 L.J.Q.B. 555; 45 L.T. 33.
- (7) *Wynne-Finch v. Chaytor*, [1903] 2 Ch. 475; Digest, Practice, 825, 3821; 72 L.J.Ch. 723; 89 L.T. 123.
- D** (8) *Lever Bros., Ltd. v. Kneale & Bagnall*, [1937] 2 K.B. 87; [1937] 2 All E.R. 477; Digest Supp.; 106 L.J.K.B. 465; 157 L.T. 30.
- (9) *Holgate v. Lancashire Mental Hospitals Board, Gill & Robertson* (1937), unreported.
- (10) *Re Frere & Staveley Taylor & Co. & North Shore Mill Co., Ltd.*, [1905] 1 K.B. 366; Digest, Practice, 707, 3020; 74 L.J.K.B. 208; 92 L.T. 194.
- E** (11) *Re Colman & Watson*, [1908] 1 K.B. 47; Digest, Practice, 707, 3021; 77 L.J.K.B. 121; 97 L.T. 857.
- (12) *Simbro Trading Co. v. Posograph (Parent) Corpn.*, [1929] 2 K.B. 266; Digest Supp.; 98 L.J.K.B. 631; 141 L.T. 395.

F APPEAL from an order of ASQUITH, J., made on Apr. 8, 1938, granting leave under the Mental Treatment Act, 1930, s. 16 (2), to one Shoesmith to bring an action against the Lancashire Mental Hospitals Board for damages for an assault committed by a patient who had escaped from one of their institutions.

Ralph Etherton for the appellants.

H. W. Shawcross for the respondent.

G *Shawcross*: There is a preliminary point. This court has no jurisdiction to hear this appeal. It is not a matter of practice or procedure. The order of the judge is not an order made in a pending action, because there was no action pending. There was no writ issued, unlike the case of an application for leave to serve a writ out of the jurisdiction. Under **H** the old Act, there were two cases which went to the Divisional Court, and no point was taken that it was a matter of practice or procedure. This court cannot give itself jurisdiction through having heard a case that it had no jurisdiction to hear. [Counsel referred to *Re Withers & Co.* (1) and *Lever Bros., Ltd. v. Kneale & Bagnall* (8).]

Etherton: This court has already entertained jurisdiction in this class

of case in *Re Frost* (2), and *Holgate v. Lancashire Mental Hospitals Board, Gill & Robertson* (9). [Counsel referred to *Poyser v. Minors* (6), *Black v. Dawson* (4), *Yonge v. Toynbee* (5), and *Re Withers & Co.* (1).]

Shawcross : There is no evidence before the court that the applicant is proposing to bring her action in this court. It might be brought in the county court, or in the Liverpool Court of Passage. It is submitted A that the *dictum* of BUCKLEY, L.J., in *Yonge v. Toynbee* (5) cannot be applied retrospectively to an action not then in existence. In *Frost's* case (2) and *Holgate's* case (9), the point was not taken, and this court assumed jurisdiction. That cannot give the court jurisdiction in a later case. [Counsel referred to *Re Frere & Staveley Taylor & Co. and North B Shore Mill Co., Ltd.* (10), *Re Colman & Watson* (11), and *Simbro Trading Co. v. Posograph (Parent) Corpn.* (12).]

GREER, L.J. : In this case, two points are raised. In the first place, the respondents say, as a preliminary point, that this court has no jurisdiction to deal with this appeal, because, as the law has stood C since 1894, the appeal must be to a Divisional Court, and not to the Court of Appeal, because the matter involved is not a matter of practice and procedure. Until 1894, appeals on questions of practice and procedure went from the judge in chambers to a Divisional Court, and from the Divisional Court to the Court of Appeal. That was thought to be an D unnecessarily expensive method of dealing with matters of practice and procedure in actions, and a statute was passed in 1894 to alter that, and to provide that appeals in matters of practice and procedure should come direct to this court instead of going through the Divisional Court.

The matter we have to deal with in this case is an application that E was made to a judge in chambers under the Mental Treatment Act, 1930, s. 16 (2), which is as follows :

No proceedings, civil or criminal, shall be brought against any person in any court in respect of any such matter as is mentioned in the last preceding subsection, without the leave of the High Court, and leave shall not be given unless the court F is satisfied that there is substantial ground for the contention that the person, against whom it is sought to bring the proceedings, has acted in bad faith or without reasonable care.

Of course, there is no question of bad faith in this case, but it was contended before the judge that there was substantial ground for the contention that the authorities had acted without reasonable care. The judge, G directing his mind to that question, decided that, in his view, there was substantial ground for the contention that the proprietors of the institution had acted without reasonable care. If that be right, it does not seem to matter very much whether the view which I have expressed in the course of the argument, and to which I adhere, is right or wrong. H If it is wrong, and if the matter is a matter of practice and procedure, then I think that the judge was right in his conclusion. However, it is necessary that something should be said about the preliminary point, because, if the preliminary point is right, we have no jurisdiction to say anything at all, either one way or the other.

In *Re Withers & Co.* (1), I ventured to express my view in these words, at p. 196 :

The decisions and *dicta* of judges who have had to consider what are matters of practice and procedure as distinct from final decisions are very conflicting, and in those circumstances I feel that this court is in a position to exercise its own judgment in the matter. I have come to the conclusion that in this case we ought to apply the distinction, well-known to jurists, which exists between substantive decisions and adjective decisions. In the latter they would include decisions on practice and procedure. One would think that decisions as to matters of practice and procedure are those given in the course of legal proceedings to get a final result. In my judgment, a decision to be one in a matter of practice and procedure must be a decision in the course of an action or other matter in the High Court.

I adhere to the view I expressed in that case, because the Judicature Act and the Act of 1894 were concerned with the jurisdiction of a court which was created first in the Judicature Act, under which jurisdiction was given to deal with actions which were brought in the High Court. I note that, though in this case it is admitted that the intention was to bring an action in the High Court, the Mental Treatment Act, 1930, s. 16 (2) deals with an application which has to be made where the proceedings are either criminal or civil, and may be brought in any court whatsoever. That has to be interpreted as an application made in reference to matters with which the High Court may have no concern whatsoever, because the proceedings may be either criminal, or in a county court or in the mayor's court or the Liverpool Court of Passage—in any court whatsoever.

It seems to me that it is impossible to hold that an application of that sort is an application with reference to proceedings in the High Court. I think that it is one of those cases in which, unfortunately, there is left a case in which an appeal, if there be an appeal, is to the Divisional Court. The application is made as a substantive application to a judge of the High Court (who is the High Court for this purpose), and then, there being no provision that the appeal shall be to the Court of Appeal, the appeal must necessarily be, as it always is, independently of the rule relating to practice and procedure, an appeal to a Divisional Court.

There have been some expressions of opinion to the contrary, but there has been, so far as we can discover, and so far as counsel can discover, no case in which an application, preliminary to the issue of the writ, has ever been dealt with as a case of practice and procedure. Unfortunately, in two cases to which our attention has been called, we did in fact exercise jurisdiction where the point had not been argued, and in which we ought to have refused to accept jurisdiction, but, in my judgment, we are entitled to say that we are not bound by those decisions, which were *per incuriam*, because the point had never been argued before us.

I wish to repeat what I said in the course of the argument—namely, that the court has more than once, sitting as a court with all its six members, decided that it can overrule a decision of the Court of Appeal which has held the field for a number of years. It did so in the case of

Wynne-Finch v. Chaytor (7) where a case which had stood in THE ANNUAL PRACTICE and THE YEARLY PRACTICE for nine or ten years was overruled. If the Court of Appeal, sitting with its six members, can do so, equally a court sitting with a quorum of members can do the same thing. Although, as a matter of courtesy and of usual practice, this court deems it right to follow its own decisions in earlier cases, there is no rule of law which compels it to do so. A

For these reasons, I think that this preliminary objection is a good one and ought to succeed. If I am wrong on this, and if the view which I understand my brethren are about to state is right, then I would dismiss this appeal, on the ground that the judge was right in the view which he took. So, that being the case, it may be that my views on the question as to whether it is practice and procedure may not matter, because, assuming that it is practice and procedure, I agree with the decision of the judge. B

SLESSER, L.J. : In this case, a preliminary objection to the hearing of this appeal has been taken by the respondent, which is based upon the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (3), which provides that : C

in matters of practice and procedure every appeal from a judge shall be to the Court of Appeal. D

They also rely upon R.S.C., Ord. 54, r. 23, to the effect that :

In the King's Bench Division, except in matters of practice and procedure, the appeal from a decision of a judge at chambers shall be to a Divisional Court.

It is said on behalf of the respondent that this appeal is an appeal not on a matter of practice and procedure, and therefore can properly only be heard in the Divisional Court. E

There is no question, as GREER, L.J., has already stated, but that this court has more than once entertained an appeal on the question of leave to bring proceedings being granted or refused under the Mental Treatment Act, 1930, s. 16. One of such cases was *Re Frost* (2), and there have been other unreported cases. F

To quote from LORD ELLENBOROUGH, L.C.J., in *Moorsom v. Kymer* (3), at p. 313, I start from the view that :

It is extremely dangerous to shake the authority of decided cases . . . G

This is more particularly so where they deal with questions of jurisdiction, although I respectfully agree with GREER, L.J., that there is no rule of law that prevents this court, either sitting with a full complement of its members or with a sufficient number, from reviewing its own decisions. Starting with that view, I have great hesitation in acceding to the argument that this court should now repudiate a jurisdiction entertained as recently as last year, notwithstanding the fact that on that occasion the point of jurisdiction was not argued. Apart, however, from that hesitation, I have come to the conclusion, on a consideration of the actual merits of the argument, that this court has jurisdiction to entertain the H

present appeal. The section which we have here to consider—the Mental Treatment Act, 1930, s. 16—places a preliminary clog upon the right of persons to bring proceedings, civil or criminal, in the circumstances which have already been stated by GREER, L.J., without the leave of the High Court. There follow the grounds on which leave should not be

A given, namely :

... leave shall not be given unless the court is satisfied that there is substantial ground for the contention that the person, against whom it is sought to bring the proceedings, has acted in bad faith or without reasonable care.

B The statute also appears to contemplate, in subsect. (4), that an application to the judge to obtain the leave referred to in the section shall be deemed, for the purposes of the Public Authorities Protection Act, to be the commencement of the proceedings, and not the date of the issue of the writ.

C In my view, the leave which was sought was part of the proceedings. I agree with Mr. Shawcross that, if the proceedings contemplated, for which leave was asked, were proceedings other than proceedings in the High Court, very difficult questions would arise. If they were criminal proceedings, I should imagine that it might be argued that this court has no jurisdiction in any event, because it would be an appeal in a
D criminal cause or matter, but the proceedings might be civil proceedings brought in a court other than the High Court. The particular facts of this case show clearly (and Mr. Shawcross very frankly does not dispute the point) that here the proceedings for which leave was sought were proceedings in the High Court. Before the judge, costs in the cause,
E in the High Court, as I understand it, were ordered, and also, after leave was given, and before this appeal was heard, in accordance with the leave given, a writ was issued in the District Registry of the High Court. Therefore, what I am about to say is upon the assumption, which is an assumption founded upon fact, that the leave which was given by the
F judge in this case, upon which the appeal is now to be considered, was leave given in civil proceedings in the High Court.

On that assumption, it seems to me that the matter was one of practice and procedure. The nearest case which I can find to the present one, albeit it was one where the writ had been issued, is that of *Black v. Dawson* (4). In that case, it was held that :

An application by a defendant to discharge an order at chambers, made *ex parte*, giving leave to serve the writ upon him out of the jurisdiction, or to set aside the service, should be made by a summons at chambers, and not by motion in the Divisional Court or in the Court of Appeal.

H LORD ESHER, M.R., said, at p. 849 :

In this case an *ex parte* application was made to the judge at chambers for leave to serve the writ of summons out of the jurisdiction. That was a step in procedure, and if the judge had refused the application an appeal would have lain to this court with leave.

Therefore, it has been held by the Court of Appeal (LOPES and RIGBY, L.JJ., there concurred) that an appeal from leave to serve a writ or

summons out of the jurisdiction would be a matter of practice and procedure. There, although the writ had been issued, it would have been entirely abortive with regard to a defendant out of the jurisdiction unless leave had been given. That seems to me to go a long way towards establishing that the issue of an effectual writ (if I may use the phrase) is not necessarily the beginning of the proceedings. It has been held A that a writ which requires leave in order that it may be served and so be effectual is a proper subject-matter of appeal direct to this court, as being a question of practice and procedure.

I am also influenced by the definition of "practice and procedure" which is to be found in the judgment of BUCKLEY, L.J., in *Yonge v. Toynbee* (5), at p. 220 : B

The expression "practice and procedure" is not confined to steps in the action itself, but covers also matters in connection with the action.

The matters there considered were matters happening after the writ, but equally, I think, the language is applicable to cases of leave to issue a writ which seem to me, properly understood, to be matters in connection with the action. C

I would next refer to the case which GREER, L.J., mentioned—*Re Withers & Co.* (1)—in which GREER, L.J., drew, if I may say so, with respect, the very useful distinction between cases of substantive D decisions and adjective decisions. He said at p. 196 :

In the latter they would include decisions on practice and procedure.

At p. 195 SCRUTTON, L.J. had said :

I have come to the conclusion that it is neither practice nor procedure, but is a question of substantive right under the Solicitors Act . . . E

In my view, in the present case, this application for leave to start proceedings is not a question of substantive right, but is adjectival to the substantive right which is sought to be achieved. I am fortified in that view by the observations of LUSH, L.J., in *Poyser v. Minors* (6), F at p. 333 :

"Practice" in its larger sense—the sense in which it was obviously used in that Act, like "procedure" which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer the machinery as distinguished from its product. G

I think that, taking that distinction, the obtaining of leave in this case was a mode of procedure by which the legal right was to be enforced, and was machinery as distinguished from the product, which would be the damages that it was hoped ultimately to obtain for the negligence contemplated. H

I have dealt with the matter at some length, since, on one view, the court was formerly in error in this matter, and, being a matter of jurisdiction, it is one of general importance. I have come to the conclusion that this court was right in its former view as expressed in *Re Frost* (2),

notwithstanding the fact that it did not have the benefit of the argument of counsel that an appeal under this section should come to this court as being a matter of practice or procedure.

MACKINNON, L.J. : Conceiving, as I do, that the purpose of this, A or of any other, court is to do justice between the parties who appear before it, it does appear to me to be monstrous that our time has been taken up on an appeal to decide whether, in the obscure words of an Act of Parliament, parties have a right to come to this court or ought to have gone to another room down the corridor in which three other judges are, B or may be, sitting as a Divisional Court. This obscure problem puts the parties and their advisers in the extremely difficult and potentially expensive position of having to know to which court they ought to go. In this case, the present appellants came here, and it is objected that they ought to have gone there. If they had gone there, so nice is the C question involved that I think it highly likely that there they would have been met with the objection that they ought to have come here.

The Act of 1894 enacted that appeals from a judge in chambers on matters of practice and procedure should come direct to this court. Inferentially, or consequentially, R.S.C., Ord. 54, r. 23, lays it down that :

D Except in matters of practice and procedure, the appeal from the decision of a judge at chambers shall be to a Divisional Court.

The question, therefore, is : What is a matter of practice and procedure ? I think that this is an extremely obscure problem. As I say, it is really monstrous that a party should have to be in the extraordinarily difficult E position of having to decide to which court he ought to resort. I cannot think that it can be true that it can be a matter of practice and procedure only after a writ has been issued. The Arbitration Act, 1934, s. 8, provides various powers of the court by way of assistance in arbitrations.

A court may make orders for various things, such as discovery, examinations of witnesses before an examiner, securing the amount in dispute F in the reference, the detention, or preservation, or inspection of any property or thing involved in the reference. I think that any order made in chambers, or any application under that section, would clearly be a matter of procedure, and an appeal in regard to it would lie to this G court. Nevertheless, it would be a matter in which no writ had been issued, for the simple reason that it arose out of an arbitration. Under R.S.C., Ord. 11—"Service out of the jurisdiction"—if a judge grants or refuses leave, and an appeal be taken from his decision, there is no doubt, I think, that it comes to this court. The distinction, apparently, H is that if one goes to a judge in chambers and says, "May I serve a writ which I have taken out ?" that is a matter of practice and procedure ; but if one goes to a judge in chambers, under this Act, and says, "May I take out a writ and serve it ?" that is not a matter of practice and procedure. That only illustrates the extreme subtlety and nicety involved in this, I almost said, ridiculous question. The same problem

that arises under this section of the Mental Treatment Act, 1930, would exactly arise under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 51 (1), which deals with the procedure by which people may be put on the list as notorious litigants, and anybody on that list may not institute proceedings unless leave is given by a court or judge on an application by him. That is precisely the same thing. I cannot think that, if the question decided by the judge in chambers is whether a writ issued may be served, it is a matter of practice and procedure, and the question whether a writ may be issued and served is not a matter of practice and procedure. It is almost impossible to suggest a definition. I think that practice and procedure includes any matter in connection with an action, or a proposed action, in the High Court.

That being so, I think that the present appellants, in attempting to solve this extremely difficult problem, were right in coming to this court, and would be wrong in going to the Divisional Court.

Appeal dismissed with costs.

Solicitors: *Norton, Rose, Greenwell & Co.*, agents for *Sir George Hammond Etherton*, Clerk of the Lancashire County Council (for the appellants); *Gibson & Weldon*, agents for *Henry Backhouse & Son*, Blackburn (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

BRITISH METAL CORPORATION, LTD. v. LUDLOW BROTHERS (1913), LTD.

[CHANCERY DIVISION (Farwell, J.), May 20, 1938.]

Practice—Costs—Taxation—Allowance of two junior counsel—Discretion of taxing master—R.S.C., Ord. 65, r. 27 (47).

Upon an appeal, the appellants before the hearing wrote to the respondents stating that they were briefing leading counsel. The respondents thereupon replied that they were briefing two counsel, both of the Outer Bar. The appeal concerned the construction of the rules for arbitrations in the metal trade, and was of importance to parties other than the parties to the appeal. The taxing master disallowed all the fees of the second counsel for the respondents, basing the exercise of his discretion upon the experience of the senior of the two counsel briefed by them:—

HELD: in the circumstances the taxing master had exercised his discretion upon a wrong principle, and the case was a proper one for the allowance of the fees of two counsel both of the Outer Bar for the respondents to the appeal.

[EDITORIAL NOTE.] The court will only interfere with the exercise of his discretion by the taxing master where he has proceeded upon a wrong principle, and it is here held that the master was wrong in basing his decision upon the experience and skill of the senior of the two junior counsel engaged. It was, of course, shown that the case was one of importance and difficulty in any event.

AS TO ALLOWING FEES OF TWO COUNSEL, see HALSBURY, Hailsham Edn., Vol. 2, pp. 552, 553, para. 758; and FOR CASES, see DIGEST, Practice, pp. 937-939, Nos. 4761-4805. See also YEARLY SUPREME COURT PRACTICE, 1938, p. 1537.]

Cases referred to :

- (1) *Re Potts, Ex p. Epstein v. Trustee & Bankrupt*, [1935] Ch. 334 ; Digest Supp. ; 104 L.J.Ch. 49 ; 152 L.T. 456.
- (2) *Friend v. Solly* (1847), 10 Beav. 329 ; Digest, Practice, 955, 4948.
- (3) *Hallows v. Fernie* (1868), 3 Ch. App. 467 ; Digest, Pleading, 26, 221 ; 18 L.T. 340.

A ADJOURNED SUMMONS arising out of the disallowance by the taxing master of fees of the second of two junior counsel briefed by the respondents to an appeal. The hearing of the action before CLAUSON, J. (as he then was), is reported [1937] 4 All E.R. 154, and the appeal therefrom is reported [1938] 1 All E.R. 135.

B *R. A. Willes* for the applicants.
J. F. F. Platts Mills for the respondents.

C FARWELL, J. : This case arises in the following manner. A dispute occurred between two parties as to the price of certain metal, and, under the rules governing the London Metal Exchange, it was necessary to refer the matter to the arbitration of a particular tribunal set up by those rules. By those rules the parties are not permitted to appear by counsel or by solicitors, but appear themselves before the tribunal.

D In this case the arguments of the parties were heard by two arbitrators, and ultimately an award was made, and signed by three persons. The applicants thought the matter unsatisfactory, and accordingly proceedings were taken in the High Court to have the award set aside, on the ground that it was bad on the face of it. The point taken was that the arbitration was heard by two arbitrators, but that the award was signed,
E or appeared to be signed, by three arbitrators. Thus it was, on the face of it, an award made by two persons who had heard the arguments and by one person who had not, and on that it was said that the award could not stand. When the matter came before CLAUSON, J., he
F decided, on the construction of the rules, which no doubt were complicated and needed elucidation, that the award was bad on the face of it, and he set it aside. This decision did not satisfy the respondents, and they appealed to the Court of Appeal, who dismissed the appeal and ordered the respondents hereto to pay the costs. At the hearing before
G CLAUSON, J., Mr. Willes appeared alone for the applicants, and Mr. Platts Mills, who was against him, was also alone. After notice of appeal had been given, Mr. Willes's clients wrote to the respondents' solicitors in these terms :

H Unless you are instructed to brief a leader, Messrs. Shakespeare & Vernon (Ludlow Brothers (1913), Ltd.'s, solicitors) will be content to leave the matter in the hands of Mr. Willes.

To this the respondents' solicitors, Messrs. Linklaters & Paines, replied : " We are instructing a leader on behalf of our clients." The applicants' solicitors replied :

As you have instructed two counsel, we have briefed Mr. R. A. Willes and Mr. L. H. Gluckstein.

In due course the costs were taxed by the taxing master, and he disallowed all the fees of second counsel, Mr. Willes's junior, to which fees the applicants take objection. The answers to the objections are these :

These objections are to my disallowance of the brief to Mr. Gluckstein on the hearing of an appeal from the order of CLAUSON, J., dated Oct. 22, 1937. On the hearing before CLAUSON, J., both sides briefed junior counsel only, Mr. R. A. Willes appearing as counsel for these respondents [the present applicants]. On Nov. 12, 1937, the respondents' solicitors wrote to the appellants' solicitors with reference to the appeal. A

He states the effect of the letters which I have read, and continues :

As is well known, by Ord. 65, r. 27 (reg. 47), where costs of retaining two counsel may properly be allowed, such allowance may be made although both counsel may have been selected from the Outer Bar, and such allowance is always made where proper. B

Pausing there, the taxing master was not putting his objections on the ground that Mr. Willes was the leading counsel on the appeal with a junior, and his clients were not represented by a King's Counsel with himself as junior. Quite obviously, to have refused the costs of a counsel merely on that ground—that is to say, that the leading counsel was not within the Bar—would not have been a good ground at all, and could have been reversed on objection being taken. C

The taxing master continues :

Notwithstanding the fact that the appellants [the present respondents] instructed a leader, I am of opinion, having regard to all the circumstances of the case, that there was no justification for the respondents briefing a junior to a counsel of such experience as Mr. Willes to assist him in supporting in the Court of Appeal an order which he had obtained in the court below. I therefore overrule the objections. D

On that the matter comes before me, and I have to consider whether I can properly interfere with what the taxing master has done. Not very long ago, I myself had to consider the question of how far this court ought to interfere with the taxing master when he has refused to allow the costs of leading counsel. This was the case of *Re Potts, Ex p. Epstein v. Trustee & Bankrupt* (1), which raised a question of briefing leading counsel before the registrar in bankruptcy on an application to approve a scheme of composition. There were other parties to the proceedings who had not briefed leading counsel, although one of the parties did, in fact, brief leading counsel. The fees of leading counsel were disallowed by the taxing master on the ground (to some extent, at any rate) that leading counsel could not properly be briefed before the registrar in bankruptcy on an application of that kind. The facts were quite different from those of the present case, but I think that the principles which I ventured to state in that case are applicable here, and I see no reason to-day to depart from the view which I there took. I said there, at pp. 339, 340 : E

The question which I have to determine is whether, in the circumstances of this case, the taxing master was right in disallowing the proper fees for leading counsel or whether he misconceived the position and ought to have allowed them. F

I have read the objections and the master's answers. A matter of this kind is *prima facie* one for the discretion of the taxing master, and this court is very slow G

H

indeed to interfere with the exercise of that discretion, and, indeed, in my judgment this court ought not to interfere, unless it has reason to think that the taxing master, in exercising his discretion, has acted upon some wrong principle or upon some misunderstanding of the true position.

A The taxing master in his answer to objections has made reference to two cases ; one, *Friend v. Solly* (2), is an authority for the proposition that the number of counsel to be allowed is *prima facie* a matter in the discretion of the taxing master. That no one can dispute. The other, *Hallows v. Fernie* (3), is a case in which the fees of leading counsel were not allowed on taxation, where there had been examination and cross-examination of witnesses on commission.

B With great respect to the taxing master it does not seem to me that the second of those cases has any real bearing on the matter at all. No one suggests that merely because witnesses have to be examined and cross-examined that that alone is sufficient in every case to justify the employment of leading counsel : that would be a ridiculous suggestion, and I cannot think that anyone would venture to put it forward. The truth of the matter is that each case must depend upon its own facts, and in order to see whether the employment of leading counsel is justified or not, one has to consider the whole of the facts, remembering always that leading counsel may be a luxury for which an opponent, or the estate of a bankrupt, should not be made to pay, and that, on the other hand, in some cases the employment of leading counsel may be a proper precaution to take, in order to ensure that the case of the person in question may be fully and properly presented to the court, and that the court may have every assistance possible in a difficult case in arriving at a proper conclusion.

C As I read the taxing master's answers to objections, he seems to have been much influenced in the view which he took by the fact that leading counsel were not employed on behalf of Kayton or the foreign company. In my judgment, that is a wrong point of view. The fact that those two persons were not represented by leading counsel is no reason for deciding that Epstein was not justified in being so represented. Their position, as I have already pointed out, was not the same as that of Epstein, and in my judgment it was the duty of the taxing master to consider the position of each of the parties separately, and irrespective of the fact that one or other had or had not employed leading counsel.

D In my judgment the taxing master has proceeded, so far as he has permitted himself to be influenced by that consideration, on a wrong basis. He should have disregarded the fact that Kayton and the other creditor were only represented by junior counsel, and should have considered the position of Epstein apart from them.

E He also appears, as I read the answers to objections, to have taken the view that this was a matter in which leading counsel was quite unnecessary, and merely a luxury which was not required for the proper protection of Epstein or for the assistance of the court.

Again, in that regard, I am unable to accept the view of the taxing master.

F There cannot be any doubt that this is a matter which is not, *prima facie*, one in which the court ought to disturb or upset the discretion of the taxing master, and, unless I am satisfied that the taxing master has proceeded on some wrong basis, I ought not to interfere with the exercise of his discretion. I think that the taxing master was probably right in disregarding the fact that Mr. Willes's opponents in the Court of Appeal had thought it necessary to take in leading counsel. In my view, that in itself is not sufficient necessarily in every case to justify the employment of leading counsel on the other side. It may be that, where the appellant is appealing from a decision of a judge, the appellant's solicitors may take the view that they have a more difficult task than that of the respondents, because they have, first of all, to get over the fact that there is a decision against their client which has already been given. It does not necessarily follow, and I do not think that it would be right to say, that, in every case, because one side takes in a leading counsel, the other side is justified in employing two counsel. It must depend wholly on the particular facts of the case, but one cannot overlook in this case

that the respondent's solicitors took the precaution of suggesting to the other side that the matter might be left to junior counsel. The response to that was that the appellants were going to take in leading counsel, so that the employment of two counsel was to some extent invited in this particular case by the appellants' solicitors. There, again, I do not think that that would be sufficient to justify my interference with the taxing master's discretion. However, one has to remember that the matter had been fully considered and determined by CLAUSON, J. It was a question of the construction of the rules of the London Metal Exchange relating to arbitration, and it was a matter of importance no doubt to members engaged in that trade who have occasion to make use of the facilities afforded by the Metal Exchange rules. The matter, therefore, was one of importance not to the parties alone, but a question which might be of importance in other cases, and, although one entirely sympathises with the taxing master's view that Mr. Willes is a counsel of so much experience that he would hardly need the assistance of a junior, at the same time there is always the possibility that counsel may, at the moment when he is required in court, be actually occupied in another court, and for the time being may be unable to reach the court in time. Also, it is possible that, however able counsel may be, the second counsel may be able to present the case in a way which appeals to the tribunal more than the way in which it was presented by the counsel who addresses it first.

I think that the taxing master ought to have taken the view that the matter was of importance, not only to the immediate parties, but beyond that, in that it was not merely a case in a court of first instance, but a case in the Court of Appeal, and that the other side had thought it right to employ, and to state that they were employing, the services of very eminent leading counsel to assist them on the hearing of the appeal. Although I entirely accept, and loyally abide by, the view that the matter is *prima facie* one of discretion, and one in which I ought not, *prima facie*, to interfere, I have come to the conclusion that the taxing master did not proceed on a proper basis, because he failed to appreciate that the matter was not merely of importance to the parties themselves, but had importance to others outside altogether. The fact, too, that leading counsel had been briefed on the other side is, I think, a matter which, having regard to the circumstances, he ought to have treated as justifying the respondents' solicitors in the Court of Appeal in thinking that it was necessary for the proper assistance of the court, and for the proper protection of their clients, that their clients should have not less assistance from counsel than their opponents received. I find it difficult to appreciate the precise ground on which the discretion of the taxing master is said to have been exercised. So far as I understand his answers to objections, he bases them on the experience of Mr. Willes. I think that he made a mistake in exercising his discretion in the way he did. It was a difficult case, but he ought to have exercised his discretion on

the ground that, considering all the facts, this was a case of some importance to persons other than the mere parties to the proceedings. It was a case in the Court of Appeal where the other side had already stated their intention of briefing leading counsel, and that was sufficient justification to entitle the solicitors instructing Mr. Willes to take the view that the employment of two counsel was a proper precaution to take in order to ensure that the case might be properly presented to the court. For these reasons, I allow this objection.

Objection allowed with costs.

Solicitors: *Peacock & Goddard*, agents for *Shakespeare & Vernon*, Birmingham (for the applicants); *Linklaters & Paines* (for the respondents).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

Re MEREDITH'S TRUSTS, MEREDITH v. CLARKE.

[CHANCERY DIVISION (Bennett, J.), April 27, 28, 29, June 14, 1938.]

Husband and Wife—Restraint on anticipation—Order for payment of costs—Order in form prescribed since passing of 1935 Act—Discoveriture after order—Appointment of receiver—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), ss. 1, 2 (1).

An order for the payment of costs was made against a married woman on Nov. 4, 1936, the order stating that such costs were not to be payable out of any property of hers to the enjoyment of which there was attached an enforceable restraint against anticipation. She was entitled under a settlement made on Oct. 3, 1892, to the income of a trust fund for her separate use without power of anticipation. Her husband was living on Nov. 4, 1936, the date of the order, but died on Feb. 1, 1937, and she had not remarried. The appointment of a receiver by way of equitable execution was asked for:—

HELD: (i) the Law Reform (Married Women and Tortfeasors) Act, 1935, ss. 1, 2, did not prevent the appointment of a receiver in these circumstances unless the terms of the order itself did so.

(ii) the words of the order merely prohibited payments being made out of property to which there was attached an enforceable restraint against anticipation, and not out of property to which a restraint upon anticipation was attached at the date of the order.

[EDITORIAL NOTE. The form of the judgment against a married woman was altered upon the passing of the 1935 Act, and this is the first decision as to the power to appoint a receiver of income which has been subject to a restraint on anticipation. The old form of order was held to protect the income after the husband's death, but this is held not to be so under the present form. It will be noted that, in the present case, the restraint was still effective at the date of the order.

AS TO JUDGMENT AGAINST MARRIED WOMAN, see HALSBURY, Hailsham Edn., Vol. 16, pp. 734-737, paras. 1201-1206; and FOR CASES, see DIGEST, Vol. 27, pp. 120-122, Nos. 966-982; pp. 129-132, Nos. 1053-1080.]

Cases referred to:

(1) *Barnett v. Howard*, [1900] 2 Q.B. 784; 27 Digest 121, 973; 69 L.J.Q.B. 955; 83 L.T. 301.

- (2) *Brown v. Dimpleby*, [1904] 1 K.B. 28; 27 Digest 121, 974; 73 L.J.K.B. 35; 89 L.T. 424.
- (3) *Scott v. Morley* (1887), 20 Q.B.D. 120; 27 Digest 180, 1469; 57 L.J.Q.B. 43; 57 L.T. 919.
- (4) *Pelton Brothers v. Harrison*, [1891] 2 Q.B. 422; 27 Digest 121, 970; 60 L.J.Q.B. 742; 65 L.T. 514; *subsequent proceedings*, [1892] 1 Q.B. 118.
- (5) *Pike v. Fitzgibbon, Martin v. Fitzgibbon* (1881), 17 Ch.D. 454; 27 Digest 120, 968; 50 L.J.Ch. 394; 44 L.T. 562; *varying* (1880), 14 Ch.D. 837. A

SUMMONSES in an action. The particulars of the summonses are stated at the commencement of the judgment.

J. Leonard Stone for the plaintiff.

H. O. Danckwerts for the defendant, Mitchelhill. B

E. M. Winterbotham for the defendants, Sneath and Waterhouse.

Stone: At the date of the order, an enforceable restraint upon anticipation was attached to the property against which it is now sought to levy execution. The crucial date is the date when the liability or obligation was incurred—namely, the date of the order. The position of a married woman, restrained before the Act of 1935 came into operation, is guarded, and her property cannot be taken in execution if the liability was incurred when she was under coverture. [Counsel referred to *Barnett v. Howard* (1), *Brown v. Dimpleby* (2), *Scott v. Morley* (3), *Pelton Brothers v. Harrison* (4), *Pike v. Fitzgibbon* (5).] C D

Danckwerts: The reason why the property can be taken in execution is that the restraint no longer attaches to it. The Act of 1935 enacts that a woman may contract to the same extent as a man, or hold property in the same way as a man, but as regards a settlement made before 1936, there may be a restraint upon anticipation, but that is operative during coverture only. E

BENNETT, J.: In this action there are before me two summonses, one issued on Dec. 17, 1937, by the defendant Mitchelhill, and the other on Jan. 5, 1938, by the defendants Sneath and Waterhouse. Each summons asks for the appointment of the same named person as receiver by way of equitable execution to receive the income and other moneys receivable in respect of the plaintiff's interest in the investments and funds for the time being subject to the trusts of a settlement dated Oct. 3, 1892, and made between William Maxse Meredith of the first part, the plaintiff, then Margaret Elliot, of the second part, and two gentlemen as trustees of the third part, in or towards satisfaction of certain sums due to the applicants respectively for taxed costs ordered to be paid by the plaintiff to the applicants by an order made by FARWELL, J., on Nov. 4, 1936. F G H

The settlement was a settlement made in anticipation of a marriage shortly afterwards solemnised between the plaintiff and the said William Maxse Meredith of property belonging at the date of the settlement to the plaintiff. The material provision of the settlement is that it was thereby declared that the trustees should stand possessed of the

trust fund upon trust to pay the annual income thereof to the plaintiff during her life for her separate use, without power of anticipation. On Nov. 4, 1936, the date of the order of FARWELL, J., the plaintiff's husband, the said William Maxse Meredith, was living.

The relevant parts of the order read as follow :

- A It is ordered that the plaintiff do pay to the defendants their costs of this motion, to be taxed by the taxing master, the costs of the defendant Walter Fuller Clarke to be taxed as between solicitor and client and the remaining defendants as between party and party. But such costs are not to be payable out of any property of hers to the enjoyment of which there is attached any enforceable restraint against anticipation.
- B The costs which the plaintiff was ordered to pay to the applicants have been taxed. Those payable to the defendant Mitchelhill have been certified at the sum of £51 3s. 2d. Those payable to the defendants Sneath and Waterhouse have been certified at the sum of £29 9s. These sums have not been paid. The plaintiff's husband, the said William
- C Maxse Meredith, died on Feb. 1, 1937. The plaintiff has not re-married. It has been proved that the plaintiff has no property which can be taken by ordinary process of execution, and that she lives in furnished apartments.

- In this state of facts, the applicants submit that they are entitled to
- D the orders they respectively ask, in view of the changes in the law relating to married women effected by the provisions of Part I of the Law Reform (Married Women and Tortfeasors) Act, 1935. Part I of the Act came into force on Aug. 2, 1935. It repeals the Married Women's Property Act, 1882, ss. 1-5, and the Married Women's Property Act, 1893, s. 1.
- E

The relevant provisions are to be found in sects. 1 and 2 (1) of the Act, and these provisions are as follow :

1. Subject to the provisions of this Part of this Act, and subject, as respects actions in tort between husband and wife, to the provisions of the Married Women's Property Act, 1882, s. 12, a married woman shall (a) be capable of acquiring, holding, and disposing of, any property ; and (b) be capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt, or obligation ; and (c) be capable of suing and being sued, either in tort or in contract or otherwise ; and (d) be subject to the law relating to bankruptcy and to the enforcement of judgments and orders, in all respects as if she were a *feme sole*.
- F

2. (1) Subject to the provisions of this Part of this Act all property which (a) immediately before the passing of this Act was the separate property of a married woman or held for her separate use in equity ; or (b) belongs at the time of her marriage to a woman married after the passing of this Act ; or (c) after the passing of this Act is acquired by or devolves upon a married woman, shall belong to her in all respects as if she were a *feme sole* and may be disposed of accordingly : provided that nothing in this subsection shall interfere with or render inoperative any restriction upon anticipation or alienation attached to the enjoyment of any property by virtue of any provision attaching such a restriction, contained in any Act passed before the passing of this Act, or in any instrument executed before Jan. 1, 1936.
- G

- H In my judgment, it is plain upon the wording of those provisions—the plaintiff not being under coverture, and the Married Women's Property Act, 1882, ss. 1-5, and the Married Women's Property Act, 1893, s. 1, having been repealed—that the applicants are entitled to the relief they respectively claim, unless the language of the order of

Nov. 4, 1936, bars their rights. The first section of the Act is an enabling one, relating to personal capacity of the married woman. Thereunder the married woman can, amongst other things, render herself liable in respect of any obligation, and be subject to the law relating to the enforcement of judgments and orders as if she were a *feme sole*. The second section deals with her property, and in particular with what, before the passing of the Act, was technically described as her separate property, or property held for her separate use in equity, and provides that such property is to belong to her in all respects as if she were a *feme sole*. A

The proviso to sect. 2 (1) is, I think, inserted to make it clear that restrictions upon anticipation or alienation attached to enjoyment of any property by the provisions of an instrument executed before Jan. 1, 1936, are not interfered with by the provisions of the subsection. It may have been thought desirable to insert it because of the provisions of sect. 2 (2), (3). The proviso does at any rate make it plain that restrictions against anticipation or alienation imposed before Jan. 1, 1936, are not interfered with, but it does no more than that. B C

The argument on behalf of the plaintiff in resisting the orders asked for was based upon the language of the order of Nov. 4, 1936, and was to the effect that the words used meant that, if, at the date of the order, the plaintiff was entitled to property to which there was then attached an enforceable restraint against anticipation, the costs which the plaintiff was ordered to pay to the applicants never could be payable out of that property. The answer to that argument is a simple one—namely, that that is not what the order says. It merely prohibits payments being made out of property to which there is attached an enforceable restraint against anticipation. D E

The question is whether the property which the applicants seek to have taken in execution is subject to an enforceable restraint against anticipation. The answer to that question is in the negative. It follows, therefore, that the applicants are entitled to the orders for which they respectively ask. F

Solicitors: *Hugh-Jones & Flinn* (for the plaintiff); *Bertie F. Browne* (for the defendant J. P. Mitchelhill); *Waterhouse & Co.* (for the defendants Sneath and Waterhouse). G

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

THOMAS v. HAMMERSMITH BOROUGH COUNCIL.

[COURT OF APPEAL (Greer, Slessor, and MacKinnon, L.J.J.), May 19, 20, 23, 24, 25, 26, June², 1938.]

Building Contracts—Architect—Remuneration—Erection of a town hall—Scale of charges of Royal Institute of British Architects—Stages of construction of building—Abandonment by building owner before the completion of a stage already begun—Right of architect to be paid for work actually done.

The defendants employed the plaintiff as architect in connection with the erection of a new town hall. It was agreed that his fees should be in accordance with the scale of professional charges of the Royal Institute of British Architects. This scale provided that, in cases where the project was abandoned, the fee payable depended upon the stage of the work that had been completed, being in the present case (a) for preparing sketch design and making approximate estimate, one-quarter of the total fee, and (b) for preparing drawings and particulars sufficient to enable quantities to be prepared, two-thirds of the total fee. When stage (a) had been completed and stage (b) nearly so, the defendants abandoned the scheme. They contended that, as stage (b) had not been completed, no fee was due to the plaintiff in respect of that stage, and that the only amount due to him was that due in respect of stage (a):—

HELD: the defendants, having instructed the plaintiff to proceed with stage (b), had lost their right of abandoning and terminating his employment at the end of stage (a). They were therefore under an obligation to allow him to earn the fee for stage (b), and, having broken their contract, they were liable to pay him for the work actually done in respect of stage (b).

[EDITORIAL NOTE. The particular scale which is here considered has now been replaced by a later scale, but the case, especially in the judgment of SLESSOR, L.J., considers the general position arising upon abandonment by the building owner. The decision, although it follows the general principles of law upon a breach of contract by one party, is of importance, as the application of those principles to the abandonment by a building owner has only been considered in one previous case (*Elkington v. Wandsworth Corpn.* (1924), 41 T.L.R. 76), where the matter seems to have arisen quite incidentally.

AS TO ARCHITECT'S FEES ON ABANDONMENT BY BUILDING OWNER, see HALSBURY, Hailsham Edn., Vol. 3, p. 347, para. 648; and FOR CASES, see DIGEST, Vol. 7, pp. 443, 444, Nos. 439-448.]

Cases referred to:

- (1) *Planche v. Colburn* (1831), 8 Bing. 14; 12 Digest 350, 2906; 1 L.J.C.P. 7.
- (2) *Prickett v. Badger* (1856), 1 C.B.N.S. 296; 1 Digest 509, 1754; 26 L.J.C.P. 33.
- (3) *Rhodes v. Forwood* (1876), 1 App. Cas. 256; 1 Digest 540, 1944; 47 L.J.Q.B. 396; 34 L.T. 890.
- (4) *Stirling v. Mailland* (1864), 5 B. & S. 840; 1 Digest 541, 1951; 34 L.J.Q.B. 1; 11 L.T. 337.
- (5) *Devonald v. Rosser & Sons*, [1906] 2 K.B. 728; 12 Digest 623, 5132; 75 L.J.K.B. 688; 95 L.T. 232.

APPEAL from a decision of PORTER, J., dated Dec. 21, 1937. The facts and arguments of the case are fully set out in the judgments.

D. N. Pritt, K.C., and *R. A. Willes* for the appellants.

John W. Morris, K.C., and *G. Granville Sharp* for the respondent.

GREER, L.J.: In 1930 the appellants, the Hammersmith Borough Council, were considering the advisability of building a new town hall

and decided that, if the work were done, they would employ the respondent. In the first instance, the respondent was willing to do the preliminary work for the sum of 250 guineas plus his out-of-pocket expenses. No doubt in consenting to this he expected that in due course the matter would go through and he would be appointed architect of the job, and, as it was a piece of work that would cost a large sum of money, his commission would amount to a substantial sum. At the time, however, he had not received a retainer under the seal of the council. In Mar., 1931, the Unemployment Grants Committee refused the application which had been made to them for the necessary funds. The matter dropped until May, 1933, when the scheme was resuscitated by the council in the expectation that through the county council they would obtain the necessary money from the local loans fund. On June 28, 1933, the appellant council passed the following resolution :

Resolved that the council do appoint Sir Brumwell Thomas, F.R.I.B.A., of F.3, Albany, Piccadilly, W.1, as architect in connection with the revised scheme for the erection of the new town hall, and do agree to the payment to him of fees in accordance with the scale of professional charges of the Royal Institute of British Architects, it being agreed that the scale charge in respect of the new works shall be inclusive of all incidental fees and services whatsoever in connection with the works, including services already performed.

The resolution was later sealed with the seal of the council, and was accepted by the respondent on Nov. 7, 1933. By that date a new scale had come into operation, but it was common ground between the appellants and the respondent that the sealing dated back, and that the scale charge referred to was the scale in force on June 28, 1933. Having thus got his appointment under the seal of the council, the respondent went on with the preparation of his plans.

On seeing the respondent's drawings, the appellants thought that the elevation of the building was not entirely satisfactory having regard to the flatness of the roof, and it was suggested, either by the appellants or by the respondent, and accepted by the appellants, that it would be an improvement if a dome were placed on the roof. This necessarily involved an alteration in the internal arrangements. From time to time the corporation officials were consulted with regard to the accommodation that would be required for the various departments, and the figures on which the respondent had made his original plans were found inadequate to provide for the additional accommodation which the various officials required. He then made a plan which involved the accommodation of the medical officer's department in the basement, or lower ground floor.

The terms of the respondent's employment involved payment in accordance with the Royal Institute of British Architects scale applicable in June, 1933. The relevant parts of the scale to be considered are the conditions of engagement, cl. 1, the fees on new work, cl. 4, fees on omitted works, and cl. 5, a fee for partial service. The conditions of engagement state in subel. (g) :

that in all cases in which any projected work is not proceeded with for a period of

two years after drawings have been prepared the architect's services shall be paid for as for abandoned work.

Subcl. (h) states :

that all drawings, specifications, and documents prepared by the architect shall remain his property, the copyright in the same being reserved to him.

A It is to be observed that subcl. (g) seems to be based on the assumption that there is to be a payment for abandoned work, and that, where the work is not proceeded with within a period of two years, a payment equivalent to the payment for abandoned work must be made.

Clauses 1, 4 and 5 are as follow :

B 1. Fees on new works. For taking the client's instructions, preparing sketch design, making approximate estimate of cost by cubic measurement, or otherwise, preparing drawings and specifications for the purpose of estimates, obtaining tenders and in preparation of contract, selecting and instructing consultants, furnishing to the contractor one copy of the drawings and specification and such other details as are necessary for the proper carrying out of the works, general supervision as above defined, issuing certificates for payment and passing and certifying accounts, the charge of new works is to be a percentage on the total cost of all executed work as follows :—(a) if the contract or order exceeds £2,000 the percentage is to be 6 per cent., (b) if the contract or order does not exceed £2,000 the percentage is to be 10 per cent. in the case of works costing £100 graduated to 6 per cent. in the case of works costing £2,000 as the special character of such works may render appropriate.

D 4. Fees on omitted works. In addition to the percentage on the total cost of executed works, the architect is to be paid in respect of all works included in the tender or order, but not executed, two-thirds of the charge which would have been due upon them had they been carried out.

E 5. Fee for partial service. If the project or part of it be abandoned, or if the services of the architect cease or are dispensed with before a contract is entered into or order given, the charges in respect of the works abandoned or for which the architect was employed (as the case may be) are as follows : (a) for taking client's instructions, preparing sketch design, and making approximate estimate of cost by cubic measurement, or otherwise, one-fourth of the percentage stated in cl. 1 or 2 (as the case may be) on the estimated cost of such works ; (b) for taking client's instructions, preparing sketch design, making approximate estimate of cost by cubic measurement, or otherwise, and preparing drawings and particulars sufficient to enable quantities to be prepared or a tender to be obtained, two-thirds of the percentage stated in cl. 1 or 2 (as the case may be) on the estimated cost of such works.

F It was established by evidence that the respondent had before action done all the work mentioned in cl. 5 (a), and that on the express instructions of the defendants he had done a large part of the additional work mentioned in subcl. (b) in preparing drawings and particulars to enable quantities to be prepared or a tender obtained, and a sum of £3,000 was paid to him on account generally. His case, before any amendment of the pleadings, was that he had in fact completed all the work necessary to entitle him to the remuneration provided for in subcl. (b), but the judge came, and I think rightly, to the conclusion that, at the time when the resolution to abandon the work was passed, the respondent had not finished all the work necessary to entitle him to such remuneration.

H On Sept. 25, 1935, on the recommendation of the whole council, it was decided by the council to abandon the proposed erection of a new town hall and the town clerk was instructed to terminate the agreement with the respondent. The town clerk acted on these instructions, and the agreement with the respondent was determined. As I have said, the judge was

satisfied that the work of the respondent had not reached the stage which justified him in saying that the respondent had finished all the work required in subcl. (b) to entitle him to the remuneration therein mentioned. However, the judge allowed an amendment to be made during the hearing of the case to raise the question whether the respondent, though not entitled to recover the full amount that would be due if he had completed all the work mentioned in cl. 5 (b) of the scale, was entitled to claim damages for breach of contract in being prevented from continuing the work in order to earn the amount that he would be entitled to under cl. 5 (b) of the scale if he had been allowed to continue. The judge decided in the respondent's favour on this amended claim, and gave judgment for the amount which he could have recovered under cl. 5 (b) if he had been allowed to continue, less a credit for £3,000 already received, and less a further amount of £1,000 on grounds which he stated in his judgment. The correctness of the judge's judgment on this depends, in my opinion, upon the true interpretation of cl. 5 (b) of the scale, as applied to the position given to the respondent by the resolution appointing him architect. Clause 5 (b), in my judgment, is not directed to giving the building owner the power to abandon, but is merely directed to the question as to what remuneration the architect shall receive when abandonment takes place after the work in subcl. (a) has been done, and what he is to receive by way of remuneration after the work mentioned in subcl. (b) has been done. I think that it is involved in the scale that, if the work mentioned in subcl. (a) or the additional work mentioned in subcl. (b) has been partly done, then there is an obligation upon the building owner to allow that work to be completed. The result of holding otherwise would mean that an architect who had completed most of the work required for the purpose of enabling quantities to be prepared could be deprived of any remuneration for the work he had done by the abandonment of the scheme before he had had time to complete his work. The work done by the respondent was, I think, deficient in several respects which would have had to be put right before he could finally say that the quantities could be taken out, but, having regard to the reasonable practice obtaining between architects and quantity surveyors, it seems to me that, if the scheme had not been abandoned, and if the respondent had consulted a quantity surveyor, the quantity surveyor could not immediately have taken out all the quantities, but he could, and would, have called attention to the matters which would have to be decided before he could proceed to prepare all the quantities. He would, for example, want to know whether the building owner had been advised to make trial holes, and whether the trial holes had been taken. He would also want to know, after trial holes had been taken, what proposal would be made by the architect as to the nature of the foundations. He would also want to know whether it had been decided to have the roof slated or tiled. He would further want to know whether the architect had consulted a steel specialist with regard

to the steel supports for the building. I have little doubt that, if these matters had been pointed out to the respondent, he would have taken the necessary steps to enable him to give all the required information to the quantity surveyor.

A It was contended by counsel on behalf of the appellants (i) that they had a complete answer to the claim as originally made, (ii) that there was such a want of skill, or such deficiency, in the plans prepared by the respondent that they were justified in putting an end to his engagement as architect, and (iii) that the work which he had done was useless. The judge—I think rightly—negatived all these contentions. He found that B the defendants, having prevented the plaintiff from completing the work required to enable him to recover the remuneration provided for in sub-cl. (b), had broken their contract. By this I think that he meant the contract implied by reason of the words of cl. 5 of the scale. He says in his judgment :

C There still remains the question whether under cl. 5 the client is entitled to abandon at will or only for good cause. No one can compel him to continue his contemplated building, but, if he does abandon, he is, in my view, under an obligation to the architect to pay for such services as he has instructed him to perform—that is to say, in the present case, for the services under cl. 5 (b), for which 4 per cent. is payable, since the defendants had instructed him to prepare working drawings.

D The expression “working drawings” is used in this connection in the sense of drawings required for the purpose of enabling the bill of quantities to be prepared. The judge continues :

E Mr. Pritt argued that the architect was entitled to receive payment only up to the stage last reached. If this was so, in the present case, I should think that the plaintiff was entitled to nothing, as he had not reached the stage applicable, but I cannot believe that the client is entitled to let the architect proceed almost to completion of his plans, then abandon the work, and pay nothing. I think that the plaintiff is entitled to damages for his loss by the abandonment, damages which may amount to the whole 4 per cent. or may be diminished because the plaintiff has avoided payments he would have been obliged to make, or has been able to use his own and his assistants' time to advantage on other projects. This is, I think, the claim as framed under cl. 11 (c) of the statement of claim.

F The judge carefully considered the question as to how much he should deduct from the amount payable under cl. 5 (b) of the scale in respect of the work which would still have had to be done by the architect to entitle him to the remuneration provided for in that clause, and in a very careful judgment he came to the conclusion that £1,000 deduction G was adequate for the purpose of arriving at the proper figure as to damages, and he therefore gave judgment for the amount, calculated by cl. 5 (b), to which the architect would have been entitled if he had completed the stage mentioned in that paragraph, less the sum of £1,000 and the £3,000 already paid, and gave judgment for that sum. In my H judgment, he made quite sufficient allowance off the amount that would have been received under cl. 5 (b) in respect of the work that would have been necessary for the architect to do in order to complete his work sufficiently to enable quantities to be prepared, and I see no reason to differ from his judgment. In my view, this appeal should be dismissed, with costs.

SLESSER, L.J.: On June 28, 1933, the defendant council, by resolution under seal, appointed the plaintiff as "architect in connection with the revised scheme for the erection of the new town hall" and agreed to the payment to him of fees in accordance with the scale of professional charges of the Royal Institute of British Architects. The architect thereon, with additions relating to former work, here not A material, including the charges therefor, accepted the appointment and proceeded with the work, until, on July 23, 1935, the defendant council decided to abandon the scheme and terminate the agreement with him. In order to arrive at a true conclusion as to the legal result of the council's action in this matter, I think it helpful first to consider what would have B been the agreement between the parties if the appointment had been *simpliciter* to act as architect for the erection of the new town hall, without any provision as to scale of charges, and if the council had then, before the work was completed, without cause other than their mere volition, terminated the agreement. In such case, I entertain no doubt C that the architect would have been entitled to reasonable remuneration for the work which he had already done, and also to damages for the loss of remuneration which he had been prevented from earning until the work was finished: see *Planché v. Colburn* (1) and *Prickett v. Badger* (2). Although the contract in this assumed form would contain no express D term to this effect, I think that it would be implied that the council, having employed the plaintiff to build their town hall, agreed with him that they would not prevent him from doing the work, and so prevent him from earning his remuneration. This, I think, if authority be needed, is supported by the case in the House of Lords of *Rhodes v. Forwood* (3), E where LORD PENZANCE, at p. 274, quotes with approval the language of COCKBURN, C.J., in *Stirling v. Maitland* (4), at p. 852, which seems to me applicable in the present case:

that the defendant is bound to continue a state of things which is necessary to the carrying out of his own contract.

Also SIR GORELL BARNES, P., said, in *Devonald v. Rosser & Sons* (5), at p. 742:

... unless restricted by something else, an employer ought to find work to enable the workman to perform his part of the bargain, namely, to do his work.

In the present case, however, it is said that the scale of professional G charges which is incorporated into the agreement and forms a term of it, as in the case of *Rhodes v. Forwood* (3), makes such a conclusion incorrect. I pass, therefore, to that scale, in order to consider whether or not it has the effect suggested. The scale is headed "Conditions of engagement," and provides that:

the architect is employed subject to the following conditions founded upon the customs of the profession, and his remuneration is payable according to the scale of charges.

The whole scale, therefore, is based on a consideration of the particular work for which the architect is employed.

Clause 1, after setting out what constitutes the work of the architect, states that the charge in respect of new works is to be a percentage on the total cost of all executed works, which, in the case of contracts or orders exceeding £2,000, is to be 6 per cent., with higher or special fees for alterations and additions, fittings, etc. (cll. 2 and 3). Next, cl. 6

A provides that, on the contract being entered into, the architect shall be entitled to an instalment of two-thirds of the charge, calculated on the total amount of the contract or order, the remainder of his remuneration being payable as the work proceeds. There are also provisions in cl. 8 for services not included in the percentage.

B So far, the provisions cited have been upon the basis that the work will be executed at least in part, but there follow charges which show clearly that the parties contemplate that the building owner may omit works or abandon the work in whole or in part. These matters are qualified by the consideration whether or not a contract has been entered

C into at the time of the omission or abandonment. Clause 4, "fees on omitted works," deals with the case of works included in a tender but not executed, in which case the architect is entitled to two-thirds of the charge which would have been due upon them had they been carried out. So also under cl. 6, already mentioned, where the instalment of two-

D thirds had been paid on the contract being entered into, it is further provided that no part of such payment shall be reclaimable from the architect in the event of the subsequent abandonment of the works. Thus, after a contract has been entered into, and work is omitted or abandoned, in any event, a certain minimum is guaranteed to the

E architect, and in such case, while there is a right in the building owner to omit or abandon, the omission fee payable to the architect is by the agreement ascertained.

I pass now to the particular provision—cl. 5—which applies as in this case if the project be abandoned before a contract is made. The

F fee in such case is based upon two stages: (a) where the architect is employed and is to receive one-fourth of the percentage in cl. 1—that is here $1\frac{1}{2}$ per cent. for taking client's instructions, preparing sketch design and making approximate estimate of cost—and (b) where, in addition, the architect is employed for preparing drawings and particulars sufficient

G to enable quantities to be prepared, when two-thirds of the percentage in cl. 1—that is here 4 per cent.—is to be paid.

In the present case, the judge has found that the architect had not prepared drawings and particulars sufficient to enable quantities to be prepared, and this finding I unreservedly accept, for the reasons by him

H so lucidly stated, and for the further reasons stated in approval of his finding by GREER, L.J. In these circumstances, the council contends that, there being an implied right of abandonment in the building owners in such a case, the architect has not qualified himself to complain of breach of contract by abandonment before he had completed such drawings and particulars sufficient to enable quantities to be declared, in that

the building owner under the contract may abandon when he will, and the architect has failed to prove that he has satisfied the extra conditions of cl. 5 (b) over and above cl. 5 (a). On the other hand, on behalf of the plaintiff, it is said that, since the architect was generally employed to construct the building, there is an obligation on the building owner to enable him to earn, among other charges, the fees to be earned by doing the work stated in cl. 5 (a) or (b), and that, having here employed him on the subject-matter of cl. 5 (b)—namely, to prepare drawings sufficient to enable quantities to be prepared—the defendants have lost the opportunity of exercising their power of abandoning or terminating his employment at the end of the work contemplated in cl. 5 (a), and so must either allow him to complete his work to earn his fee under cl. 5 (b) or pay him damages for what they have prevented him from earning.

In my view, this latter contention is correct. The opening words of cl. 5 (a) and cl. 5 (b), "For taking instructions," resemble those of cl. 1, which is dealing with the executed works, and lay down the percentage generally where there is no omission, abandonment or partial service. These words, to my mind, suggest continuity. That is to say, instructions must be with regard to the matter of the service, and generally would state the requirements of the building owner. In a sense, all the details specified in cl. 1 and in cl. 5 (a) and (b) are but the working out of these instructions, which instructions, in the case of cl. 5, must, I think, impliedly be taken to cover either the stage mentioned in cl. 5 (a) or that mentioned in cl. 5 (b). That is to say, in this case the architect must be taken to have received, and did in fact receive, expressly or impliedly, instructions to prepare drawings and particulars sufficient to enable quantities to be prepared. Having received these instructions, he was entitled to require that he should be allowed to carry them out. The contrary view would produce the result, for example, that, under cl. 5 (a), if the architect took the client's instructions and prepared a sketch design, but failed to complete the approximate estimate of cost, although, when the contract is entered into, under cl. 4 or cl. 6 he would be remunerated, he would get nothing. For this difference of treatment, depending upon whether a contract exists or not, I can see no justification. I think that in any event, once he is employed at all for the purposes of cl. 5 (a), he becomes entitled to be allowed to earn $1\frac{1}{2}$ per cent. Thereupon the employers may, it is true, terminate his agreement or abandon the work, but, if they continue, they employ him at least to prepare drawings for the quantity surveyor, and become liable to enable him to earn the 4 per cent. under cl. 5 (b) in respect of work up to and including the new stage. This, I think, is the only qualification which can fairly be imported into the scale of charges, which is itself only impliedly to be taken to be a variation of the architect's right to complete the work which he would otherwise have been employed to do. It is an interpretation which avoids the absurd

result that, notwithstanding that he had been engaged, and had prepared sketch designs, he would, on the appellants' view, on their abandonment of the work, be entitled to no payment at all.

Having arrived at this conclusion on the construction of the contract, it becomes unnecessary further to consider the facts, save that I would
A say that I think that the judge has deducted a certain amount from the damages upon the basis that the architect, being set free from this agreement by its breach, was enabled to earn otherwise, and also has avoided payments he might have been obliged to make. In respect of this
B diminution of damage, the judge has made a deduction of £1,000, and I find myself unable to say that this sum should be altered. In my
C view, the judge did not make any deduction for work not completed or inadequately done other than for payments which would have had to be made in order that certain designs—notably the steel work—should have been rendered fit for use by a quantity surveyor. This and the
freeing of the plaintiff's time are matters difficult to assess, but properly the subject of abatement, and, as I say, I do not think that the sum of £1,000 is not a fair deduction from the damages. For these reasons, I agree with GREER, L.J., that this appeal fails.

D
E
F
MACKINNON, L.J. : By a resolution under the seal of the defendant council dated June 28, 1933, the plaintiff was appointed as architect in connection with a scheme for the erection of a new town hall. In pursuance of this appointment, the plaintiff did a great amount of work in the preparation of plans and drawings. Owing to changes in the scheme, and the desires of the defendants, including a change to a new
site (which had to be abandoned owing to popular clamour), there was considerable delay. By July, 1935, the business had not yet got to the stage of having a specification taken out by a quantity surveyor, still less to the stage of a contract with a builder for the erection of the town hall.

On July 23, 1935, the town clerk wrote a letter to the plaintiff which ended :

After giving the matter full consideration the committee of the whole council decided that, in all the circumstances, it would be preferable to abandon the present scheme and to terminate the agreement with you. Will you please regard this letter as a formal intimation to this effect.

G
H
If, when the plaintiff was appointed architect for the new town hall in June, 1933, no special terms as to his remuneration had been agreed, the defendants would have been liable to pay him reasonable reward. Upon this abandonment of the scheme, and dismissal of the architect, in July, 1935, they would have been liable to pay him reasonable remuneration for the work he had done already, together with damages for preventing him from earning payment for the further work in completion of his appointed task. However, the resolution of June 28, 1933, went on to provide that the defendants :

do agree to the payment to him [the plaintiff] of fees in accordance with the scale of professional charges of the Royal Institute of British Architects.

In Nov., 1934, the defendants paid to the plaintiff the sum of £3,000 on account of his fees. When, by their letter of July 23, 1935, the defendants terminated the agreement with the plaintiff, the question of what further sum, if any, the plaintiff was entitled to be paid depends upon the true construction of the contract of June 28, 1933, and of the terms of the Royal Institute of British Architects scale which it A incorporated.

In July, 1935, the defendants terminated the agreement with the plaintiff, and abandoned the scheme. They thereby made it impossible for the event to arrive on which the plaintiff would be entitled to receive the £8,000 (less the £3,000 paid on account), or the subsequent instal- B ments making up the balance of the £12,000. The scale makes provision for what is to be paid to the architect in the event of the total or partial abandonment of the building scheme by the building owner. It does so, not very logically, in cl. 4, headed "Fees on omitted works," and in cl. 5, headed "Fee for partial service." I say "not very logically," C since cl. 4 refers to the abandonment or omission of work after the building contract has been made, whereas cl. 5 refers to the abandonment of the project, or part of it, or the ending of the architect's services, before any building contract can have been entered into. Chrono- D logically, therefore, if not logically, cl. 5 should have preceded cl. 4. Clauses 4 and 5 provide for the fees to be paid to the architect on the work, or part of it, being abandoned by the building owner—namely, stage 1, cl. 5 (a): when the architect has taken the client's instructions, prepared sketch design, and made approximate estimate of cost by cubic measurement or otherwise. This is the first part of his work, E which is repeated at the beginning of cl. 1, and at the beginning of cl. 5 (b). At this stage, the fee is to be one-fourth of the 6 per cent.—that is, in this case, £3,000. Stage 2, cl. 5 (b): when he has done that, and prepared drawings and particulars sufficient to enable quantities to be prepared or a tender obtained. At this stage, the fee F is to be two-thirds of 6 per cent., or, in this case, £8,000. It will be observed that this is a point earlier than the contract being entered into, upon which, under cl. 6, if there had been no abandonment, the £8,000 would have been payable under cl. 6. Stage 3, cl. 4: after the contract is made, if part of the work is omitted, the architect is to G have two-thirds of 6 per cent. on the cost of the omitted work, in addition to the full 6 per cent. on the cost of completed work. It would appear that, if, after the contract, the whole scheme is abandoned, so that the whole work is omitted, he would only get the same fee as on the second stage; but this is not very clear.

In the present case, the plaintiff's work had got well into stage 2, but not to the end of stage 2. He had prepared a great number of drawings and particulars, but they were not yet "sufficient to enable quantities to be prepared or a tender obtained." He had got, perhaps, three-quarters of the way through stage 2, but had not reached the end H

of it. To what, then, is the plaintiff entitled? The defendants say that as stage 2 is not completed, he is not entitled to claim anything under cl. 5 (b), and can only claim under cl. 5 (a) for the completion of stage 1. As this would give him £3,000, the amount already paid to him on account in Nov., 1934, they say that he can recover nothing

A more in this action. I cannot accept this contention. *Prima facie* the architect is engaged for the whole work of completing the building, and *prima facie* it would be a breach of the contract with him for the building owner to abandon it, and terminate his employment. The scale does not in terms authorise the owner to abandon, but it does

B make provision for the fees to be paid to the architect if he does abandon it, a provision which will afford a substitute for the damages which the architect might otherwise claim. In so far as cl. 5 can be said to authorise the owner to abandon, and terminate the architect's employment, I think that it authorises him to do so only at the end of stage 1,

C or at the end of stage 2. I do not think that it authorises him to abandon half-way or three-quarters of the way through stage 2, and then say that, as the stage is not completed, he need not pay the fees for that stage. This, I think, is the view of PORTER, J., though perhaps he put the same result rather differently—namely, that, if the owner has not

D abandoned at the end of stage 1, and has instructed, or allowed, the architect to go on doing the work involved in stage 2, it is an implied term of the contract that he will allow him to complete stage 2, so as to be able to earn the fees payable upon its completion. In either view, for the building owner to abandon the scheme when stage 2 has been

E partly completed is a breach of contract on his part, for which the architect can claim damages. Those damages in this case I think were rightly assessed by the judge at £7,000.

What I have said as to stage 2 of course applies equally to stage 1. I think it is even clearer, however, that this scale authorises the owner

F to abandon only at the end of stage 1, and not after stage 2 has been begun but before it is completed. If it were otherwise, the architect, who might have done artistic work of the highest value “in preparing a sketch design,” would be paid nothing at all if the owner chose to terminate his employment before he had completed the task of “making approximate

G estimate of cost by cubic measurement or otherwise.” In the result, I think that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Hugh Royle*, Town Clerk, Hammersmith (for the appellants);
Kenneth Brown, Baker, Baker (for the respondent).

H

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

BEATTIE v. E. & F. BEATTIE, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
June 1, 2, 1938.]

*Company—Articles of association—Contract between company and member—
Action by member in representative capacity against director and company
—Article providing for arbitration—Whether submission in writing for
purposes of stay of action—Arbitration Act, 1889 (c. 49), ss. 4, 27.—
Companies Act, 1929 (c. 23), s. 20.*

The plaintiff, a director and shareholder in a company, brought an action, in her representative capacity as shareholder, against a fellow-director and shareholder, in his capacity as director, alleging that he had made certain payments contrary to the regulations of the company. The defendant applied under the Arbitration Act, 1889, s. 4, to have the action stayed, and relied upon a clause in the articles of association providing that, whenever any doubt, difference or dispute should arise between any members of the company or between the company and any member or members or on any other account, matter or thing in any way connected with the company, or the conduct, affairs, business, or interest thereof, or any act or default of the directors, or any of them, the members of the company respectively should not take proceedings at law, but the same should be referred to arbitration. It was contended that there was no submission in writing as required by the Arbitration Act, 1889, s. 27 :—

HELD : (i) the tacit agreement inferred from conduct, whereby the defendant had been appointed director, could not be a written agreement for submission within sect. 4 of the Arbitration Act.

(ii) the contractual force given to the article of association by the Companies Act, 1929, s. 20, was limited to those provisions of the article that applied to the relationship of the members in their capacity as members, and did not extend to those provisions that applied to the relationship of the members and the directors as such.

[EDITORIAL NOTE. A distinction is here made between an action brought against an officer of the company as a member of the company and one brought against him in his capacity as a director. Where the action is one that can be brought against any member of the company in his capacity as a member, the defendant can apply to have the matter referred to arbitration, but this is not so where the action can only be brought against one member of the company, not in his capacity as a member but in his capacity as director. No one, by the operation of the Companies Act, 1929, s. 20, can be given a right by an article in any capacity other than that of a member. Such a right can only exist by virtue of some contract between such person and the company. This approves the decision of *ASTBURY, J.*, in *Hickman v. Kent or Romney Marsh Sheep-Breeders' Asscn.* (1).

AS TO HOW FAR ARTICLES ARE A CONTRACT BETWEEN COMPANY AND MEMBER, see *HALSBURY*, Hailsham Edn., Vol. 5, pp. 140-142, para. 255 ; and FOR CASES, see *DIGEST*, Vol. 9, pp. 86-89, Nos. 341-357.]

Cases referred to :

- (1) *Hickman v. Kent or Romney Marsh Sheep-Breeders' Asscn.*, [1915] 1 Ch. 881 ; 9 Digest 86, 341 ; 84 L.J.Ch. 688 ; 113 L.T. 159.
- (2) *Eley v. Positive Government Security Life Assurance Co.* (1876), 1 Ex.D. 88 ; 9 Digest 88, 351 ; 45 L.J.Q.B. 451 ; 34 L.T. 190.

APPEAL from an interlocutory order made on Jan. 24, 1938, by SIR JOHN BENNETT, Vice-Chancellor of the County Palatine of Lancaster.

W. C. Cleveland-Stevens, K.C., and R. A. Forrester for the appellant, Ernest Beattie.

R. F. Roxburgh, K.C., and Harold Brown for the respondents.

SIR WILFRID GREENE, M.R. : This is an appeal from the decision
A of SIR JOHN BENNETT, Vice-Chancellor of the County Palatine of
Lancaster, which arises out of an action brought by Mrs. Margaret Jane
Beattie against a company called E. & F. Beattie, Ltd., and Mr. Ernest
Beattie. The company is a private company, and the action is brought
by the plaintiff in her representative capacity as shareholder. The total
B number of issued shares of the company is 3,228 ordinary shares. Of
those shares, the plaintiff holds 1,614, which is exactly half. The
remainder are held as to 1,514 by the defendant Ernest Beattie, and as to
100 by his son Edward Beattie, who is not a party to the action. There
are two directors of the company, Mrs. Beattie and the defendant,
C Ernest Beattie, who is chairman, but has no casting vote.

Disputes having arisen, Mrs. Beattie issued her writ on Dec. 30, 1936,
and the indorsement related to two matters, (i) a question of her right
to inspect the books and accounts, and (ii) a question as to a purported
increase of capital and an allotment of new shares. In regard to that
D latter question, there were two subsequent amendments. So far as that
part of the action is concerned, no question arises on this appeal. The
action is continuing on those points.

On Dec. 22, 1937, the plaintiff applied by summons for leave to amend
her statement of claim and her writ. The nature of the amendments
E which she desired to make was shortly as follows. She alleged that the
defendant, Ernest Beattie, had paid to himself and had paid to Edward
Beattie certain sums by way of remuneration and so forth which, under
the regulations of the company, he was not entitled to pay. There is
no allegation of any bad faith or anything of that kind in respect of the
F payments. They are merely payments of remuneration which are said
not to have been justified.

When that application for leave to amend was made, the defendant
Ernest Beattie applied under sect. 4 of the Arbitration Act to have that
part of the action stayed pursuant to an arbitration clause contained in
G the articles of association. The notice of motion was in the ordinary
form. It asked for the action to be stayed so far as it related to the
new matters proposed to be litigated, pursuant to sect. 4 of the Arbitra-
tion Act. Then it went on :

The plaintiff [Mrs. Margaret Beattie] and the defendants [the company and
H Mr. Ernest Beattie] having under the submission contained in art. 133 of the articles
of association of the company agreed that all disputes arising between the company
and any member or members touching [various matters] should be referred to
arbitration.

It is not suggested that there is any objection to the application on the
ground of a step in the action having been taken, this new matter being
treated, for the purpose of sect. 12 of the Arbitration Act, as in effect

a new action. SIR JOHN BENNETT held that the application ought not to succeed. He accordingly dismissed it, and this appeal ensued.

As I have said, Mr. Ernest Beattie is, and was at all material times, a director of the company, and it is against him, in his capacity as director, that these claims are made. It is as a director in charge of the company's funds that he is responsible for their proper application, in accordance with the regulations which govern the company. It is in that capacity, therefore, that the action is brought against him. The claim which the plaintiff is seeking to enforce in the action—I am now dealing only with the new matter that it is sought to introduce—is, and must be, in a representative action of this character, a claim of the company itself, because a minority shareholder suing in a representative action is suing to enforce rights of the company. The reason the action takes that form is that the minority shareholder is not in a position to see that the action is brought in the name of the company itself to enforce the company's rights. Nevertheless, the action is in reality an action to enforce the rights of the company, and of nobody else. The essence of the claim is that the plaintiff is seeking to enforce the company's right to recover from the defendant, Ernest Beattie, moneys of the company which, as it is alleged, have been paid away by him. The company, of course, is a necessary defendant, because the order, if an order is made, will be an order for payment to the company, the moneys being the company's moneys.

The arbitration clause is contained in art. 133, and it is as follows :

Whenever any doubt, difference, or dispute shall arise between any members of the company or between the company and any member or members (and for the purpose of this article the word "member" shall include any person claiming through or under a member) . . . or on any other account, matter, or thing in any way connected with the company ; or the conduct, affairs, business, or interest thereof, or any act or default of the directors, or any of them, the members of the company respectively shall not take proceedings at law in respect of such doubt, difference, or dispute, but the same shall be referred to two arbitrators or their umpire [pursuant to the Arbitration Act, 1889].

There was some question as to the accuracy of the print that is before us, where it uses the words "the members of the company respectively shall not take proceedings." It was suggested that the "of" should be either "and" or "or." I do not think that it matters whether this is so or not.

The matter was dealt with by SIR JOHN BENNETT in this way. He held first of all that, upon the true construction of the article, this present dispute did not fall within it. Secondly, he held that, if that be wrong as a matter of construction, then the present appellant, Mr. Ernest Beattie, cannot rely on this article as constituting a contract between himself and the company, and that therefore it cannot be relied upon as a submission to arbitration between him and the company for the purpose of sect. 4. Lastly, he expressed his view on the question of discretion, but, in view of his decision, it was not necessary for him to exercise his discretion in the matter.

The way in which the matter is put on the first question—that of construction—is this. It is said on behalf of the plaintiff, and it was so held by SIR JOHN BENNETT, that in the phrase, “Where any doubt, difference or dispute shall arise between any members of the company, or between the company and any member or members” the words “any member or members” must be construed as subject to this qualification: “in his or their capacity as member or members.” That means, as a matter of construction, that a disputant who happens to be a member, but is disputing in his capacity as director, will be excluded from the class of disputant with which this clause is concerned.

It is argued on behalf of the appellant, on the other hand, that this is not what the language really means, that a member is a member, and that there is no distinction to be drawn for this purpose between his capacity as a member and his capacity as an individual.

I do not myself find it necessary to resolve what appears to be a rather subtle question. It may be just to say that on construction the word “members” in this clause means “members in their capacity as members”—that is, excluding any relationship which does not flow from the membership itself. It may or may not mean that, and I prefer to leave that matter without any expression of opinion on my part, because, in my judgment, there is a quite clear answer to this present appeal in the second matter with which SIR JOHN BENNETT dealt.

In order to bring himself under sect. 4 of the Arbitration Act, the appellant must, of course, point to a written agreement for submission. For that reason, it will not be sufficient for him to rely upon an agreement appointing him director which is merely to be inferred from conduct, even if in such an agreement a term corresponding to art. 133 ought to be imported. An agreement so extracted from the general relationship of the parties would not be a sufficient submission within sect. 4.

The appellant accordingly seeks to find in the articles themselves a contract to which he is a party giving him the right to demand an arbitration in the present circumstances. I cannot find that contract. The appellant must rely upon the Companies Act, 1929, s. 20, which gives to articles of association a contractual force. That section provides:

(1) Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

Mr. Cleveland-Stevens is saying: “Here is a member—namely, Mr. Ernest Beattie. Here is an article which provides that a dispute between the company and a member shall be referred to arbitration. It covers among other things a dispute relating to an act or default of a director.” He says that what he is seeking to do in the present case is to enforce that right as a member under that article, and not any right as a director, and that he has a right, and all other members have a right, when they find the company disputing with a director, to insist

upon that dispute being referred to arbitration. Mr. Cleveland-Stevens says that the case must be treated as though the circumstance that the appellant happens to be a director is immaterial. He says that it is quite immaterial that the member who is demanding arbitration is himself the member attacked.

In my judgment, that argument is based upon an incorrect view both A as to the effect of the article and as to the effect of sect. 20 of the Companies Act. The question as to the precise effect of sect. 20 has been the subject of considerable controversy in the past, and it may very well be that there will be considerable controversy about it in the future. It appears to me, however, that this much, at any rate, is good law—that B the contractual force given to the articles of association by the section is limited to such provisions of the articles as apply to the relationship of the members in their capacity as members.

In saying that, I do not think that I am in any way departing from or extending (and it certainly is not my intention to depart from or C extend) certain observations of ASTBURY, J., in the well-known case of *Hickman v. Kent or Romney Marsh Sheep-Breeders' Assn.* (1). In that case, ASTBURY, J., made a careful review of all the decisions, and he expressed his conclusions in regard to them in this way. He referred to certain cases—*Eley v. Positive Government Security Life Assurance D Co.* (2) and certain others—and pointed out, at p. 897, that those decisions amounted to this :

An outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles treating them as contracts between himself and the company to enforce E those rights. Those rights are not part of the general regulations of the company applicable alike to all shareholders and can only exist by virtue of some contract between such person and the company . . .

Then again he says, at p. 900 :

. . . no right merely purporting to be given by an article to a person, whether a F member or not, in a capacity other than that of a member, as, for instance, as solicitor, promoter, director, can be enforced against the company . . .

With those two statements I respectfully agree. They are statements with regard to the true construction and operation of sect. 20, and they have the result in the present case of preventing that section from giving G contractual force to the article as between the company and its directors as such.

It is to be observed that the real matter which is here being litigated is a dispute between the company and the appellant in his capacity as a director, and, when the appellant, relying upon this clause, seeks to H have that dispute referred to arbitration, it is *that* dispute, and none other, which he is seeking to have referred. By seeking to have it referred he is not, in my judgment, seeking to enforce a right which is common to himself and all other members. He is seeking to enforce quite a different right. I will explain what I mean. Let me assume that this

article on its true construction entitles any member of the company to say to the company, when it is in dispute with a director: "You, the company, are bound by your contract with me in the articles to refer this dispute to arbitration, and I call upon you so to do." That is the right, and the only right in this respect, which is common to all the members under this article. If that were the right which the appellant were seeking to exercise, there might be something to be said for that argument, but, with all respect to the able argument of Mr. Cleveland-Stevens, it appears to me that that is not at all the right which the appellant is seeking to enforce. He is not seeking to enforce a right to call upon the company to arbitrate a dispute, which is only accidentally a dispute with himself. He is asking, as a disputant, to have the dispute to which he is a party referred. That is sufficient to differentiate it from the right which is common to all the other members of the company under this article, which I have tried to define. That right is one which a member might find very great difficulty in enforcing in the courts, because it concerns a matter relating to the internal management of the company, with which the courts will not, in general, interfere.

Quite apart from that consideration, however, the two rights are, in my judgment, perfectly distinct and quite different—the general right of a member as a member, and the right which the appellant as a party to the dispute is seeking to enforce. Indeed, Mr. Cleveland-Stevens agreed that his argument really amounted to saying that the present application is in essence the same as proceedings brought by Mr. Ernest Beattie, as a shareholder, to restrain the company from litigating, and to obtain a mandatory order on the company to go to arbitration. That is a very different thing, however, from what he is now seeking, since his claim, as I have said, is to insist upon a reference of his own dispute. That seems to me to deal conclusively with the matter, and I do not think that anything I have said in any way differs from the reasons which SIR JOHN BENNETT has given on this part of the case. When he says, as he does say, after examining the cases—

this art. 133 having the effect given to it by the Companies Act, 1929, s. 20, does not constitute an agreement between the company and the defendant director in his capacity as director, even though he is a member of the company

—his conclusion, in my opinion, is perfectly right.

The only other matter which has been discussed is the question of discretion. SIR JOHN BENNETT appears to indicate the view that, had he been in favour of the appellant on other matters, he would have exercised his discretion in his favour. That has been touched on in the argument before us, but, having regard to the grounds upon which I have rested my decision, it is unnecessary for me to deal with it. However, from that I do not wish it to be in any way thought that I should necessarily have taken a view on the matter of discretion the same as that which SIR JOHN BENNETT appears to have taken. In the result, the appeal must be dismissed.

SCOTT, L.J. : I agree with what SIR WILFRID GREENE, M.R., has said as to the scope of art. 133 in the light of sect. 20 of the Companies Act, and the application of that article to the terms of sect. 4 of the Arbitration Act, which says that, if any party to a submission, or any person claiming through or under him, commences any legal proceedings against any other party to the submission, then application can be made to the court to stay such proceedings. A

I agree that this appeal should be dismissed, for the reasons that SIR WILFRID GREENE, M.R., has given, and with which I entirely agree. I would like to add a very express statement that, so far as I am concerned, it is not to be thought that I would regard this particular dispute as one that ought to be taken from the court and referred to arbitration, even if our decision on the question of the interpretation of the particular article were wrong. B

CLAUSON, L.J. : I agree with all that has fallen from SIR WILFRID GREENE, M.R., and SCOTT, L.J., and, in those circumstances, I have nothing to add. C

Appeal dismissed.

Solicitors : *Cunliffe & Airy*, agents for *Lee, Scott, Start & Mottershead*, Manchester (for the appellant, Ernest Beattie) ; *T. J. Smith & Son*, Liverpool (for the respondents). D

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

Re NEAVE'S SETTLEMENT TRUSTS, NEAVE *v.* NEAVE. E

[CHANCERY DIVISION (Farwell, J.), **June 2, 1938.**]

Powers—Special power to appoint among children—Excessive exercise—Appointment making appointees under doctrine of election bound to settle appointed shares—Validity.

A father who, under two settlements, had a special power of appointment of funds among his children by his will appointed the funds in unequal shares to his two sons, and declared that each son should, under the equitable doctrine of election, settle his share to the satisfaction of his trustees upon the trusts of his share of the residuary estate. The trustees were given absolute power to determine the amount and manner in which, in case of default, compensation should be made :— F

HELD : (i) the condition attached to the appointment was such as the law did not recognise, and the sons took their appointed shares free from any condition. G

(ii) if the condition were good, the discretion given to the trustees left the distribution of the residuary estate wholly in the hands of the trustees, and this the law does not permit.

[EDITORIAL NOTE. The judgment herein discusses the distinction between a power of appointment and property. A testator may impose any conditions upon a devise or bequest, but he can exercise a power of appointment only according to the terms of the power given to him in the instrument creating it. Even if such an exercise of the power was valid, the testator had imposed such a condition that in effect he had left the trustees to make his will for him, and this the law does not allow. H

AS TO EXCESSIVE EXECUTION OF POWERS, see HALSBURY, Hailsham Edn.; Vol. 25, pp. 570-576, paras. 1019-1026; and FOR CASES, see DIGEST, Vol. 37, pp. 490-492, Nos. 847-865.]

Cases referred to :

- (1) *Re Oliver's Settlement, Evered v. Leigh*, [1905] 1 Ch. 191; 37 Digest 68, 102; 74 L.J.Ch. 62.
- (2) *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1; 37 Digest 123, 552; 79 L.J.Ch. 1; 101 L.T. 837.
- (3) *Wollaston v. King* (1869), L.R. 8 Eq. 165; 37 Digest 109, 419; 38 L.J.Ch. 61; 20 L.T. 1003.
- (4) *Bristow v. Warde* (1794), 2 Ves. 336; 37 Digest 403, 146.
- (5) *Churchill v. Churchill* (1867), L.R. 5 Eq. 44; 37 Digest 498, 907; 37 L.J.Ch. 92.
- (6) *King v. King* (1864), 15 I. Ch.R. 479; 20 Digest 429, case 1590i.

ADJOURNED SUMMONS asking the court to determine whether, on the true construction of the testator's will, the two sons of the testator took the settled property which had been appointed to them by the testator under a power contained in a marriage settlement and in a voluntary settlement free from any liability to make any settlement of the appointed shares, or whether they were bound to settle the shares under a provision contained in the testator's will with regard to the equitable doctrine of election, the testator having bequeathed to each of them a share of his residuary estate.

P. H. L. Brough for the plaintiff, an executor and trustee of the deceased's will and of the two settlements.

Andrew Clark for the first defendant, the other executor and trustee of the will and of the two settlements, and also a beneficiary.

A. C. Nesbitt for the second and third defendants.

Hon. Denys Buckley for the fourth defendant, a son of the testator and a beneficiary under the will.

Evelyn Riviere for the fifth and sixth defendants.

Clark: The direction to settle is null and void, as being contrary to an established rule of law. If an attempt is made to cut down an absolute appointment by imposing upon it provisions which cannot be enforced in law, or provisions to benefit some one not an object of the power, the appointment must be disregarded for all purposes. To permit the provision to give rise to a case for election would be to allow the testator to do something indirectly which the law does not allow to be done directly. The rule of law cannot be overridden by the testator's expression of a wish that it should not apply, any more than the rule against perpetuities can be overridden by a testator's expression of a wish that the rule shall not apply. If the direction is not void as contravening a rule of law, it is void for uncertainty. The direction in the appointment that the shares are to be settled cannot take effect, and the only question is as to what is to happen to the sons' interests in the residuary estate if they do not settle. The trustees are given power to impose any kind of penalty that they may think fit, if the beneficiaries

do not settle these shares. No basis of compensation is fixed by the testator. He has left the matter entirely to his trustees. [Counsel referred to *Re Oliver's Settlement*, *Evered v. Leigh* (1) and *Re Nash, Cook v. Frederick* (2).]

Buckley : There is no clear direction in the will in the present case as to how the provisions are to be cut down so as to justify the court in departing from the provisions, which are clear and unambiguous. The equitable doctrine of election can have no application to this case. [Counsel referred to *Wollaston v. King* (3) and *Bristow v. Warde* (4).]

Nesbitt : No question of election arises, because this is a case where there is an express condition imposed by a testator. The testator has said that, under the equitable doctrine of election, each of his sons shall do something—namely, settle the appointed share or pay compensation. The testator has not interfered with the quantum of the appointed fund. He has regulated the quantum which his sons take under the residuary gift. The compensation was to come out of the free property of which the testator could dispose. It can come out of the residuary estate only. [Counsel referred to *Churchill v. Churchill* (5) and *King v. King* (6).]

Riviere : The clause in question is not a proviso upon the appointment, but a condition which attaches to the residuary estate. The compensation was to come out of the gift of residue, and not out of the appointed share.

FARWELL, J. : This summons raises a question which has given rise to an interesting discussion as to the effect of an appointment under a special power and what is called in the will the equitable doctrine of election. The question arises in this way. By a marriage settlement made on Apr. 29, 1878, between Sheffield Henry Morier Neave and the lady who subsequently became his wife, certain funds were settled upon trust after the death of the husband and wife as the husband and wife or the survivor of them should appoint among the children of the marriage, with a trust in default of appointment which it is not necessary for me to mention. By another settlement, a voluntary settlement, made on Dec. 26, 1896, the spouses and the survivor had a similar special power of appointment among the children. Of course, at the date of the marriage settlement, there were no children, but at the date of the second settlement—the voluntary settlement—the only two children of the marriage, the two sons, were lives in being. The joint power of appointment was not exercised by the spouses, and the husband his wife having predeceased him, by his will dated July 20, 1936, exercised the power.

The husband died on Oct. 24, 1936, and the question which I have to determine really turns wholly upon the true construction of his will, because his will not only disposes of his own property but also exercises the powers under both settlements. Therefore, I think that I need not do more than state, as I have done very shortly, the power which he is purporting to exercise, and I may go straight to his will. By his will he

appointed executors and trustees, he gave certain legacies, and then, in cl. 5, he dealt with this power :

A In exercise of the power for this purpose conferred on me as the survivor of my wife by my marriage settlement dated Apr. 29, 1878, and by a settlement dated Dec. 26, 1896, and made between my wife of the first part myself of the second part and myself and my wife of the third part I appoint that the trustees of these settlements shall after my death stand possessed of all the money investments and property for the time being subject to the trusts thereof in trust to divide the same into four equal parts and shall hold three of such parts in trust for my son Sheffield Airey Neave and shall hold the other such part in trust for my son Richard provided always and I declare that each of my sons shall under the equitable doctrine of election be bound within such time as my trustees shall appoint to settle at the cost of my estate and to the satisfaction of my trustees his appointed share under each of the said settlements upon the trusts hereinafter declared concerning his share in my residuary estate and so as to form one fund therewith for all purposes and my trustees may at their absolute discretion decide any question as to the amount and manner in which in case of default compensation is to be made.

B Then the testator gave certain legacies, to which I need not refer, and made a devise, and then he disposed of the whole of his residuary estate
C by giving it to his trustees upon trust to sell in the usual way and to pay debts and funeral expenses and to divide the same into four equal parts, directing that they shall :

D hold three of such parts upon the trusts hereinafter declared for my said son Sheffield Airey and shall hold the other such part upon the trusts hereinafter declared for my said son Richard Neave and I direct that for the purposes of the distribution between my said two sons under this clause each of my said sons shall bring into hotchpot all the property and interest which he shall become entitled to under the will of my brother Digby Neave on the death of the widow of my said brother Digby Neave and account for the same accordingly.

E Then there is another direction with regard to bringing into hotchpot.
Then there follow the trusts upon which the residue is to be held :

F (a) The income of the share in my residuary estate of my said son Sheffield Airey Neave shall be paid to him during his life but the income of the share of my son Richard shall be held by my trustees for his benefit during his life on the protective trusts declared by the Trustee Act, 1925, s. 33. (b) From and after the decease of either of my said sons his share and the income thereof shall be held upon trust for such one or more of his male issue immediate or remote born before the expiration of 21 years after the decease of the son so dying as he may by deed with or without power of revocation and new appointment or by will or codicil appoint. (c) In default of any such appointment and so far as any such appointment shall not extend such share shall be held upon trust for all his sons who shall attain the age of 21 years and if more than one equally as tenants in common.

G Then there is a provision with regard to any grandson taking a share in default of appointment. Then, finally :

(e) If the son of mine so dying as aforesaid shall have no issue who shall take a vested interest under the preceding trusts then after the death of such son his share shall accrue to and be held in trust for my other son and his male issue in like manner as hereinbefore declared concerning his original share.

H The question that I have to determine is whether the two sons take the settled property which had been appointed to them under the power contained in the marriage settlement and the voluntary settlement free from any liability to make any settlement, or whether they are bound to settle under this provision with regard to the equitable doctrine of election.

I think that, in considering a case of this sort, it is most important to bear in mind what is really very elementary—namely, the distinction between property and power. Where a person has a special power of appointment over property, he has no right to do anything more than to dispose of the property subject to the power in a way within the four walls of the provisions contained in the original instrument creating the power. The property is not the appointor's property in any sense of the word. He cannot do with it as he pleases. He can only dispose of it in accordance with the express provisions in the settlement which creates the power. On the other hand, a man may make a will and dispose of his own property exactly as he pleases, subject to the ordinary rules of law. He may give it to whom he pleases. He may impose any conditions within the rules of law which he thinks fit to impose as terms of his gift of the property. That has to be borne in mind (although, as I say, it is very elementary) when one comes to consider the effect of this will. So far as the appointment to the two sons is concerned, there is no possible objection to it. It is an absolute appointment to each of the two sons. The two sons were both of them objects of the power under both settlements. The testator was entitled to exercise the power, as he did, by appointing it, as he has done, to the two sons. So far there is no difficulty. Then, however, he has sought to impose a condition upon the two sons in connection with their enjoyment of the property which they take under the power. He has endeavoured to impose upon them a condition that they shall settle that property in such a way that, if it had been contained in the appointment itself, it would obviously have been void on one ground, at any rate—namely, that it exceeded the power. In my judgment, a testator cannot so exercise his power as to impose a condition as to the enjoyment of the property which he is appointing in such a way that the appointment would have an illegal effect. However, a testator may, of course, say: "I exercise the special power of appointment in favour of the objects of the power, and I give the residue of my property, some other portion of my property, to those objects, but, if those objects do not make a settlement of the property which they get under the appointment, then they shall forfeit what I otherwise would have given them out of my own property." That is a perfectly legal thing, and one which any testator is entitled to do. It is said in this case that, on the true construction of this will, that is really what the testator has done. He has said: "I make an appointment, an absolute appointment, to both my sons. I give them the interests in my residuary estate, and they must provide compensation out of those interests. If they do not make the settlement of the settled property which I wish them to make—a settlement which I cannot oblige them to make, but which I desire them to make—if they do not give expression to my wishes, they are to take less out of my residuary estate." It is said that, if I read the will as a whole, that is the true construction of it. If that be the true con-

- struction to put upon it, it is, of course, a very clumsy way of attempting to do something which could be done perfectly simply. However, it may be that that is what the testator had in mind, and it may be that, by this reference to the equitable doctrine of election, it is possible to read into the will as a whole the effect which I am asked to put upon it. So
- A far as it attempts to interfere with the property given under the appointment to the two sons directly, it obviously cannot take effect at all. So far as it is intended to limit by way of compensation the share which the sons take out of the testator's own property, it may be a good provision. However, even if I read this provision with regard to compensation as
- B not referring to anything more than such interests as the sons take in the testator's own property, still it seems to me that I am left in a great difficulty, because, assuming that to be the true construction, it is left wholly in the hands of the trustees to say how the residuary estate is to be disposed of. If the sons refuse to make the settlement—which, as
- C I have said, the testator desired them to make—then how is the residuary estate to be disposed of? One son takes a life interest, the other takes a protective interest, and there are gifts over to their children and their issue. It is wholly a matter for the trustees to say what compensation is to be made, and how it is to be made, and in effect it is for the trustees
- D to say, in those circumstances, how the residuary estate of the testator is to be disposed of—at any rate, so far as the interest of the two sons is concerned. That, in my judgment, is something which the law does not permit. It is well-settled that a testator cannot leave it to someone else, except by giving a power of appointment, to say how the property shall
- E be disposed of, and that is what this testator has tried to do. He has said that it shall be a matter for the trustees, if his sons do not make the settlement, to say how the residuary estate should go, whether the sons should take any benefit, and, if so, what, or whether they should be cut out altogether, and the property go direct to the children of the sons.
- F In that way, it would be a matter for the discretion of the trustees to determine the destination—at any rate, to some extent—of the testator's residuary estate. In my judgment, that is something which the law does not permit. In those circumstances, even if I read this condition as a condition relating, not to the settled property, but to his own property—
- G that is to say, as a term that the gift of his own property is to be lessened if the sons do not comply with his wishes—it is, in my judgment, ineffective and unenforceable, because it is such a condition as the law will not recognise.

H The result of that is that the original appointment, which is a perfectly good appointment, must stand, and the sons will take their appointed shares free from any condition which the testator has sought in vain to impose upon them.

Solicitors: *Pennington & Son* (for the plaintiff and the first three defendants); *Young, Jones & Co.* (for fourth, fifth and sixth defendants).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

R. v. BARNES BOROUGH COUNCIL, *Ex parte* CONLAN.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **May 4, 5, June 2, 1938.**]

Local Government—Production of documents to councillor—Documents relating to pending litigation—Sufficient production for proper discharge of duties—Prejudice of council's interest by production.

A
B
C
A borough council and a club, the owners of a large estate in the borough, made an agreement with regard to the development of the land. The matter attracted public interest, and an action against the council, was commenced by the Attorney-General at the relation of a private individual claiming a declaration that the agreement was *ultra vires*. The applicant, a councillor of the borough, complained that he had been refused access to the papers having reference to the action. The conduct of the action was referred to a special committee of the council, upon which the applicant was invited to serve, but he declined to do so. The applicant then asked for production of the Town Clerk's notes on certain documents connected with the case, minutes of the committee which had negotiated the agreements with the club, and all correspondence with the club. Production of these documents was refused, the council acting upon the advice of leading counsel:—

D
HELD: the right of a councillor to production is restricted to the production of such documents as will enable him properly to carry out his duties as councillor, and, upon the facts, the applicant had not by the refusal to disclose the documents here in question been prevented from the proper discharge of any of his duties. On the other hand, if the documents had been disclosed, the interests of the council in the pending litigation might have been prejudiced. The applicant was not, therefore, entitled to production of the documents.

E
[EDITORIAL NOTE. It must occasionally happen that certain councillors find themselves opposed—quite honestly—to certain actions of the council as a whole. When litigation is involved, it is clear that the interests of the council as a whole might be seriously prejudiced by a councillor, who found himself in such disagreement with his fellow members, having a roving commission for inspection of all the documents relating to the litigation. The present case shows how, by taking suitable steps to ensure the proper conduct of the proceedings, the council can avoid such difficulties.

F
AS TO INSPECTION OF DOCUMENTS BY COUNCILLORS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 749-751, paras. 1275-1278; and FOR CASES, see DIGEST, Vol. 16, pp. 315, 316, Nos. 1275-1291.]

Cases referred to:

- G
(1) *R. v. All Saints, Wigan (Churchwardens)* (1876), 1 App. Cas. 611; 16 Digest 277, 899; 35 L.T. 381; *affg.* S.C. *sub nom.* *R. v. Wigan* (1874), L.R. 9 Q.B. 317.
(2) *R. v. Southwold Corpn., Ex p. Wrightson* (1907), 97 L.T. 431; 16 Digest 316, 1288.
(3) *R. v. Hampstead Borough Council, Ex p. Woodward* (1917), 116 L.T. 213; 13 Digest 302, 341.

H
RULE NISI for *mandamus* for inspection of documents. The facts are stated in the judgment of the court, delivered by HUMPHREYS, J. The following are the classes of documents of which production was sought:

1. Town Clerk's comments on copy statement of claim submitted to counsel as stated in the resume of case circulated to all members of the council on the 22nd February, 1938.

2. Town Clerk's notes on copy agreements of 1st August, 1935, and 24th January 1936, as stated in the said resume.

3. All agreements supplemental to the said agreement of the 1st August, 1935 (subsequent to that of the 24th January, 1936), including in particular that of the 28th October, 1936.

4. Minutes of meetings of town planning sub-committee or town planning clauses sub-committee in relation to Ranelagh Club, Limited.

A 5. Minutes of meetings of special sub-committee which negotiated with Ranelagh Club, Limited, in 1935, 1936 and possibly 1937, including any meetings of any committees called "joint" or "mixed."

6. All correspondence with Ranelagh Club, Limited.

7. All cases to counsel to advise.

8. All counsel's opinions.

The production of the documents under Nos. 3, 4, 7 and 8 was not pressed upon the argument in the rule.

B *Cyril J. Radcliffe, K.C.*, and *Wilfrid M. Hunt* for the respondents, showing cause against the rule.

D. N. Pritt, K.C., and *J. Alan Bell* for the applicant.

C HUMPHREYS, J. [delivering the judgment of the court]: In this case, a rule *nisi* was granted at the instance of John Nicholas Patrick Conlan directed to the mayor, aldermen and burgesses of the borough of Barnes calling upon them to show cause why a writ of *mandamus* should not issue directing them to produce to Conlan, a councillor of the
D borough of Barnes, for his inspection certain documents named therein. The documents mentioned in the rule were originally divided into eight classes. For various reasons, the demand for access to some of those documents was not pressed on the argument of the rule, but there remain to be dealt with the classes of documents numbered 1, 2, 5 and 6.

E The facts giving rise to this application are by no means agreed, and, upon the argument of the rule, no less than nineteen affidavits were produced on one side or the other. In our opinion, however, the legal question raised can be disposed of without deciding any question of fact which is the subject of dispute. Within the borough of Barnes lie the
F grounds of the Ranelagh Club, 117 acres in extent and owned by a company called the Ranelagh Club, Ltd. Prior to 1935, a question had arisen as to the future of those grounds. Discussions had taken place, and some steps had been taken by the borough council in the direction of town-planning those grounds. From Mar., 1935, negotiations took
G place between the borough council and the company, and on July 31, at a meeting of the council, it was decided that an agreement be entered into. The agreement was made and dated Aug. 1, 1935. At that time, Conlan was a member of the council, and had been present during the discussion of the agreement, but left the meeting before the
H vote upon this matter was taken. After that date, quarrels apparently arose among the directors of the company themselves and between them and other persons, with the result that litigation has been, as Mr. Radcliffe expressed it, raging ever since. On Feb. 5, 1938, a writ and statement of claim in an action against the borough council at the suit of the Attorney-General on the relation of a Mr. Thomas, the president of the

Barnes Ratepayers' Association, were served upon the council. The claims in the said action are for declarations, *inter alia*, that the agreement of Aug. 1, 1935, and an agreement supplemental thereto, made on Jan. 24, 1936, were *ultra vires* the corporation, and not binding upon them. On Feb. 9, 1938, the receipt of the writ was brought before the council by the town clerk, and, after the contents of the writ and statement of claim had been read and explained by that gentleman, it was resolved by eighteen votes to one that the town clerk be instructed to enter an appearance to the writ, that the town clerk be appointed solicitor to the corporation in the action, and that a special committee be set up to consider the whole matter, to obtain counsel's opinion, and to take the necessary steps to defend the action. It was moved by a councillor that Conlan, who was at that time chairman of the town-planning committee of the council, should be a member of the special committee. Conlan, however, declined so to serve. It was contended by Mr. Pritt, in the course of his argument in support of the rule, that Conlan's refusal to serve upon the special committee was the only proper course for him to take, since counsel had advised that those appointed to act on the special committee should be unanimous in their desire to see the council successful, a description, said counsel, which could hardly be applied to his client. Mr. Pritt may be right in that contention. At all events, the admission leaves no doubt as to the attitude of Conlan towards the defence to the action. On the same evening, Feb. 9, the special committee held a meeting, at which they instructed the town clerk to obtain the joint opinion and advice of two King's Counsel, specially versed in that branch of the law. On Feb. 16, there was another meeting of the special committee, at which the case for the opinion of counsel was approved by the committee, and at which it was resolved that, pending the receipt of counsel's opinion and further instructions from the committee, the town clerk be instructed not to permit inspection of the documents submitted to counsel. At a further meeting of the committee, on Feb. 19, it appeared that a conference with counsel had been held, and, upon consideration of the oral opinion expressed by counsel at such conference, it was resolved that the action be defended, and that the town clerk should prepare a report for presentation to a special meeting of the council to be held on Feb. 24. On Feb. 24, there was a special meeting of the council, at which this matter was further considered, and the written opinion of counsel, which had been received, fully discussed, and it was finally resolved that the conduct of the defence to the action be left to the special committee with power to act, except that the special committee should not be empowered to discontinue or compromise the defence to the action without the authority of the council. It was further resolved that the special committee report to the council from time to time as they deemed advisable. It was further resolved that information concerning or relative to the said action be not given to individual members of the council except

by way of reports of the special committee or pursuant to further directions by the council on that point. Meanwhile, Conlan had consulted a solicitor, Mr. Webb, who had written letters making many demands for information to be supplied to Conlan. Mr. Webb had demanded to see the draft case prepared for counsel before it was submitted, and asked

- A to be informed as to who had chosen the counsel to be instructed, and as to whether the person or persons who had selected the counsel had satisfied himself or themselves that neither of the counsel was biased by reason of having been engaged in any other litigation affecting the site. He further suggested that the town clerk had exceeded his duty
 B in the advice which he had tendered to the council on the matter of the defence to the action. As a result of these letters, it was decided by the special committee to take the opinion of counsel upon the question whether Conlan was entitled to the information which he was demanding upon any of the matters. On Mar. 3 counsel advised that the committee
 C could properly refuse the requests made by Mr. Webb on behalf of Conlan.

It appears, therefore, that the council have acted throughout upon the advice of leading counsel, upon whose advice they have agreed to defend the action. They have entrusted the conduct of the defence to

- D the action on their behalf to a special committee, and it is again upon the advice of counsel that they have refused to disclose to Conlan documents other than those which have been disclosed to all the members of the council. It further appears that the special committee took considerable trouble to satisfy themselves that counsel were given the
 E fullest information to enable them to form their opinion. Conlan professes in his affidavit to be unable properly to fulfil his duties as a councillor without access to the documents in question.

Mr. Radcliffe, in showing cause against the rule, submitted that the documents in question are quite unnecessary to enable Conlan to fulfil
 F any duties he may have as a councillor in regard to the defence of the action, and, without alleging that Conlan is actuated by improper motives, he argued that there is sufficient evidence to show that Conlan's attitude in regard to the action is so antagonistic to the decision of the council to defend the action that any disclosure to him of documents not
 G open to the inspection of all members of the council would be more likely to result in hampering and obstructing, than in assisting, the defence to the action upon the lines advised by counsel and resolved upon by the special committee.

- H The law upon this matter is not open to doubt. It may be well to repeat the well-known words of LORD CHELMSFORD in *R. v. All Saints, Wigan (Churchwardens)* (1), at p. 620, with regard to the nature of the writ of *mandamus* :

A writ of *mandamus* is a prerogative writ and not a writ of right and it is in this sense in the discretion of the court whether it shall be granted or not. The court may refuse to grant the writ not only upon the merits, but upon some delay

or other matter, personal to the party applying for it ; in this the court exercises a discretion which cannot be questioned.

As to the right of a councillor to inspect all documents in possession of the council, there was no dispute at the bar that such a right exists, so far as his access to the documents is reasonably necessary to enable the councillor properly to perform his duties as a member of the council. A The common law right of a councillor to inspect documents in the possession of the council arises from his common law duty to keep himself informed of all matters necessary to enable him properly to discharge his duty as a councillor. There must be some limit to this duty. To hold that each councillor of such a body as, for instance, the London B County Council, is charged with the duty of making himself familiar with every document in the possession of that body would be to impose an impossible burden upon individual councillors. The duties are therefore divided amongst various committees and sub-committees.

In our judgment, it is plain that, as was decided in *R. v. Southwold C Corpn., Ex p. Wrightson* (2) :

a councillor has no right to a roving commission to go and examine books or documents of a corporation because he is a councillor. Mere curiosity or desire to see and inspect documents is not sufficient.

Moreover, if the facts should disclose some indirect motive on the part of D the prosecutor of the rule not consistent with the interests of the council as a whole, this court would rightly exercise the discretion, referred to by LORD CHELMSFORD, in the direction of refusing to compel the council to give disclosure. The case of *R. v. Hampstead Borough Council, Ex p. Woodward* (3) is a clear authority to this effect. In that case, the docu- E ments in question had come before the council in the ordinary course of business, but this court refused a *mandamus* to compel disclosure of them to a member of the council, upon the ground, as stated in the judgment of LORD READING, L.C.J., in which RIDLEY and LUSH, JJ., concurred, that there was ground for thinking that Mr. Woodward, the F councillor in question, was not actuated solely by his public position, but was inspired by an indirect motive to assist a person who was in litigation with the council.

In spite of the full and vigorous argument by Mr. Pritt, the court is of the opinion that the Barnes Borough Council, the members of the G special committee and the town clerk have acted throughout this matter with perfect propriety. They have placed themselves from the start in the hands of experienced leading counsel, and at every step they have acted in accordance with the advice tendered to them. We are satisfied upon reading the affidavits that the fullest information was given to H counsel to enable them to form their opinion upon the matters referred to them.

In our judgment, it has not been established that Conlan has been prevented from carrying out any duties which fell upon him as a councillor by the failure to disclose the documents, the subject of the rule

in this case, and, while no useful result would follow from such a disclosure to Conlan, the interests of the council in the pending litigation might be prejudiced. In the view we take as to the rights of the parties, it is unnecessary to differentiate between the various groups of documents. The rule is discharged.

A *Rule discharged with costs.*

Solicitors: *Arthur C. Fox*, Town Clerk, Barnes (for the respondents); *William P. Webb* (for the applicant).

[Reported by MICHAEL MARCUS, Esq., *Barrister-at-Law.*]

B

REFUGE ASSURANCE CO., LTD. v. PEARLBERG.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
May 27, 1938.]

C *Mortgage—Receiver—Appointment—By mortgagee in possession—Law of Property Act, 1925 (c. 20), ss. 101 (1) (iii), 109 (1).*

A mortgagee of several properties went into possession by R., on Oct. 23. It was intended that R. should take possession as receiver, and a letter to this effect written by the mortgagee was delivered to the mortgagor, but the deed of appointment was not executed until Nov. 11 in the same year:—

D

HELD: a mortgagee in possession has a statutory power to appoint a receiver by virtue of the Law of Property Act, 1925, s. 101 (1) (iii), and, upon such an appointment being made, must be treated as having gone out of possession on the date of the appointment.

Decision of SIMONDS, J. ([1938] 2 All E.R. 25) affirmed.

E

[EDITORIAL NOTE. The principal matter debated here is the question whether a mortgagee in possession has a statutory power of appointing a receiver. On this point the court has virtually followed a *dictum* of PEARSON, J., in *Tillett v. Nixon* (1), which was referred to without dissent by P. O. LAWRENCE, J., in *Anchor Trust Co., Ltd. v. Bell* (2).

AS TO APPOINTMENT OF RECEIVER OUT OF COURT, see HALSBURY, Hailsham Edn., Vol. 23, pp. 447-449, paras. 658, 659; and FOR CASES, see DIGEST, Vol. 35, pp. 530, 531, Nos. 2614, 2615.]

F

Cases referred to:

(1) *Tillett v. Nixon* (1883), 25 Ch.D. 238; 35 Digest 521, 2506; 53 L.J.Ch. 199; 49 L.T. 598.

(2) *Anchor Trust Co., Ltd. v. Bell*, [1926] Ch. 805; 35 Digest 512, 2425; 95 L.J.Ch. 564; 135 L.T. 311.

G

APPEAL from an order of SIMONDS, J., dated Mar. 10, 1938, and reported [1938] 2 All E.R. 25, where the facts are fully stated.

H. A. H. Christie, K.C., and David Weitzman for the appellant (the H defendant).

Alexander Grant, K.C., and H. S. Barker for the respondents (the plaintiffs).

SIR WILFRID GREENE, M.R.: The plaintiffs obtained an order of foreclosure *nisi* on June 10, 1937. It related to mortgages of three

blocks of property in Manchester and two insurance policies which were held as collateral security. There were, in point of fact, three separate mortgages, one for each block of property, two of the three having this collateral security added. That order directed accounts and inquiries, in the usual form, including an inquiry as to whether the plaintiffs had entered into possession. If they did, then there was to be an account A on the footing of wilful default.

The issue as to whether or not they had entered into possession was dealt with in court before SIMONDS, J., evidence was called and disputed issues of fact were considered. The issues of fact as to the payment of interest, interest being in arrear, and so on, were all decided by the judge B in favour of the plaintiffs, and, accordingly, there is left now this issue, which may be stated quite simply.

The plaintiffs went into possession on Oct. 23, 1931. That is not disputed. On Nov. 11, 1931, they executed the usual form of appointment, appointing Mr. Roberts, estate agent, as receiver. Mr. Roberts C in fact was the person who, on Oct. 23, 1931, had been put into possession by the plaintiffs on their behalf. The short point is: What was the effect of that appointment of Mr. Roberts as receiver? Did it, as the defendant (the appellant) urges, leave the plaintiffs still in possession, or, at any rate, in the position of persons who must be treated as being D in possession with a consequential liability to account on the footing of wilful default, or must the plaintiffs be treated as having gone out of possession when they made that appointment on Nov. 11, 1931? The judge held that the latter view was the correct one, and, in my opinion, his judgment was perfectly right. E

The appointment was made under the powers contained in the Law of Property Act, 1925, ss. 101 (1) (iii), 109 (1). I need not read those sections, but it is worth noticing that the powers which they confer are conferred to the like extent as if they had been given in the mortgage deed. We are therefore dealing with what may be described as a statutory F term imported into the mortgage deed and regulating the contractual relationships between the parties.

Approaching the matter as a pure matter of construction of the language used, it appears to me, as it appeared to the judge, to be beyond question that the words in which the power to appoint a receiver is G expressed are perfectly clear words which are not limited so as not to apply where the mortgagee is in possession at the date when he makes the appointment. There is no such express limitation.

Mr. Christie put his argument in three ways. First of all, he said (although he did not develop it at any length) that the statutory power H must be read as containing an implied proviso to the effect that the power may not be exercised by a mortgagee in possession. The effect of that, of course, if it were right, would be that in the present case the appointment of Nov. 11, 1931, would be a nullity. In my opinion, no such implication ought to be read into those perfectly plain

words. It is said that they must be construed in the light of the fundamental rules of equity which regulate the relationship of mortgagor and mortgagee, and particularly the strict rule which has always been applied to mortgagees who go into possession. I see no reason in any of the rules of equity relating to these matters for reading into the
 A contract between the parties something which is not there. Why we should read into the statute words which are not there I am afraid I cannot follow.

However, Mr. Christie had two other ways of putting his case. He said that the section must be read, not as prohibiting the appointment
 B when the mortgagee is in possession, but as subject to a proviso that the exercise of the statutory power by a mortgagee in possession is not to affect the continuance of his possession. In other words, he is to be treated as still being in possession for the purpose of liability to account on the footing of wilful default, notwithstanding the circumstance that
 C he has appointed a receiver who, of course, is the agent of the mortgagor. It seems to me that, if it were possible to find something more impossible to import by implication than the suggestion with which I have already dealt, it would be found in this suggestion, which imputes to the legislature an intention to produce a result which appears to me to be quite fantastic,
 D a result under which, at one and the same time, there would be a receiver appointed under the section and a mortgagee having possession outside the section. The two positions appear to me to be too incompatible with one another to permit of any such suggestion. In the present case, the incompatibility appears very clearly, because, if the argument were
 E correct, it would mean that Mr. Roberts is to be treated at one and the same time as the agent of the plaintiffs, to retain possession of the premises on their behalf, and as receiver appointed by the plaintiffs as agent of the mortgagor, to collect the rent, two positions which are entirely inconsistent one with the other.

F The third proposition was that, even if the construction of the section be what in my opinion it is, without any implied proviso, nevertheless the power which it confers is one which a court of equity will not allow to be enforced. No ground was suggested why equity should interfere with the exercise of the power, and I can see no reason why it should
 G do so. There is nothing oppressive about the matter. It is in effect part of the contract between the parties, and on no principle that I can discover could it be said that a court of equity would be justified in interfering with the exercise of the power.

Numerous authorities have been cited to us, but I do not find it
 H necessary to refer to them. Certain of them are referred to in the judgment of the judge. There is a *dictum* of PEARSON, J., in *Tillett v. Nixon* (1) and a *dictum* of P. O. LAWRENCE, J. (as he then was), in *Anchor Trust Co., Ltd. v. Bell* (2), each of which supports the view that under the statutory power the mortgagee is entitled to appoint a receiver notwithstanding that he is in possession. While finding support for

the view which I have found in the observations of those judges, I should myself have come to the same conclusion quite clearly as a matter of principle. When one comes down to the basis of the matter, it is a question of the construction of this provision in the Act of Parliament. Is it or is it not proper or necessary to read into that provision some implied term, qualification or proviso? Is there any doctrine of equity A which compels us to do that, or is there any doctrine of equity which compels us, if it is not to be read in, to deprive the mortgagee of the rights which, as a matter of construction, the statute gives to him? I know of no such doctrine. In my opinion, therefore, the appeal fails, and must be dismissed with costs. B

SCOTT, L.J. : I agree.

CLAUSON, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *John T. Lewis & Woods*, agents for *Laurence Marks*, Manchester (for the appellant) ; *Hopwood & Sons* for *W. P. Green*, Manchester (for the respondents). C

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

HALL BROTHERS S.S. CO., LTD. v. YOUNG. THE TRIDENT.

[KING'S BENCH DIVISION (Goddard, J.), May 31, June 1, 1938.]

Insurance—Marine insurance—Collision clause—Sum payable by way of D
damages—Indemnity to French pilot-boat. E

The plaintiffs, the owners of the Trident, sued the defendant as one of the underwriters of a Lloyd's policy of marine insurance for the due proportion of a sum which they had had to pay in consequence of legal proceedings in France. In those proceedings the plaintiffs were sued by the pilotage authority of Dunkirk for damage done to a pilot-boat engaged by the Trident in consequence of a collision between the two vessels, which it was agreed was in no way due to any negligence on the part of the Trident. The plaintiffs counterclaimed in those proceedings for damage done to the Trident, but this counterclaim was dismissed. F The evidence of French lawyers showed that the claim of the pilotage authority was in the nature of an indemnity, and could be answered only by showing gross negligence on the part of the pilot-boat, and the claim G was not, therefore, of a delictual or quasi-delictual character. The collision clause of the policy provided that the insurers should pay three-fourths of any sum paid by way of damages in respect of a collision :—

HELD : the sum paid in consequence of the action in the French courts was not paid by way of damages, and therefore was not recoverable under the policy. H

[EDITORIAL NOTE. Though there is much upon which this case may be distinguished upon the facts from the case of *Furness Withy & Co., Ltd. v. Duder* (3), it would seem that the same legal principles are applicable, and that the court was in fact bound by that decision. The words "by way of damages" in the usual collision clause presuppose a claim in tort, and are not applicable to a claim of a contractual or a quasi-contractual nature.

AS TO COLLISION CLAUSE, see HALSBURY, Hailsham Edn., Vol. 18, pp. 310-313, paras. 435-437; and FOR CASES, see DIGEST, Vol. 29, pp. 212-215, Nos. 1697-1716.]

Cases referred to :

- A (1) *Great Western Ry. Co. v. Mostyn (Owners)*, *The Mostyn*, [1928] A.C. 57; Digest Supp.; 97 L.J.P. 8; 138 L.T. 403.
- (2) *Birmingham & District Land Co. v. London & North Western Ry. Co.* (1886), 34 Ch.D. 261; 26 Digest 222, 1747; 56 L.J.Ch. 956; 55 L.T. 699.
- (3) *Furness Withy & Co., Ltd. v. Duder*, [1936] 2 K.B. 461; [1936] 2 All E.R. 119; Digest Supp.; 105 L.J.K.B. 473; 154 L.T. 663.
- B (4) *De Vaux v. Salvador* (1836), 4 Ad. & El. 420; 29 Digest 212, 1695; 51 L.J.K.B. 134.
- (5) *Taylor v. Dewar* (1864), 5 B. & S. 58; 29 Digest 214, 1709; 33 L.J.Q.B. 141; 10 L.T. 267.
- (6) *Xenos v. Fox* (1869), L.R. 4 C.P. 665; 29 Digest 214, 1710; 38 L.J.C.P. 351.
- (7) *M'Cowan v. Baine & Johnston*, *The Niobe*, [1891] A.C. 401; 29 Digest 213, 1702; 65 L.T. 502; *previous proceedings* (1888), 13 P.D. 55.
- C (8) *Tatham, Bromage & Co. v. Burr*, *The Engineer*, [1898] A.C. 382; 29 Digest 215, 1713; 67 L.J.P. 61; 78 L.T. 473.

ACTION for loss under a collision clause of a policy of marine insurance. The relevant clause and the facts are fully set out in the judgment.

D *W. L. McNair*, for the plaintiffs, referred to *Furness Withy & Co., Ltd. v. Duder* (3), *Great Western Ry. Co. v. Mostyn (Owners)*, *The Mostyn* (1) and *Birmingham & District Land Co. v. London & North Western Ry. Co.* (2).

E *Cyril Miller*, for the defendant, referred to *De Vaux v. Salvador* (4), *Taylor v. Dewar* (5), *Xenos v. Fox* (6), *McGowan v. The Niobe* (7), and *The Engineer* (8).

F GODDARD, J. : In this case the plaintiffs sue the defendant, a Lloyd's underwriter, for a loss under a policy of marine insurance, and the case raises a neat point under the collision clause, which, in the policy in question, is in what is reasonably common form. I should say that the case has been tried on an agreed statement of facts, with the addition of evidence from two French lawyers upon a point of French law.

G The facts with regard to the alleged loss are that the Trident, the ship in question, arrived off Dunkirk on a voyage on which she was engaged on Aug. 24, 1929, and a French pilot-boat, the Veteran, owned by the Pilotage Administration of Dunkirk, put out to her. At that time there was a strong breeze from the south-west, a moderate sea and clear visibility. The statement of facts then sets out :

H The Veteran approached the Trident's port side, and, as she was manœuvring to come alongside, a nut came loose in her steering-gear, so that it failed to operate when the helmsman put his helm over, with the result that the Veteran's star-board bow struck the Trident in way of No. 2 hatch, both vessels receiving physical damage. The Trident, which was at the time of the collision lying stopped in the water, was in no way to blame for the collision, and there was no gross negligence on the part of the pilot within the meaning of the French law hereinafter referred to.

Proceedings were then taken in the French courts, the Pilotage Administration of Dunkirk claiming a sum of money which they alleged was

due to them for doing repairs to the French pilot-boat. They did not claim a specific sum, but asked for an inquiry into the cost of doing the repairs to the pilot-boat, and they did not claim for any demurrage or loss incurred while the pilot-boat was laid up. They confined their claim to the amount that it cost to do the repairs. They brought their claim under a provision of the French law which is contained in a Decree of Mar. 28, 1928, under which it is provided that, except in the case of *faute lourde*—which the parties agree means gross or serious negligence—on the part of the pilot, damage suffered by the pilot-vessel during the pilotage, or during manœuvres necessary for embarking and disembarking the pilot, shall be borne by the ship. The Trident counter-claimed in the action, or filed a cross-claim in the action, for damages which she had sustained. The case went as high as the Court of Cassation, the supreme appellate tribunal in France, and the Court of Cassation held that under this decree the French pilot-boat was entitled to recover the cost of repairs, and dismissed the claim of the Trident.

The owners of the Trident sue the underwriter, alleging that it is a loss within the collision clause, which runs in this way :

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision the undersigned will pay the assured such proportion of three-fourths of such sum or sums so paid as their respective subscriptions hereto bear to the value of the ship hereby insured.

Then there are certain provisions with regard to the payment of costs if the defence is undertaken with the consent of the underwriters :

provided . . . in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of the undersigned, they will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay.

Then there are provisions as to how the loss is to be calculated if both ships are held to blame. Then there comes this :

Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision ; or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

For the plaintiffs, it is contended that the sum which the shipowners have to pay in respect of the repairs to the pilot-vessel is a sum which is recoverable under that clause, inasmuch as the ships did come into collision. On the other hand, for the underwriter, it is contended that the insurance here is an insurance only against a liability in tort. The contemplation of the policy is that the underwriter is to indemnify the shipowner, where the shipowner is held to blame or partly to blame, and that the words " by way of damages " must be strictly construed, and they show that the insurance is limited to sums which have to be paid by way of damages, which indicates a liability in tort.

Both parties have called lawyers from France, in each case gentlemen distinguished in their profession, to explain the provision of the French

law, which, if I may humbly say so, seems to be reasonably clear in itself. There is some difference of opinion, I think, between the French lawyers, but not much, as to whether, in the action which is brought by the Pilotage Authority against the ship, there is any element of conception of what in English law we should call a tort, which in French law I think

A is called a quasi-delict. It seems to me that, certainly so far as it is a matter of coming to a decision upon the evidence of the French lawyers, there is no conception of delict or tort in the cause of action which is given by the French decree to the pilot-boat. It seems to me that the theory which probably underlies the legislation—though it does not matter, B when it is a matter of policy of law, what theory underlies the legislation—is that the pilot-boat is rendering a service for the benefit of the ship which requires pilotage, and therefore any damage which the pilot-boat may receive in the course of rendering that service is to be regarded as an expense of the pilotage, and is to be paid by the ship, in just the C same way as she would have to pay the pilotage due, or whatever is the correct expression used in France, as remuneration for the service which the pilot renders. It is not unlike the liability which is cast upon a shipowner by English law, or, rather by an English statute—the Harbours, Docks and Piers Clauses Act, 1847, s. 74—under which it is D provided that the owner of a vessel who damages a harbour, dock or pier is responsible to the harbour authority for the amount of that damage, even though the damage may be caused by no default or negligence on the part of the owner, or the master or the seamen on the ship. The statute gives a right to recover the money.

E If it were a mere matter of having to decide whether the action lay in contract or in tort, I should be inclined to the view that it would be regarded as lying in contract. It is in effect a statutory cause of action. It is a cause of action which is given by a statute to recover a sum of money in the happening of a certain event. I am speaking now both of the F French statute and of the English statute to which I have referred. The statute, as it seems to me, expressly confers this right, although there be no fault on the part of the shipmaster or the owners, although, in the case of the French law, it gives a defence to the ship if it can be shown that the damage was caused, not by some mere act of negligence, G but by something which the court regards as gross or serious negligence on the part of the pilot. I think that one exception may be regarded as a term added to the contract. I do not think that the French lawyers quite take that view. The opinion which I prefer, and which I have come to the conclusion I ought to say is proved, is that at any rate it H is not a liability in tort or in quasi-delict or in delict, and I think that in England we might very well consider, when considering the case of the Harbours Act, that the true result is that a ship is allowed into a harbour on certain terms. One term is that she shall pay harbour dues. Another term is that she shall pay for any damage which she may cause to the harbour works, even though that damage is accidental or caused by

circumstances over which the ship has no control. There is no difficulty in visualising a contract made between parties to that effect. However, whether the obligation is regarded as contractual or as quasi-contractual, I am quite certain that the obligation which is imposed upon the ship by French law is not a delictual or a quasi-delictual obligation.

Then I have to consider the words "by way of damages." Mr. A McNair's contention is that, in a business document between business men, that ought to include such a sum as the one in question, and he calls attention to the case of *The Mostyn* (1) in the House of Lords, where it certainly was not decided whether the claim was one for damages in the strict sense, but where the claim was put forward at any rate in B the action as a claim for damages. Mr. McNair argues that business men, who have been accustomed to use expressions which may have technical meanings but to which they would not necessarily attach technical meanings, must have intended that a sum of money which is to be paid as a direct consequence of a collision ought to be held covered C by the terms of the collision clause. On the other hand, my duty in construing a document, whether a commercial document or any other sort of document, is to give a meaning to all the words in the document, if I can do so, and I have to give a meaning to the words "by way of damages." Mr. Miller argues that the real result of the D French legislation is to give an indemnity to the pilot-boat, and that damages should be confined strictly to damages which are recoverable either for breach of contract or for a tortious act. It is admitted here, I think, or must be admitted, that, if the proper view is that the obligation to pay arises *ex contractu* (I mean on implied terms, in the sense E I have endeavoured to explain—that it is part of the terms of the contract between the pilot and the ship to pay for any fortuitous damage which may be suffered), that is not within the terms of the policy, because the policy is not considering a contractual, but a tortious, liability.

One case to which Mr. Miller referred is of considerable assistance in F this case, I think. That is *Birmingham & District Land Co. v. London & North Western Ry. Co.* (2), where the actual question which fell for decision before the court was whether third-party proceedings could be taken, which in those days, and until quite recent times, could be taken only in a case where the claim was strictly for contribution or indemnity, G and not where one person who was held liable for damages might have a corresponding claim for damages over against some third party. BOWEN, L.J., said, at p. 274 :

In nine cases out of ten a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract : by express contract H if it is given in terms by the contract between the two parties ; by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given upon an assumed promise by a person to do what, under the circumstances, he ought to do. I say in nine cases out of ten, for there may possibly be a tenth. Thus there might be a statute enacting that under certain circumstances a person should be entitled

to indemnity as such, in which case the right would not arise out of contract, and I do not say that there may not be other cases of a direct right in equity to an indemnity as such which does not come within the rule that all indemnity must arise out of contract express or implied.

- There BOWEN, L.J., laid down a doctrine which is, I think, familiar to most lawyers—that “indemnity,” in its proper sense, is always the
- A result of a contract, but he does say that there may possibly be a case in which indemnity may be given by statute, and “indemnity” for that purpose, I suppose, means a reimbursement by one person to another of something which the latter has had to pay, but without taking into account any damage which that person may have suffered. He is to be
- B indemnified against payments or against expenses, but he does not get anything more than the mere sum which he has had to pay, which is exactly the case here. The French pilot-boat is not asking for any damages for loss of hire while she is laid up. She is only asking the reimbursement of the money which she will have to pay for the repairs
- C which it is necessary to execute in consequence of this collision, which took place without any fault of the Trident, and without, as I was told, any gross negligence on the part of the pilot, and that is all to which by the French court she is held entitled. Mr. Miller has put forward what I think is a formidable argument here when he says that the
- D English underwriters insuring this ship may well agree to indemnify the owners against the negligence and errors of navigation of their own servants, but why should the court hold that the underwriter is indemnifying the owners against damage which is caused, not by the fault of their servants, but by the fault of somebody else, because, if there was fault
- E here at all (and it would be exceedingly difficult—at any rate, according to English ideas—to say that there was no fault here) on the part of the French pilot, although it may not have been a gross fault, why should I construe this fault as giving protection, where the fault, if any, was not the fault of the master or crew of the English ship, but of the foreign ship,
- F and yet it is the foreign ship which, under the provisions of foreign law, gets the sum of money? I think that that is a very formidable argument. It is an argument which goes some way to destroy the contrary view submitted by Mr. McNair—that the business men (the underwriter and the shipowners in this case) must have contemplated that the damages,
- G when they used the expression “by way of damages,” must cover any sum of money which the owner has to pay as the result of his ship coming into collision with another ship. I think that I ought to construe this expression “by way of damages” as meaning by way of damages which have to be paid in consequence of a tortious act, a tortious act
- H committed by the ship. I think that in that view I have the support of BRANSON, J., in the case of *Furness Withy & Co. Ltd. v. Duder* (3), where he was considering a collision clause in exactly the same terms as those of the one I am considering. BRANSON, J., said, at p. 468 :

The expression “become liable to pay . . . by way of damages” indicates, to my mind, a liability which arises as a matter of tort, and not as a matter of contract.

It is true that BRANSON, J., was not considering the same sort of case as that which has arisen here. He was considering a case in which there had been a bargain made between the ship and the owner of the tug. The headnote is as follows :

Where, pursuant to the terms of a towage contract between the owners of a steamship and the owner of the only tugs available at a port, the former pay to the latter a sum in respect of damage to a tug resulting from a collision during towage between the steamship and the tug caused solely by the negligent navigation of the tug, the owners of the steamship cannot recover the amount of that sum from the underwriters of a policy of marine insurance on the steamship containing a running-down clause in the usual form, inasmuch as that clause applies only to liabilities arising from tort and not to liabilities arising from contract.

I think that that is a good workable rule to apply to this clause, and that these liabilities which may be imposed on a ship by foreign law, although the ship is in no way to blame, are not to be held covered by the common form of collision clause, as this one is, under which the underwriter agrees to indemnify the shipowner against sums which he should become liable to pay by way of damages. I think that that points, and is intended to point, only to cases in which the ship is held liable for damage which has been caused by her fault. It is perfectly true that there is a proviso contained in the second branch of the running-down clause which excludes sums :

which the assured may become liable to pay, or shall pay for removal of obstruction under statutory powers, for injury to harbours, wharves, piers, stages and similar structures, consequent on such collision ; or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

Mr. McNair's argument is that that excepts the liability which the ship will incur under the Harbours, Docks and Piers Clauses Act, 1847. If the ship sinks in midstream, or in a harbour, the harbour commissioners can recover from the owners the cost of raising her. He says also that that shows that it was not intended to apply to workmen's compensation. I do not take that view of the proviso. I think that it means that, if there is a collision between two ships, it is obvious that certain consequences may happen which may involve the owners in further damages. Their ship or the other ship in the collision may be sunk, and then the cost of raising the ship has to be taken into account. One ship or the other, as a consequence of a collision, may be thrown against the pier, if the collision takes place in a harbour, and be damaged. The cargo may be damaged. There may be loss of life, upon which very heavy claims may arise. That class of damage is not to be included in the sum which is recoverable from the underwriters. I do not think that that is by any means inconsistent with the construction which I have placed on the clause. I think that, if my construction is right, it simply means that, though your ship may be negligently navigated, so that you become liable for damages on account of a collision in which it has been involved, the underwriter indemnifies you against the sum which you have to pay, unless it is a sum in respect of these enumerated excepted risks.

For these reasons—not without some doubt, because I think it is not an altogether easy point, and it is a point of first instance except in so far as it is covered by the judgment of BRANSON, J., and he was considering a different state of circumstances—I have come to the conclusion that my judgment should be for the defendant. Accordingly,

A I give judgment for the defendant with costs.

Solicitors: *Lightbonds, Jones & Co.*, agents for *Ingledew & Co.*, Newcastle-upon-Tyne (for the plaintiffs); *William A. Crump & Son* (for the defendant).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

B

R. v. HOWARD, *Ex parte* DA COSTA.

C [KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), May 6, 1938.]

Bastardy—Affiliation order—Second application—First order appealed to quarter sessions and quashed—Finality of order of quarter sessions.

D On appeal to quarter sessions an order of affiliation was quashed on the ground that the evidence of the complainant had not been corroborated in some material particular as required by the Bastardy Laws Amendment Act, 1872, s. 4:—

HELD: the order of quarter sessions was final, and no fresh proceedings could be taken before the justices.

R. v. Herrington (1) and *R. v. Glynne* (2) followed.

E [EDITORIAL NOTE. This case re-affirms the distinction between the refusal of a court of petty sessions to make an affiliation order and the refusal of the court of quarter sessions to make such an order or to quash one which has already been made. Following the decision in *R. v. Glynne* (2), it is re-affirmed that the decision at quarter sessions is final.

F AS TO SECOND OR FURTHER APPLICATIONS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 585, 586, para. 806; and FOR CASES, see DIGEST, Vol. 3, p. 390, Nos. 281-288.]

Cases referred to:

(1) *R. v. Herrington* (1864), 3 New Rep. 468; 3 Digest 399, 334; *sub nom. R. v. Harrington*, 9 L.T. 721.

G (2) *R. v. Glynne* (1871), L.R. 7 Q.B. 16; 3 Digest 390, 287; 41 L.J.M.C. 58; 26 L.T. 61.

(3) *McGregor v. Telford*, [1915] 3 K.B. 237; 3 Digest 390, 285; 84 L.J.K.B. 1902; 113 L.T. 84.

H APPLICATION to make absolute a rule *nisi* for a writ of prohibition to the stipendiary magistrate for the borough of East Ham to prohibit him from proceeding to hear a certain summons, dated Oct. 9, 1937, whereby Dorothy Emily Dawson, a single woman, was the complainant against Harry Da Costa, alleging him to be the father of a bastard child. The ground of the rule is that the stipendiary has no jurisdiction to hear or determine the summons by reason that the complaint the subject-

matter of the said summons has already been heard and determined by the court of quarter sessions after a hearing upon the merits. The facts are fully set out in the judgment of LORD HEWART, L.C.J.

J. C. Llewellyn for the applicant.

George Pollock for the respondent, showing cause why the rule should not be made absolute. A

LORD HEWART, L.C.J. : On Aug. 7, 1937, Da Costa was summoned to answer a complaint that he was the father of the complainant's bastard child. That summons was heard on Aug. 12, when it was submitted on his behalf that there was no corroboration of the complainant's evidence as required by the Bastardy Laws Amendment Act, 1872, s. 4, "in some material particular by other evidence to the satisfaction of the said justices." The meaning of those words has long been determined to be : B

in some particular tending to implicate the putative father, making it more probable than not that he was the father of the child. C

That submission was overruled, and, no evidence being tendered by the putative father, an order was made adjudging him to be the father. His appeal to the Essex Quarter Sessions was heard on Sept. 30. The respondent and her witnesses gave evidence on oath, and at the close of her case it was submitted that there was no case to answer, and, counsel for the respondent having replied, it was held that there was no case to answer, and the order of Aug. 12 was quashed. D

On Oct. 13, the putative father was served with a fresh summons to answer a further claim by the mother, and that summons came on for hearing on Oct. 26. A submission was made by the putative father that the matter had already been determined by quarter sessions, and that the stipendiary had therefore no jurisdiction to reopen it. The magistrate adjourned the matter, that it might be finally determined, and delivered a written judgment holding that he had jurisdiction to hear it. It is in these circumstances that there has been an application for prohibition. Our attention has been directed to several cases, and it has been abundantly made plain that there has been a development, I will not say in the law, but in the clearness with which the law has been explained. E

If one looks at the report in the LAW TIMES of *R. v. Herrington* (1), it is stated in the headnote : F

A dismissal upon the ground of there being no sufficient corroborative evidence is not a dismissal upon the merits. G

That case decides that, where an application to justices in petty sessions is dismissed, not upon the merits, but merely for want of corroboration, the complainant is not debarred from making a second application. What is being dealt with is an application to justices. The matter received a different—and, indeed, opposite—complexion a few years H

later in *R. v. Glynne* (2). In that case it is clearly laid down in the headnote :

Where on appeal to quarter sessions [quarter sessions being for this purpose quite distinct from petty sessions] an order of affiliation is quashed on the ground of the insufficiency of the corroborative evidence . . . the order of quarter sessions is a decision on the merits, and is final, and fresh proceedings cannot be taken before justices.

A It is to be observed that in that case the judges were BLACKBURN, MELLOR, and LUSH, JJ. Of those three, two—BLACKBURN and MELLOR, JJ.—had been members of the court which heard *R. v. Herrington* (1), and it appears from the report of *R. v. Glynne* (2), at pp. 16, 17, that :

B . . . after the respondent and the only two witnesses called by her counsel had been examined and cross-examined, counsel for the appellant submitted that there was not sufficient corroborative evidence, as required by the statute. After having retired for consultation with the other justices, the chairman said, "What we have to consider is, whether the evidence of the respondent is corroborated with regard to the main issue in any material point ; a large majority of us are of opinion it is not, and therefore we do not call upon the appellant to reply. The order is consequently quashed."

C A fresh summons was obtained and the justices in petty sessions refused to hear it. There followed the rule calling on certain justices of Flintshire to show cause why they should not adjudicate on that second summons.

D It was therefore made perfectly clear that the ground on which the justices acted was that there was an absence of the corroboration required by the statute, and that was made clear by the voice of the chairman speaking at quarter sessions. In those circumstances, the argument and the observations of the court during the argument are of some importance. For example, LUSH, J., said, at p. 20 :

E It is immaterial whether the decision of petty sessions was on the merits or not. A fresh application might have been made if the previous dismissal had been on the merits.

F Again, when counsel cited a decision in which it was pointed out that orders in bastardy were always treated as orders, and not as convictions, LUSH, J., interposed, at p. 20 :

That was a case of an order of petty sessions, not of quarter sessions.

G All the judgments in *R. v. Glynne* (2) made it perfectly clear that there was a fundamental distinction between petty sessions, on the one hand, and quarter sessions, on the other hand. The judgment of MELLOR, J., was perfectly unambiguous. He said, at p. 25 :

H It appears that all the cases upon which Mr. Merewether relied were cases in which the previous decision was not a decision of the quarter sessions, but of the petty sessions. I think the ground of distinction in those cases was rightly taken, and I think it is perfectly consistent with those cases to hold that when a hearing of this kind has taken place before a court of quarter sessions, it is final, and deprives any petty sessions thereafter of any jurisdiction to rehear.

In like manner, LUSH, J., said, at p. 25 :

Neither party is concluded by the decision of the petty sessions. If they decline to make an order, the woman cannot appeal to the quarter sessions against their decision [that, of course, is no longer the case], and therefore this court has held that she is at liberty to apply again to the petty sessions, and to produce other evidence before them. If, on the other hand, the justices make an order, the putative

father is, by the express terms of the statute, entitled to appeal to the quarter sessions : so that the decision of the petty sessions is not binding upon either party. Then I think both reason and convenience require us to hold that the decision of the court of quarter sessions is binding and conclusive upon the parties. The decrees of a court of appeal, from its very nature and constitution, must be binding upon the inferior tribunal. . . .

That determination that the decision of quarter sessions is final and binding goes back to 1871, and since that time the only case which can be said to throw any light on the matter is *McGregor v. Telford* (3), but that is a purely negative judgment, which leaves *R. v. Glynne* (2) unimpaired.

So long as *R. v. Glynne* (2) stands, an argument such as we have heard in this present case is really quite impossible, and, in my opinion, the rule must be made absolute.

BRANSON, J. : I agree.

HUMPHREYS, J. : I agree, and I only desire to add that, in my opinion, the headnote to the report in the LAW REPORTS of *R. v. Glynne* (2) correctly represents the judgment :

Where on appeal to quarter sessions an order of affiliation is quashed on the ground of the insufficiency of the corroborative evidence . . . the order of quarter sessions is a decision on the merits, and is final, and fresh proceedings cannot be taken before justices.

I think that that decision is binding on us, and, even if it were not, I entirely agree with it. I also think that *R. v. Herrington* (1) is untouched by *R. v. Glynne* (2), and also remains good law.

Solicitors : *Breeze, Benton & Co.* (for the applicant) ; *Duthie, Hart & Duthie* (for the respondent.)

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

APPEAL OF BELCHER, *Re* ESSEX FLOUR & GRAIN CO., LTD.

[KING'S BENCH DIVISION (Branson, J.), June 14, 15, 1938.]

Work and Labour—National health insurance—Employment—Canvasser—Payment of fixed sum weekly for expenses—Remuneration by payment of value of first order from new customers—Whether employment within the meaning of the National Health Insurance Act, 1936—National Health Insurance Act, 1936 (c. 32), Sched. I.

The appellant was employed as a canvasser by a firm of millers and corn factors. By the terms of his employment, he was paid a fixed sum of 5s. per week as expenses, and also the price of the first order obtained from a new customer in the streets allocated to him to canvass. He worked for the firm for five days in each week, and did not work for any other person. He was not obliged to canvass at specified times, nor had he to obtain permission if he wished not to work on any particular day, but, if he did not do so, the sum of 1s. was deducted from his expenses :—

HELD : the applicant was not employed within the meaning of the National Health Insurance Act, 1936.

[EDITORIAL NOTE. The position of a commercial traveller and that of a canvasser are dealt with in a memorandum issued by the Ministry. After pointing out the importance of the right to exercise control over the operations of the agent, it suggests that, where, except for the regulations of the selling price of the goods, the district to be worked and the granting of credit, the agent is free to do the work how and when he likes—and possibly not to do it at all—there is no

A contract of service, and therefore no liability to be compulsorily insured. Certain exceptions in respect of agents paid by commission are contained in the National Health Insurance Act, 1936, Sched. I, Part II. In the present case, it will be observed that there was reserved to the canvasser the liberty of not working upon any particular day or days when he did not wish to do so, and upon this it is considered that there was no sufficient right of control, and therefore no contract of service.

B AS TO PERSONS COMPULSORILY INSURED, see HALSBURY, 1st Edn., Vol. 28, Work and Labour, pp. 905-911, paras. 1610-1614; and FOR CASES, see DIGEST, Vol. 44, pp. 1308-1311, Nos. 140-154.]

Cases referred to :

- C** (1) *Airway, Ltd. v. Dunphy*, Memoranda of Decisions by the Minister of Health, Supp. No. 4, No. 658.
- (2) *Performing Right Society, Ltd. v. Mitchell & Booker (Palais de Danse), Ltd.*, [1924] 1 K.B. 762; Digest Supp.; 93 L.J.K.B. 306; 131 L.T. 243.
- (3) *Doggett v. Waterloo Taxi-cab Co., Ltd.*, [1910] 2 K.B. 336; 34 Digest 35, 114; 79 L.J.K.B. 1085; 102 L.T. 874; 3 B.W.C.C. 371.

D

APPEAL by way of case stated from a decision of the Minister of Health under the provisions of the National Health Insurance Act, 1936, s. 161, and R.S.C., Ord. 55B, r. 2.

The decision of the Minister given after the hearing was based upon the following facts found to be proved or admitted. The respondents, who were millers and corn factors, for the purposes of their business employed about 14 roundsmen to sell their products from vans. The roundsmen had a fixed itinerary of certain streets in the London district which they visited once a week until the round was altered or revised.

F The respondents also employed about 4 men to canvass for new customers at private houses on these rounds. The applicant was employed by the respondents as a canvasser from Apr., 1934, until Feb., 1936. At an interview with one of the directors of the respondent firm, it was agreed that he should work as a canvasser for the respondents,

G and that he should be entitled to the whole of the price of the first order obtained from a new customer in the streets allocated to him to canvass, and in addition should receive a fixed allowance of 5s. a week for expenses, the respondents to be entitled to make from this sum a deduction of 1s. in respect of any day on which the applicant did not work. At this

H interview the applicant was handed a letter allocating to him his fixed itinerary. He was to canvass private houses in the named streets, and report to the respondents in time for the information as to orders obtained to be passed on to the roundsman before he started his round the following allotted day. The applicant was normally supplied with a list of streets every Saturday to canvass the following week. As

regards those named for the earlier days of the week, he would be at liberty to canvass in time for the roundsman's journey in the following week. The applicant recorded all orders secured by him, and the same night notified the respondents of any orders received, sending in addition a weekly summary towards the end of the week. Though the applicant attended regularly at the respondents' offices every Saturday to receive payments due to him and instructions for the following week, he was not obliged so to attend, and, if he had not, any money due to him would have been sent by post. Although the applicant worked regularly each day for the respondents, and for the respondents alone, he was not obliged to canvass at specified times, and was able to take two or three days off without leave if he so wished, though in that case he would have had to notify the respondents of his intention, and the reasons therefor. The applicant for the purpose of his canvassing did not carry samples, but only a price list. He visited none but new customers, and, when he had secured an order, his work was finished so far as that customer was concerned, the securing of repeat orders being the duty of the roundsmen. The applicant received as part of his remuneration the price of any order obtained by him, but received no further remuneration in respect of repeat orders obtained by the roundsmen. The allowance of 5s. per week in respect of expenses did not cover the expenses incurred by the applicant in making his rounds. He was expected to confine his activities in each week to the streets in his list for that week, though occasionally he was ordered by the respondents to leave his named streets and instead to canvass in other streets stated. As the list usually contained more streets than the applicant could canvass in a week, he occasionally notified the respondents that he had enough work to do, asking them not to supply him with a fresh list of streets. Although throughout his employment with the respondents the applicant had no other occupation and worked for no other employers, this was no condition of his employment, except that he was not allowed to canvass for orders for flour on behalf of other firms. It was contended on behalf of the applicant that the employment was employment under a contract of service, and therefore was employment within the meaning of the Insurance Act. After the hearing, and after the Minister had considered the report, he decided not to alter his decision, dated Dec. 31, 1936, that the applicant's employment as canvasser by the respondents was not employment under a contract of service, and sent a memorandum, dated July 31, 1937, to that effect to the applicant's solicitors on Aug. 5, 1937. By notice in writing dated Oct. 12, 1937, the applicant gave notice of appeal against the decision of the Minister made on Dec. 31, 1936, and revised on July 31, 1937, on the ground that the Minister's decision was wrong, and required the Minister to state a case in accordance with R.S.C., Ord. 55B, r. 2.

G. Russell Vick, K.C., and *P. L. E. Rawlins* for the appellant.
Valentine Holmes for the respondent.

BRANSON, J. : I think that, before dealing with the particular points which arise on this particular case, it is right that I should make a few general observations upon the jurisdiction of this court in dealing with appeals under this section. The National Health Insurance Act, 1936, s. 161, provides :

- A (1) If any question arises—(a) whether any employment or any class of employment is or will be employment within the meaning of this Act, or whether a person is or was a person employed within the meaning of this Act . . . the question shall be determined by the Minister, in accordance with regulations made for the purpose.

Then the proviso declares :

- B (i) If any person is aggrieved by the decision of the Minister on any question arising under para. (a) . . . he may appeal therefrom on any question of law to a judge of the High Court selected for the purpose by the Lord Chancellor, and the decision of that judge shall be final.

It so happens that at the moment I am the judge so selected, and my decision upon this matter will be a final decision, which fact, as it seems to me, renders it the more essential that I should be careful, in exercising the jurisdiction conferred upon me, to keep within the limits which the Act prescribes and to avoid turning an appeal which is given upon a point of law into an appeal by way of a re-hearing of the facts of the case.

- C In the present case, the appellant, Frank Belcher, made an application in Aug., 1936, to obtain the Minister's decision upon the question whether his employment by the Essex Flour and Grain Co., Ltd., as a canvasser was employment by them within the meaning of the Act. All proper notices were given, and the requirements were complied with, and the Minister, being of opinion that he could properly dispense with an oral hearing, did so dispense, and, having come to a determination upon the question without such an oral hearing, he decided that the applicant had not been employed under a contract of service. Then the applicant, being dissatisfied, submitted to the Minister a memorandum alleging new facts, and asked the Minister to revise his decision in accordance with sect. 161 (4) of the Act of 1936. The Minister considered the memorandum so submitted, and appointed Mr. Hodgetts, a barrister-at-law, to hear the application and to report to him thereon. Mr. Hodgetts heard the application. The applicant was represented by counsel, and numerous witnesses were examined and cross-examined. Mr. Hodgetts took a full note of the evidence which was given to him, and he reported to the Minister his views as to the result of the evidence so given. Upon that, the Minister decided again that Mr. Belcher was not employed under a contract of service. Again Mr. Belcher, being dissatisfied, asked the Minister to state a case under R.S.C., Ord. 55B, r. 1, and the Minister stated a case, but those advising Mr. Belcher were not satisfied that the facts stated by the Minister were the correct facts of the case, and so an application was made to the Minister to let the applicant and his advisers see the note which had been made by Mr. Hodgetts. Owing to some misunderstanding, which has now been cleared up, that note

was not at the moment produced, but it has now been produced, and Mr. Russell Vick has dealt with it before me this morning. The point for which it was desired was to enable counsel for the appellant to argue that the findings of fact by the Minister could not be supported upon the evidence, because it was said that the evidence upon certain points was all one way, and that that way was not the way in which the evidence had been stated by the Minister in the special case. I do not say that I have read every word of them, but I have looked through the notes which have now been produced, and I have listened to Mr. Russell Vick's comments made upon the notes in support of the contention that this special case should have been amended because it finds as facts matters upon which there was no evidence justifying any such finding, and my conclusion upon the matter is that the contention is unfounded. One cannot read the very careful note taken by Mr. Hodgetts without seeing that there were two views being put before the Minister and that there was evidence in support of each of those views. The Minister, who is the judge of fact, has formed his opinion as to which of those two views he will accept, and that opinion is represented by statements of facts which, according to para. 6 of the special case, he found to be proved or admitted. I therefore think that it would be quite wrong for me to constitute myself a judge of fact, to study the evidence which was given, and to form my own opinion as to what facts the Minister should have found to be admitted or proved. He is the judge of fact, and not I, and, unless it could be shown that there was no evidence upon which he could find as he did, which is not the case here, I have nothing to do with any appeal from his finding of fact. I therefore approach the case accepting the facts as found by the Minister in the special case stated for the opinion of the court.

I think that it is unnecessary for me to read the facts which have been found, because of the way in which the argument for the appellant has been put before the court. Mr. Russell Vick produced a leaflet called Memorandum 269/x, which is a leaflet issued on behalf of the Ministry of Health, and in the first part sets out what appear to the Minister to be the considerations of law upon the application of which to the facts a decision can be arrived at as to whether or not any particular person is employed under a contract of service. It is not suggested to me that that memorandum does not correctly state the law which has to be applied, nor indeed could it be, because the memorandum has already been before the court and was dealt with by ROCHE, J., in *Airway, Ltd. v. Dunphy* (1). In that case, ROCHE, J., dealt with the memorandum. He read the material parts of it, and he accepted as correct the view of the law as expressed therein, and, pointing out that it agreed with the law laid down in *Performing Right Society, Ltd. v. Mitchell & Booker (Palais de Danse), Ltd.* (2), at p. 767, and by the Court of Appeal in *Doggett v. Waterloo Taxi-cab Co., Ltd.* (3), he says:

The question is whether the Minister of Labour [in this case the Minister of

Health] has or has not upon these facts arrived at a right conclusion. There is evidence both ways, and, if the Minister had purported to say that the evidence was only one way and that he could only find in the way he did, the Minister would in my opinion be wrong, but he has decided this as a matter of fact, and in my judgment there was not only evidence on which he could so find, but on the whole I should have arrived at the same conclusion. That means that I think he is right in his decision of fact.

- A In the present case, so far as my attention has been directed to the facts, if I may respectfully say so, I think that the Minister has arrived at the conclusion at which I should have arrived upon the facts as stated by him and as indicated in the notes of the evidence to which my attention has been called. However that may be, in my view, my
 B function in this case is merely to see that the Minister has applied the correct considerations of law to facts found by him upon evidence which entitled him to find those facts, and, when those circumstances are both present, it was not the intention of the legislature that this court should interfere with the decision of the Minister. That, I think, covers all that
 C it is necessary to say in the matter, and, in my view, this appeal should be dismissed.

Appeal dismissed.

- Solicitors : *Rollit, Sons & Haydon* (for the appellant) ; *Solicitor to the Ministry of Health* (for the respondent).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

PETROS M. NOMIKOS, LTD. v. ROBERTSON.

- E [COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), **May 5, 6, 10, 23, 1938.**]

Insurance—Marine insurance—Freight—Agreement to pay if vessel a total loss—Cost of repairs greater than insured value of hull—Vessel worth more, when repaired, than insured value—No notice of abandonment—Whether constructive total loss—Marine Insurance Act, 1906 (c. 41), ss. 60, 61, 63 (2)—Institute Time Clauses (Freight), cl. 5.

- F The plaintiffs had insured the freight of the Petrakis Nomikos with the defendant, a term of the contract being that the underwriters should pay in the event of a total loss, whether absolute or constructive. While the vessel was being repaired, an explosion occurred* which caused
 G extensive damage. The cost of repairs was more than the insured value of the hull, but, owing to the rise in the value of shipping, the owners had the repairs effected. As the freight had not been earned, the plaintiffs brought the present action, alleging that there had been a constructive total loss. The defendant argued that, as there had been no abandonment, and as no notice of abandonment had been given to the hull-underwriters, there could not have been a constructive total
 H loss :—

HELD : in this case, there had been a notional constructive total loss, and therefore the freight underwriters were liable.

[EDITORIAL NOTE. By the Institute Time Clauses (Freight) the insured value shall be taken as the repaired value. In the present case the rise in the value of shipping had increased the repaired value out of proportion to the insured value, and it was sought to establish that in such circumstances there had not been a constructive

total loss. The decision, however, is given against this argument, on the ground that the parties have made their own definition of a constructive total loss.

AS TO REPAIRED VALUE, see HALSBURY, Hailsham Edn., Vol. 18, pp. 368, 369, paras. 529, 530; and FOR CASES, see DIGEST, Vol. 29, pp. 278-280, Nos. 2256-2269.]

Cases referred to :

- (1) *Roura & Forgas v. Townend*, [1919] 1 K.B. 189; 29 Digest 273, 2214; 88 L.J.K.B. 393; 120 L.T. 116.
- (2) *Hickie v. Rodocanachi* (1859), 4 H. & N. 455; 29 Digest 289, 2351; 28 L.J.Ex. 273; 33 L.T.O.S. 150.
- (3) *Jackson v. Union Marine Insurance Co.* (1874), L.R. 10 C.P. 125; 29 Digest 258, 2087; 44 L.J.C.P. 27; 31 L.T. 789.
- (4) *Carras v. London & Scottish Assurance Corp., Ltd.*, [1936] 1 K.B. 291; Digest Supp.; 105 L.J.K.B. 689; 154 L.T. 69.
- (5) *Kallenbach v. Mackenzie* (1878), 3 C.P.D. 467; 29 Digest 280, 2273; 48 L.J.Q.B. 9; 39 L.T. 215.
- (6) *Wallis, Son & Wells v. Pratt & Haynes*, [1910] 2 K.B. 1003; 12 Digest 413, 3328; 79 L.J.K.B. 1013; 103 L.T. 118; *on appeal*, [1911] A.C. 394.
- (7) *Bensaude v. Thames & Mersey Marine Insurance Co.*, [1897] A.C. 609; 29 Digest 47, 93; 66 L.J.Q.B. 666; 77 L.T. 282.
- (8) *Scottish Marine Insurance Co. v. Turner* (1853), 4 H.L. Cas. 312, n.; 29 Digest 209, 1678; 21 L.T.O.S. 10.
- (9) *United Kingdom Mutual Steamship Assurance Assn., Ltd. v. Boulton* (1898), 3 Com. Cas. 330; 29 Digest 209, 1679.
- (10) *Coker v. Bolton*, [1912] 3 K.B. 315; 29 Digest 289, 2348; 82 L.J.K.B. 91; 107 L.T. 54.
- (11) *Kulukundis v. Norwich Union Fire Insurance Society*, [1937] 1 K.B. 1; [1936] 2 All E.R. 242; Digest Supp.; 105 L.J.K.B. 703; 155 L.T. 114.
- (12) *Tunno v. Edwards* (1810), 12 East 488; 29 Digest 300, 2462.
- (13) *Roux v. Salvador* (1836), 3 Bing. N.C. 266; 29 Digest 263, 2129; 7 L.J.Ex. 328.
- (14) *Rankin v. Potter* (1873), L.R. 6 H.L. 83; 29 Digest 278, 2259; 42 L.J.C.P. 169; 29 L.T. 142; *affg.* (1870), L.R. 5 C.P. 341.
- (15) *British & Foreign Marine Insurance Co., Ltd. v. Sanday (Samuel) & Co.*, [1916] 1 A.C. 650; 29 Digest 276, 2236; 85 L.J.K.B. 550; 114 L.T. 521; *affg.*, [1915] 2 K.B. 781.
- (16) *Polurrian S.S. Co., Ltd. v. Young*, [1915] 1 K.B. 922; 29 Digest 273, 2213; 84 L.J.K.B. 1025; 112 L.T. 1053.
- (17) *Puller v. Glover* (1810), 12 East, 124; 29 Digest 277, 2245.
- (18) *Mellish v. Andrews* (1812), 15 East, 13; 29 Digest 281, 2285.
- (19) *Samuel (P.) & Co. v. Dumas*, [1924] A.C. 431; 29 Digest 112, 666; 93 L.J.K.B. 415; 130 L.T. 771; *affg.*, [1923] 1 K.B. 592.
- (20) *Rodoconachi v. Elliott* (1874), L.R. 9 C.P. 518; 29 Digest 218, 1747; 43 L.J.C.P. 255; 31 L.T. 239.
- (21) *Swan v. Pure Ice Co., Ltd.*, [1935] 2 K.B. 265; Digest Supp.; 104 L.J.K.B. 583; 152 L.T. 407; 28 B.W.C.C. 9.
- (22) *Woodside v. Globe Marine Insurance Co.*, [1896] 1 Q.B. 105; 29 Digest 246, 1985; 65 L.J.Q.B. 117; 73 L.T. 626.

APPEAL from a decision of GODDARD, J., dated Dec. 9, 1937. The facts of the case are fully set out in the judgments.

H. U. Willink, K.C., and *A. A. Mocatta* for the appellants.

Sir Robert Aske, K.C., and *W. L. McNair* for the respondent.

Willink, K.C. : It is submitted that there was here a constructive total loss of which the plaintiff did not choose to avail himself. Constructive total loss was defined in *Roura & Forgas v. Townend* (1), and that decision has never been adversely commented on. [Counsel referred to *Kaltenbach v. Mackenzie* (5), *Wallis, Son & Wells v. Pratt & Haynes* (6), *Bensaude v. Thames & Mersey Marine Insurance Co.* (7), *Scottish Marine Insurance Co. v. Turner* (8), *United Kingdom Mutual Steamship Assurance Assn., Ltd. v. Boulton* (9), *Coker v. Bolton* (10), *Carras v. London & Scottish Assurance Corp., Ltd.* (4), and *Kulukundis v. Norwich Union Fire Insurance Society* (11).]

B Mocatta : The question of time is irrelevant. The claim is because of an event—namely, the constructive total loss. The charterparty here is also irrelevant, except to show that the plaintiffs had an insurable interest.

C Aske, K.C. : There is no case of a constructive total loss where the ship was not abandoned. A ship cannot be a constructive total loss if the owner keeps the ship. [Counsel referred to *Tunno v. Edwards* (12), *Roux v. Salvador* (13), *Rankin v. Potter* (14), *British & Foreign Marine Insurance Co., Ltd. v. Sanday (Samuel) & Co.* (15), *Polurrian S.S. Co., Ltd. v. Young* (16), *Roura & Forgas v. Townend* (1), *Puller v. Glover* (17), *D Mellish v. Andrews* (18) and *Kaltenbach v. Mackenzie* (5).] Whenever a risk is mentioned in a policy of marine insurance, the loss must be proved to have been due, and to have been proximately due, to that risk. The loss here was due to the fact that repairs took so long that the cargo could not be carried, and any loss due to delay cannot be claimed.

E McNair : The court should see what the policy was dealing with. It is a policy insuring the freight for twelve months. The purpose was to insure the freight-earning capacity of the ship. If the ship is lost, the owner must be compensated, but otherwise not. Here freight was earned after the repair of the ship. [Counsel referred to *Coker v. Bolton* (10), *Samuel (P.) & Co. v. Dumas* (19) and *Rodoconachi v. Elliott* (20).]

G Willink, K.C., in reply : Total constructive loss cannot depend upon any act of the assured, any more than total loss, or partial loss, can. [Counsel referred to *Swan v. Pure Ice Co., Ltd.* (21) and *Woodside v. Globe Marine Insurance Co.* (22).] [He was stopped by the court.]

H GREER, L.J. : This is an appeal from the decision of *GODDARD, J.*, as to the meaning and effect of certain clauses contained in a policy of insurance on freight, the contract of insurance being between the plaintiffs and the defendant as one of the underwriters. The plaintiffs, besides insuring the freight, had insured the hull with a number of Lloyds underwriters, of which the defendant was one, for twelve months from July 20, 1936, valued at £28,000. The policy provided that, in the event of total or constructive total loss of the vessel, the underwriters were to pay only their proportion of £14,000, and that, for valuation and disburse-

ment clause purposes, the insured value of the vessel was to be taken as £28,000.

Under charterparty dated Sept. 23, 1936, the plaintiffs chartered the vessel Petrakis Nomikos to carry a cargo of oil for a voyage from Venezuela or alternative ports in South America to the United Kingdom. The vessel discharged a cargo of fuel oil at Havre, and left in ballast for Rotterdam for repairs. An explosion took place while the vessel was being repaired, and a claim came into existence against the underwriters on the hull as well as against the underwriters on freight, inasmuch as it became impossible for the vessel to get to the port of loading in time, the adventure thus being frustrated. Though, for the purposes of the contract, the value of the vessel for constructive total loss was contractually fixed at £28,000, the vessel, when repaired, was worth, at current values at the time of repair, £45,000. It was obviously to the advantage of the plaintiffs to have the vessel repaired, and not to abandon her to underwriters. The policy of freight contained the following clauses, which are part of the Institute Time Clauses :

5. In the event of the total loss, whether absolute or constructive, of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered. 6. In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account. 7. In calculating the amount due under this policy in respect of any claim except under cl. 3 and 5 all insurances on freight (including honour policies on freight) shall be taken into consideration, and when the total of such insurances exceeds in amount the gross freight actually at risk only a rateable proportion of the gross freight lost shall be recoverable under this policy, notwithstanding any valuation therein. 8. Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise.

It seems to me that the effect of these clauses is to define as between the insurers and the insured what is to be a constructive total loss. If the effect of the clauses would be to give to the plaintiffs an indemnity in respect of freight which they had not in fact lost, it might to that extent be held to be an honour policy to the extent to which it provided more than an indemnity, but the parties have themselves chosen an agreed definition of a constructive total loss, and no point was taken, either before the judge or in argument in this court, that the policy was unenforceable as being either wholly or in part an honour policy. Assuming, though without deciding the point, that, where there is a real constructive total loss on hull, abandonment to the insurers and notice of abandonment are required, these conditions can have no application to a conventional constructive total loss, which, on the facts of the case, is necessarily less than a real constructive total loss. I desire to add, without finally deciding the point, that the inclination of my mind is to hold that abandonment and notice of abandonment are not part of the definition of constructive total loss, but are conditions subsequent, which have to be performed before a claim can be made against underwriters. In my view, however, this question does not arise, and for my part I desire to reserve my decision with regard to it.

For these reasons, having, for the purposes of the freight policy, defined by reference to the hull policy what is to be regarded between the parties as a constructive total loss, I think that the judge was wrong in dismissing the plaintiffs' claim, and that this appeal is entitled to succeed, on the ground that in this particular instance the parties had agreed upon their own definition as to what was to amount to a constructive total loss, and the appeal succeeds, notwithstanding that, on the true facts, the vessel never was a constructive total loss, and the claim against the hull insurers was expressly a claim for particular average. The appeal must be allowed, with costs here and below. I should like to add that I congratulate the parties on the sensible and businesslike way in which they have raised the question for the determination of the court.

MACKINNON, L.J. : The plaintiffs and the defendant entered into a contract in writing dated Aug. 28, 1936. The question that arises is: What is the proper construction of that written contract?

The contract happens to be an insurance policy for £4,110 on "Freight, chartered or otherwise, in and/or over" upon the tank-steamer Petrakis Nomikos. We have had cited to us a great many cases dealing with what is called the law of marine insurance. All those cases (and indeed almost all of the "law of marine insurance") concern the construction of the terms of written contracts. Except in so far as the contracts, or policies, in those cases are to any extent in the same terms as those of the contract we have now to construe, they are of little assistance.

The plaintiffs make their claim on cl. 5 of the Institute Time Clauses (Freight), which are attached to the policy and supplement its general terms. They say: "You promised to pay the amount underwritten by this policy in the event of the total or of the constructive total loss of the steamer by insured perils within the insured period. One of those events—namely, a constructive total loss—has happened. Therefore you must pay." The defendant answers: "That event has not happened. Therefore I need not pay." The question for us is whether or not that event has happened.

The passage to be construed is really only the eleven words: "In the event of the constructive total loss of the vessel." The plaintiffs say that the proper meaning of these words is: "If the steamer is so damaged by insured perils that her owners would be entitled on giving notice of abandonment to recover a total loss from their hull-underwriters." The defendants say that the proper meaning is: "If the steamer is so damaged that the owners would have that right, and if they exercise that right and do recover for a total loss from their hull-underwriters." For several reasons, I think that the former meaning, that put forward by the plaintiffs, is the one to be preferred.

In the first place, if by this cl. 5 the underwriters meant to promise only that they would pay if underwriters on hull pay, or are liable to

pay, for a constructive total loss, it would have been easy to say so. They do not by any words make payment of a total loss by hull-underwriters a condition to their promise. The event to which their words refer is damage to the ship by insured perils.

Secondly, if the defendant is right, *Roura & Fourgas v. Townend* (1) must have been wrongly decided by ROCHE, J. That was a policy on A
 "profit on charter," which is an interest akin to freight, and it was
 "against the total or constructive total loss of the steamer only." The
 steamer was not a total loss, for she was in existence, and, after romantic
 experiences, repaired and in good order. The claim was for a loss by
 reason of the constructive total loss of the steamer. It was argued that B
 there had been no constructive total loss of the steamer, because her
 owners had not given notice of abandonment and recovered for a total
 loss. As in fact they were uninsured, of course, they had not achieved
 the impossible. ROCHE, J., held that the plaintiffs could nevertheless
 recover. I think still (as I am sure that I thought at the time) that his C
 judgment was perfectly correct, and, if it was so, it is fatal to the present
 defendant's contention.

In this case, the policy sued on recognises the existence of a policy or
 policies on hull. Clause 6 stipulates that, in ascertaining whether the
 constructive total loss referred to in cl. 5 has occurred, the insured value D
 in the hull policy shall be taken as the repaired value. At the foot of
 the body of the policy there is a warranty that 50 per cent. of the valuation
 in the hull policy is uninsured against total or constructive total loss.
 Consistently with any obligation of the plaintiffs to the defendant, by
 warranty or otherwise, the plaintiffs might have taken out their hull E
 policies for 50 per cent. of the insured value, but "against the risk of
 absolute total loss only." : see ARNOULD ON MARINE INSURANCE, sect. 902.
 As I do not think that the warranty as to 50 per cent. being uninsured
 imports any implied warranty that the other 50 per cent. is insured,
 they could also, consistently with any obligation to the defendant, have F
 had their hull policy on the terms that it was to cover only particular
 average, general average, and salvage. All this supports me in the
 view that the promise in cl. 5 is not to be construed as meaning : "In
 the event of your recovering 50 per cent. of the insured value in your hull
 policies as for a constructive total loss." G

The real question, however, is the meaning of the seven words "the
 constructive total loss of the steamer." Sir Robert Aske says that
 they mean : "The ship being damaged to a certain extent and her owners
 giving notice of abandonment." He says : "Abandonment is an essential
 element in the definition of a constructive total loss." He relies on the H
 passage in the Marine Insurance Act, 1906, s. 60 (1) :

Subject to any express provision in the policy, there is a constructive total loss
 where the subject-matter insured is reasonably abandoned on account of its actual
 total loss appearing to be unavoidable, or because it could not be preserved from
 actual total loss without an expenditure which would exceed its value when the
 expenditure had been incurred.

However, that does not help him very much, since sect. 60 (2) (ii) of the same Act defines constructive total loss in terms on which Mr. Willink could rely with equal vigour :

A In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired. In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired. . . .

Sect. 61 is still more in favour of the plaintiffs' contention :

B Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.

C It is still more in their favour because, if Sir Robert is right in the definition for which he contends, sect. 61 must be paraphrased : " If the assured abandons the ship as not worth repairing, he may either treat the loss as partial or abandon the ship." That, of course, is absurd. His right to abandon appears in both protasis and apodosis.

D The truth is that " loss " is a word of double import. It may mean objectively the disaster that has befallen the subject-matter of the insurance, or it may mean, from the underwriter's point of view, the claim that is payable on the policy—that which the underwriter has to enter in his loss-book. In the first sense—disaster to the ship—constructive total loss means the ship being so damaged that the cost of repair will exceed her repaired value. In the second sense—claim recoverable—it no doubt means that plus notice of abandonment. I think that this
E cl. 5, in speaking of " the event of the steamer being a constructive total loss," is using the phrase in the first sense, and in the precise words of sect. 60 (2) (ii) of the Act :

In the case of damage to a ship, where she is so damaged . . . that the cost of repairing the damage would exceed the value of the ship when repaired.

F I think also that it is wrong, and confusing, to bring in the second sense, so that " in the event of the constructive total loss of the steamer " is made to mean " in the event of the hull-underwriters being made liable for a constructive total loss." It results that, in my opinion, GODDARD, J., was wrong in upholding this contention of the defendant.

G The judge also relies upon another argument of the defendant. He says that, for the plaintiffs to recover under cl. 5 :

it must be proved that the loss of freight was caused by the ship becoming a constructive total loss ; [and] there is only one case in which freight is lost by this cause, and that is where a ship earns freight after abandonment to the hull underwriters, and the latter are consequently entitled to keep it.

H If I understand this rightly, it means that cl. 5, when it promises a payment " in the event of the constructive total loss of the steamer," can have effect only in one very rare event—namely, if freight earned by the steamer has been received by hull-underwriters, who have accepted notice of abandonment of the hull, or have been judicially held liable

for a constructive total loss. I cannot agree with this suggestion. It is absolutely certain that those who drafted these Institute clauses can never have intended, or even have dreamed of, any such meaning. The contemporaneous hull policy on this vessel is in evidence, and that has attached to it Institute Time Clauses (Hulls). Clause 18 of these is :

In the event of total or constructive total loss no claim to be made by the underwriters for freight whether notice of abandonment has been given or not. A

If, therefore, cl. 5 of the freight clauses means only "to pay a total loss in the event of hull-underwriters becoming entitled to freight upon the steamer being abandoned to them," it is promising to pay a loss that, under the machinery of the Institute Clauses, can never happen, and the underwriter is taking *pro tanto* a premium for nothing. For cl. 18 of the Institute Clauses for Hulls stipulates that such a form of loss never shall happen. B

Yet another consideration shows the impossibility of this construction. The right of hull-underwriters to whom the ship is abandoned to receive freight arises as an incident of the property in the ship which is transferred to them. The Marine Insurance Act, 1906, s. 63 (2) says : C

Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty ; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss. D

Nevertheless, the underwriters do not in any way become parties to the shipowner's contracts of affreightment. Thus, if the captain tranships the cargo, and earns freight by so doing, the underwriters, as abandonees of the ship, have no claim for the freight so earned : *Hickie v. Rodocanachi* (2). This cl. 5, however, which is said to promise only to pay for freight lost through its being earned by hull-underwriters, adds that the payment will be made even if the vessel is "in ballast." It is utterly impossible for underwriters on hull to have any right to freight on accepting abandonment of a vessel "in ballast." So that again in this part the clause must promise nothing, and the premium *pro tanto* be asked for nothing in return. E

It is, of course, possible that the framers of the clause, though they cannot decently have intended the suggested effect of it, may inadvertently have used words that have that meaning. I do not think, however, that they have. I differ from the judge for another reason. He says : F

It must be proved that the loss of freight was caused by the ship becoming a constructive total loss . . . and there is only one case in which freight is lost by this cause. G

I do not think that, under this clause, it is in the least necessary for the assured to prove "that the loss of freight was caused by the constructive total loss of the ship." The underwriter has promised, if a certain event happens, to pay, not any proved loss of freight, but the whole insured sum, and that "whether the ship be fully or only partly loaded, H

or in ballast, chartered or unchartered.” If the event happens, and if the assured proves that it has happened, he need prove nothing more, and, subject to the possibility (if business decency permitted it) of a defence of want of insurable interest, the underwriter must implement his promise and pay. In other words, I think that this part of the policy is an example
A of a very familiar form of insurance. An underwriter, in consideration of a premium, promises to pay a certain sum if a certain event shall happen. The event may be “if you break your leg” or “if Mrs. — shall give birth to twins,” or “if the Budget adds threepence to the income tax.” In this case the event is a double one: “In the event of a total loss
B whether absolute or constructive of the steamer.” Of those two events, one—“the constructive total loss of the steamer”—has, I think, happened, and the underwriter must fulfil his promise and pay.

Lastly, if this had been an insurance of freight against the risk of constructive total loss of the steamer, and if it had been necessary to prove
C that freight had been lost by that cause, I do not agree that the only possible loss by that cause would be where freight earned had had to be handed over to the underwriters of the abandoned ship. *Roura & Forgas v. Townend* (1) is an instance to the contrary, and the principle of *Jackson v. Union Marine Insurance Co.* (3) affords another. The
D vessel there was not in fact a constructive total loss, but, if her injuries had been greater and she had been, the result would have been the same. If the policy were in the form “against constructive total loss of the ship” (which, of course, means “against constructive total loss of the ship by perils of the seas, or other insured perils”) instead of
E “against perils of the seas,” I am clear that it would cover such a loss as that in *Jackson v. Union Marine Insurance Co.* (3), and not be limited to cover the very remote risk of freight being lost by its having, when paid, to be paid over to the hull-underwriters by reason of abandonment to them.

Finally, I should notice that GODDARD, J., was of opinion that LORD
F WRIGHT, M.R., in *Carras v. London & Scottish Assurance Corpn., Ltd.* (4), expressed the view that this cl. 5, in regard to constructive total loss of the vessel, did have this limited effect—namely, it insured only against the risk of freight going into the pockets of the hull-underwriters. I do
G not think that LORD WRIGHT did mean to say that. If he did, it was an *obiter dictum*, and one uttered during the period when he had descended from the House of Lords to this more fallible tribunal. Also, if he did say it, I hope that I may say without impropriety that, for the reasons I have given, I do not agree with him.

H One further ground of defence was raised before us, which either was not raised in the court below, or is not noticed in the judgment of GODDARD, J. It was suggested that the defendant could rely on cl. 8:

Warranted free from any claim consequent on loss of time whether arising from a peril of the seas or otherwise.

That clause was invented by underwriters over 60 years ago in order to

counteract the result of *Jackson v. Union Marine Insurance Co.* (3). The assured there had an insurance on chartered freight against perils of the seas. In the events that happened, it became necessary for him to plead: "The ship was damaged by sea perils. The repairs required to make her able to fulfil her charterparty occupied so much time that the charterer was entitled to, and did, cancel the charter. Therefore there has been a loss of the insured freight by perils of the seas." It was held that he was right. The underwriters, being desirous of immunity from any such claim in the future, invented this clause. It will bar any claim whenever it is necessary for the assured to assert the lapse of time as one of the facts establishing his cause of action. In this case, the assured is under no such necessity. He need say nothing about any lapse of time, or of the right of any charterer or goods owner to rely on lapse of time. The insurance is on "freight chartered or otherwise," which can mean only "whether there is a charterparty or not." The clause promises payment in full, "whether the steamer be fully or only partly loaded, or in ballast, chartered or unchartered." To a claim under cl. 5 the provision in cl. 8 can have no application. This, of course, does not mean that cl. 8 has no effect on this policy. The policy in its main part is an ordinary policy on freight against the ordinary insured perils. The precise claim made in *Jackson v. Union Marine Insurance Co.* (3) could be made upon it, and cl. 8 would then operate to defeat such a claim. Clause 5, however, is an added promise to pay a total loss if either of two events happens. To that added promise, when one of the two events is proved to have happened, I think that cl. 8 can have no application. The claim is in no conceivable sense "consequent on loss of time." It is simply a claim for a payment which is promised on a certain event, by reason of the happening of that event. My conclusion, therefore, is that this appeal should be allowed.

GREER, L.J.: I am authorised by SLESSER, L.J., to say that he has read both these judgments, and that he agrees with them.

Appeal allowed with costs in both courts. Judgment for the plaintiffs for £18 5s. 4d. with interest.

Solicitors: *Holman, Fenwick & Willan* (for the appellants); *Ince, Roscoe, Wilson & Glover* (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

**Re BALFOUR'S SETTLEMENT, PUBLIC TRUSTEE v.
OFFICIAL RECEIVER.**

[CHANCERY DIVISION (Farwell, J.), **May 24, 1938.**]

Settlements—Interest determinable on bankruptcy—Breach of trust—Unauthorised advances by trustee to tenant for life—Income taken to replace capital—Forfeiture.

A A marriage settlement gave the income of a fund to the tenant for life until he should die or should do or suffer something whereby the income or part thereof, if belonging absolutely to him, should become payable to, or vested in, someone else, and then followed a discretionary trust. During the years 1933-1936, the then sole trustee of the settlement, at the request of the tenant for life, made advances to him amounting to over £1,400. As the settlement contained no provision for such advances, this payment was a breach of trust. After the death of the trustee, a bank, and later the Public Trustee, acted in the trusts of the settlement. On Aug. 17, 1937, the trustees by letter asserted their right to retain the income for the recoupment of capital which had been advanced. On Aug. 26, 1937, the tenant for life filed his petition in bankruptcy. C The trustee in bankruptcy claimed to be entitled to receive the income of the fund :—

D **HELD :** from the time that the trustees asserted their right to retain the income, it became payable to, or vested in, some person other than the tenant for life, and from that moment the tenant for life's interest was forfeited. The trustee in bankruptcy had therefore no right to any part of the income,

[EDITORIAL NOTE. Forfeitures of this kind usually arise out of an attempted assignment or mortgage by the tenant for life of his income. In the present case, the forfeiture arises by reason of the exercise by the trustees of rights accruing to them upon a breach of trust. In this respect, the case is a new application of the principle of law involved.

E AS TO FORFEITURE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 199-203, para. 270 ; and FOR CASES, see DIGEST, Vol. 5, pp. 659-669, Nos. 5871-5936.] Case referred to :

(1) *Re Brewer's Settlement, Morton v. Blackmore*, [1896] 2 Ch. 503 ; 5 Digest 656, 5855 ; 65 L.J.Ch. 821 ; 75 L.T. 177.

F **ADJOURNED SUMMONS** for the determination of the question whether there had been a forfeiture of the life tenant's interest under an indenture of settlement, dated Oct. 27, 1894. The facts and arguments are fully set out in the judgment.

J. H. Stamp for the Public Trustee.

G *L. W. Byrne* for the Official Receiver.

J. F. Bowyer and *R. L. A. Hankey* for the other defendants.

H **FARWELL, J. :** On the marriage of Colonel Nigel Harington Balfour with Grace Annette Marie Balfour, formerly Madocks, a settlement was made between the intended husband and the intended wife, the father of the husband, and Richard Harington as trustee. It recites that on the intended marriage it was agreed that the reversionary sum of £20,000 should be settled. Directions are given with regard to the investment of the fund, and then there is this trust :

... and shall pay the income of the said trust premises and the investments for the time being representing the same to the said Nigel Harington Balfour until he

shall die or shall do or suffer something whereby the same or some part thereof, would through his act or default or by operation or process of law or otherwise if belonging absolutely to him become vested in or payable to some other person or persons and after the failure or determination of the trust hereinbefore declared of the said income in favour of the said Nigel Harington Balfour if the same shall fail or determine in his lifetime shall if the trustees or trustee shall in their or his absolute discretion think fit but not otherwise pay or apply such income or any part thereof in their or his discretion for or towards the maintenance and personal support of the said Nigel Harington Balfour and Grace Annette Marie Madocks and the child or children of the said marriage or for or towards the maintenance and personal support of such one or more to the exclusion of the others or other of such objects of this present discretionary trust or power in such manner as the trustees or trustee shall think proper during the remainder of the life of the said Nigel Harington Balfour and shall during such remainder of the life of the said Nigel Harington Balfour from time to time pay or apply all the residue not applied under the discretionary trust or power lastly hereinbefore contained of the said income or the whole of such income if no part thereof shall be so applied in the manner in which the same would be payable or applicable if the said Nigel Harington Balfour were then dead and after the death of the said Nigel Harington Balfour if the said Grace Annette Marie Madocks shall be then living shall pay the said income to her during her widowhood.

The marriage was duly solemnised, and there were no children of the marriage. During the years 1933-1936, one Herbert Linnell, then the sole trustee of the settlement, made advances to the husband out of the trust fund at his request of sums amounting in all to over £1,400. As there is nothing in the settlement justifying such advances, that was a breach of trust committed by the trustee at the instigation of the tenant or life.

On Jan. 11, 1937, the trustee died and left a will appointing the Westminster Bank to be his executors. The Westminster Bank proved the will in Apr., 1937. Mrs. Balfour had died before that time. When the Westminster Bank, as the executors of the last surviving trustee, received the income of the trust fund, they realised that there had been this breach of trust, and that the trustees were short by £1,400 of the capital of the trust fund. They took the view that the sum must be replaced to capital out of income which would otherwise be payable to the tenant for life before the tenant for life should receive any further premiums.

The trustees of the fund were the Westminster Bank, and it was their duty to see that money was replaced to capital, and they were entitled to take the step which they did take of holding up the income which would otherwise have been payable to the tenant for life for the purpose of accumulating that income and replacing it to capital.

In Aug., 1937, a sum representing income of nearly £350 had been received by the bank, who had refused to pay it over, claiming to retain it, as appears from a letter written by their solicitors on Aug. 14, 1937, to the solicitors acting for the tenant for life. The bank pointed out that this sum must be replaced, and claimed their right to retain it. Subsequently the Public Trustee was appointed trustee of the settlement, and he is the plaintiff in this summons. On Aug. 26, 1937, the tenant for life filed his petition in bankruptcy and was adjudicated bankrupt.

The question is whether the trustee in bankruptcy is entitled to receive the income of this fund, or whether the tenant for life had forfeited his

right to the income before the bankruptcy. The discretionary trust was in operation at the date of the bankruptcy, and there was nothing which could pass to the trustee in bankruptcy with regard to the income of the fund. In my view, there is no possible doubt as to the effect of a breach of trust committed by a trustee at the instigation of the tenant for life providing out of the trust fund sums for a purpose for which he is not entitled to provide them—a breach of trust for which the trustee is liable to the other beneficiaries. Moreover, the trustee is entitled to be indemnified by the person who has received the money.

The principle that a beneficiary who has had more than that to which he is entitled out of an income fund cannot acquire further moneys out of that trust fund until he has replaced the amount he has received is well-established. In the present case, the Westminster Bank, as the trustees, were entitled to assert—as they did in the letter of Aug. 17, 1937—their right to retain the moneys which would otherwise have been payable to the tenant for life for the purpose of the recoupment of capital moneys which he had had. They were entitled to say: “We will not pay you any more until the amount which has been lost to the trust fund is made good, and we therefore retain for that purpose money which would otherwise be due to you.” They asserted their right, and, as from that time, the income which would otherwise have been payable to the tenant for life became vested in or payable to some other person or persons. That is to say, the right to receive the income and to retain it became vested in the trustees who were asserting the right which they had.

The general principle applicable to a breach of trust of this sort is quite plain, and the result must be that which I have stated. Mr. Byrne, on behalf of the trustee in bankruptcy, has drawn my attention to the decision of CHITTY, J., in *Re Brewer's Settlement, Morton v. Blackmore* (1), a case not unlike the present one which seems to suggest that the view which I have taken is right. There was there a settlement upon trust to pay the income to him until his death or bankruptcy, or until he should:

“assign charge or incur the said income or do or suffer anything whereby the same or some part thereof would through his act or default become payable to or vested in some other person or persons” [with remainder in favour of the children of the marriage].

In that case, the settlor induced the trustee to let him dissipate part of the trust fund, and the money was spent by him for his own purposes. Then the settlor became bankrupt, and proceedings were taken by the children of the marriage, with the result that the funds lost by the breach of trust were replaced. The question raised was whether the settlor's interest had been forfeited before the bankruptcy by the dissipation of the trust fund. It was held that the settlor's interest had not been determined before the bankruptcy, and that, as the limitation until bankruptcy was void as against his creditors, his life interest passed to the trustee in bankruptcy, and that the income of the trust fund was payable to a purchaser from the trustee during the life of the settlor.

The passage which is material for the present purpose is in the judgment of CHITTY, J., where he said, at pp. 506, 507 :

For the purpose of the present question it appears to me to be immaterial whether the loans were breaches of trust or not. Undoubtedly they were breaches of trust. The tenant for life was liable to replace the fund, but without interest ; the income still belonged to himself and to no one else. So long as the money was in his hands and capable of being followed, the money itself might have been recovered from him, but the right to the income did not pass from him. After he had spent it in the manner described, it could no longer be followed : the tradesmen and others to whom he paid it were, undoubtedly, purchasers for value without notice ; the money in their hands ceased to have any existence as a trust fund. I think that it would be an extravagant refinement to say that every sovereign as he paid it away still remained part of the trust fund and was producing an income, and that such income was payable to or vested in the persons who had received the sovereign or other the money thus paid away. In my opinion, after the money had in the first instance been lent, and subsequently after it had been spent, the income of the trust fund did not become payable to or vested in any person or persons other than the tenant for life.

What the judge is dealing with is the income of the fund which had in fact been paid over in breach of trust to the tenant for life. He does not seem to have taken into consideration any other income—the rest of the trust fund which might otherwise have been payable to the tenant for life. In my judgment, the real distinction between *Re Brewer's Settlement*, *Morton v. Blackmore* (1) and the present case is this. In that case there had been no assertion of right by the trustees to impound the income before the date of the bankruptcy. The right of a trustee to impound is nothing more than an inchoate right to get the income vested in or payable to him. He is not bound to assert it. If he chooses to replace the trust fund out of his own pocket, he is not bound to call on the beneficiaries to replace it, but, if he asserts his equity and holds up the income in his hands, doing so under his right to recoup, then as from that moment the future income of the trust fund which would otherwise have been payable to the tenant for life ceases to be payable, and as from that moment his life interest is forfeited.

Accordingly, in my view, in this case, as soon as the Westminster Bank ceased to pay over the income to the tenant for life on the ground that they were retaining it for the loss, the income ceased to be payable to the tenant for life. It was only after that date that the tenant for life became bankrupt. At the date of bankruptcy, the income had ceased to be payable to the bankrupt. The right to it never went to the trustee in bankruptcy, and the trustee in bankruptcy had no right to any part of the income.

Solicitors : *Rawlinson & Son* (for the Public Trustee) ; *Tarry, Sherlock & King* (for the Official Receiver) ; *Baileys, Shaw & Gillett* (for the other defendants).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

ATTORNEY-GENERAL FOR THE ISLE OF MAN v. MOORE.

[PRIVY COUNCIL (Lord Maugham, L.C., Lord Wright and Lord Roche),
April 7, 8, May 27, 1938.]

Privy Council—Isle of Man—Mines and minerals—Crown's rights to minerals, flagg, slate and stone—Shale—Whether included in the rights reserved—Act of Settlement, 1703-04.

A

By an Act of Tynwald, known as the Act of Settlement, 1703-04, s. 16, all mines and minerals, quarries and delfs of flagg, slate or stone are reserved to His Majesty as Lord of the Isle and Manor of Man. The appellant claimed a declaration that a certain mineral commonly called shale was within the reservation in the Act of Settlement, 1703-04. The respondent by her answer, while admitting that her estate of customary freehold was subject to the Crown's legal rights, denied that the shale was a mineral within that Act. She contended that it was the ordinary subsoil of the estate and district, and her absolute property, and was composed essentially of clay and sand. It was admitted by the appellant that the contention that shale was a mineral could not be maintained, but it was contended that it was covered by the specific words "flagg, slate or stone":—

B

C

D

HELD: the question was an issue of fact, to be decided according to the particular circumstances, the duty of the court being to determine what the words meant in the vernacular of mining men, commercial men and landowners in 1703 when the Act of Settlement was passed. As there was no evidence that the words "flagg, slate or stone", or any one of them, had ever been so used, that substance was not within the terms of the Act of Settlement.

E

[EDITORIAL NOTE. The question here is whether the shale is included in the reservations made in favour of the Crown in 1703. At that time no commercial use of this substance was known or thought of; but since 1883 it has been found a suitable substance for the manufacture of bricks. Becoming thus a substance of commercial value, the construction of the Act of 1703 becomes a matter of importance.

AS TO MINERALS, see HALSBURY, Hailsham Edn., Vol. 22, pp. 528-532, paras. 1159-1161; and FOR CASES, see DIGEST, Vol. 34, pp. 606-610, Nos. 36-81.]

Cases referred to:

F

G

H

- (1) *A.-G. for Isle of Man v. Mylchreest* (1879), 4 App. Cas. 294; 34 Digest 608, 52; 48 L.J.P.C. 36; 40 L.T. 764.
- (2) *Midland Ry. Co. & Kettering, Thrapston & Huntingdon Ry. Co. v. Robinson* (1889), 15 App. Cas. 19; 11 Digest 150, 328; 59 L.J.Ch. 442; 62 L.T. 194.
- (3) *North British Ry. Co. v. Budhill Coal & Sandstone Co.*, [1910] A.C. 116; 34 Digest 607, 43; 79 L.J.P.C. 31; 101 L.T. 609.
- (4) *Caledonian Ry. Co. v. Glenboig Union Fireclay Co.*, [1911] A.C. 290; 34 Digest 606, 36; 80 L.J.P.C. 128; 104 L.T. 657.
- (5) *Linkithgow (Marquis) v. North British Ry. Co.*, [1912] S.C. 1327; 11 Digest 151, case t.
- (6) *Hext v. Gill* (1872), 7 Ch. App. 699; 34 Digest 606, 41; 41 L.J.Ch. 761; 27 L.T. 291.
- (7) *Great Western Ry. Co. v. Carpalla United China Clay Co., Ltd.*, [1909] 1 Ch. 218; 34 Digest 608, 60; 78 L.J.Ch. 105; 99 L.T. 869; *affd. on appeal*, [1910] A.C. 83.

APPEAL from a judgment and order of the Staff of Government Division of the High Court of the Isle of Man (CHAPPELL, Judge of Appeal, and COWLEY, Deemster), dated Apr. 22, 1937, dismissing an appeal by the appellant and confirming the order of the Chancery Division of the High

Court of the Isle of Man (FARRANT, Deemster) dated Nov. 12, 1936, which dismissed an information presented by the appellant. The facts of the case are set out in the judgment of their Lordships which was delivered by LORD WRIGHT.

The Attorney-General for the Isle of Man (R. B. Moore), H. O. Danckwerts and G. D. Hanson for the appellant.

F. R. Evershed, K.C., Kenneth Johnston and S. J. Kneale for the respondent.

LORD WRIGHT: This is an appeal from the High Court of the Isle of Man by His Majesty's Attorney-General for the island. It raises an important question on the construction of the Act of Tynwald, known as the Act of Settlement, 1703-04. The appellant claims on behalf of His Majesty, who is Lord of the Isle and Manor of Man under a title the history of which was expounded by this Board in *A.-G. for Isle of Man v. Mylchreest* (1). What was there said need not be repeated here. Nor is there any dispute as to the position of the respondent, so far as relevant to these proceedings. She is the holder of the Raggatt estate, which is a Manx customary estate of inheritance held by her from the Lord of the Island. Such estates, the nature of which was also fully discussed by this Board in *Mylchreest's* case (1), had been originally estates of a low kind of tenure, which by custom and judicial decision had grown into customary estates in fee simple, subject to the discharge of certain payments to the Lord of the Isle. However, as doubts and difficulties had arisen between the Lord and the tenants as to the extent and quality of the tenants' estates, the Act of Settlement was passed at a Tynwald Court on Feb. 4, 1703, by James, Earl of Derby (the then Lord), the Governor and other his Lordship's Officers and 24 Keys, the representatives of the Isle, to settle and confirm the estates and tenures of the tenants. The Act was duly proclaimed in 1704, along with an amending Act. The estate of the respondent is regulated, for purposes of this case, by the terms of these Acts. Sect. 14 provides that the tenants' estates should be good and perfect customary estates of inheritance, descendable from ancestor to heir according to the laws and customs of the Isle, and sect. 15 contains a clause for peaceable enjoyment by the tenants, subject to their due payment of rents and fines and performance of other services. Sect. 16 contains the words on which the decision of this dispute depends. It is a clause of reservation by the lord of all such royalties, regalia, prerogatives, homages, fealties, escheats, forfeitures, seizures, mines and mineralls of what kind or nature soever, quarrys and delfs of flagg, slate or stone, franchises, libertys, priviledges, and jurisdictions whatsoever, as are now and at any time heretofore have been invested in the said James, Earl of Derby, or in any of his ancestors, Lords of the said Isle.

The amending Act by sect. 7 provides that, notwithstanding the general words of the previous Act, every tenant and farmer should have liberty to dig and use all sorts of slate and stone on his tenement for his own use and the improvement of his own and his neighbours' estates, but not to dispose of them as merchandise without licence. Sect. 8 provides for the

case where a tenant, having a quarry of limestone or other common stone on his grounds, should refuse to allow another person to get the stone for the improvement of that person's lands. In that event, the Governor of the Isle might give authority to that person to dig and carry away, on paying reasonable compensation, as much as should be necessary for his use. These amending sections do not, in their Lordships' judgment, throw any light on the meaning of the words of sect. 16 of the principal Act.

The dispute which is the subject of this appeal has reference to the extent of the rights reserved to the Lord by the Act. The appellant, on Mar. 9, 1936, issued an information on behalf of the Crown against the respondent, alleging that there existed under part of the Raggatt, the respondent's estate, a valuable bed of mineral suitable for the purpose of merchandise and for making into bricks and other articles, and that the bed of mineral, commonly known as shale, was met with a few feet below the surface of the ground, and could most conveniently be won by open workings. He claimed a declaration that the shale was within the reservation of mines and minerals under the Act, and a declaration of the Crown's right to enter on the lands, break the surface, and search for, win, work and take away all minerals, including the mineral commonly called shale. The respondent by her answer, while admitting that her estate of customary freehold was subject to the Crown's legal rights, contested the right claimed in the information, and in particular denied that the shale was a mineral within the meaning of the Act of Settlement. She further averred that it was the ordinary subsoil of the estate and district, and her absolute property, and was composed essentially of clay and sand.

At the trial, the Deemster FARRANT held that shale was not within the reservation of mines and minerals in the Act, or of quarries or delfs of flaggs, slate or stone, and gave judgment in favour of the respondent. The appellant then appealed to the Staff of Government Division of the Isle of Man. At the hearing, the judges of that court were equally divided. The Judge of Appeal agreed with the first Deemster that the shale did not come within the reservation of mines or minerals, or of flagg or slate, but differed from him in holding that it came within the reservation of stone. He would have allowed the appeal, but, as Deemster COWLEY, the other judge, agreed on all points with the first Deemster, the result was that the appeal was dismissed and the judgment appealed from stood. From this decision the appellant appeals to His Majesty in Council.

Manx shale first became a matter of commercial interest in or about 1883, when a company called the Glenfaba Brick and Tile Co. obtained a lease or licence from the Crown, subject to a fixed rent and royalties, to win and work the shale from the Glenfaba estate, which was in proximity to the Raggatt estate, and proceeded to work the bed of shale at Glenfaba. The company used the shale in order to make bricks. In or

about 1936, the workable bed was becoming exhausted. They then applied to the Crown to grant them a similar lease or licence in respect of the Raggatt estate. The respondent objected, and the information was laid in order to ascertain the Crown's rights. Apart from a suggestion that the Crown was entitled to rely on a custom, which both courts have rightly negatived, the question, as both parties agree, is whether shale, A
which is not specifically mentioned in the section, is included in the reservation of

mines and mineralles of what kind or nature soever, quarrys and delfs of flagg, slate or stone . . . as now are or at any time heretofore have been invested [in the Lord].

The first use of the word "shale" cited in the OXFORD ENGLISH DICTIONARY is in 1747. The word is there defined as an argillaceous fissile rock, the laminæ of which are usually fragile and uneven, and mostly parallel to the bedding. Expert evidence as to the nature of this shale given at the trial was conflicting in many respects. It appears C
to be common ground, however, that this shale forms the subsoil of the Raggatt, and indeed of a large part of the island, that, when wetted, it breaks down into mud, and that, for this and other reasons, it is incapable of being used for roofing or for any other purpose for which common slate is used. The shale is found at a depth of about $2\frac{1}{2}$ ft. from the surface D
of the land, and goes down for a considerable distance—50 ft. or more. Some portions, generally at the top, are soft, and are described as dark blue clay, and as plastic. It is this portion which is peculiarly suitable for brickmaking. The shale, including harder or more rocky portions which are found generally lower down, is crushed by 6-ton rollers, water E
being added where necessary. When thus crushed, it can be used for making bricks, which are called shale bricks. One witness described it as a sort of soft stone which by crushing can be made into a plastic substance. However, even the hardest portion is friable. In the evidence, shale was also described as a laminated variety of clay, or as a hardened F
and compressed clay. It was also variously described as a very poor quality slate, a decomposed slate, or on its way to becoming slate. It was admittedly of no use for road-making or for building. It was said to be chemically indistinguishable from slate or clay, but it is clear that chemical analysis does not assist on a question of this character. The G
conclusion broadly seems to be that it is a chalky or clayey substance, generally a soft dark blue mud in the upper strata, but becoming harder lower down. In the lower layers, as the result of pressure, it has assumed a rocky character, but even so it is still friable, and without the hardness which characterises stone or slate.

H
In the information, it was alleged that this shale was a mineral within the words of reservation. A great part of the evidence at the trial was directed to establishing this claim as a matter of fact, but before this Board it was admitted by the Attorney-General that the contention that this shale was a mineral could not be maintained. This Board had held in

- Mylchreest's* case (1) that in sect. 16 of the Act "mines and minerals" had a connotation limited to subterranean workings, and did not include surface workings, or the material got by surface workings, such as the shale in question. It is true that since *Mylchreest's* case (1) the House of Lords, in *Midland Ry. Co. & Kettering, Thrapston & Huntingdon Ry. Co. v. Robinson* (2) held (LORD MACNAGHTEN dissenting) that "mines and minerals" as used in the Railways Clauses Act and similar statutes were not limited to underground workings, but the language of these Acts, as well as their purpose and scope, is different. The contrast in the Act of Settlement between "mines" and "quarries" and
- B "delfs" (that is, open pits or diggings) obviously excludes any construction of "mines and minerals" except a construction limited to subterranean workings.

- There remains the question whether this shale can be held to be covered by the specific words "flagg, slate or stone." The principles to
- C be applied in determining such a question have now been established by decisions of the House of Lords dealing with words of reservation in the Railways Clauses Act and similar Acts. After some conflict of judicial opinion, it has been finally established by *North British Ry. Co. v. Budhill Coal & Sandstone Co.* (3), followed by *Caledonian Ry. Co. v. Glenboig Union Fireclay Co.* (4), that this type of question is an issue of fact to be decided according to the particular circumstances of the case, the duty of the court being to determine what the words meant in the vernacular of mining men, commercial men and landowners at the relevant time, which in this case is the date of the Act of Settlement, 1703. It was
- E thus that, *mutatis mutandis*, LORD LOREBURN, L.C., stated the question in the *Budhill* case (3), at p. 127. Such an issue is necessarily an issue of fact, because it must depend on evidence of the actual user of the words—that is, the way in which they were in practice used by the classes of persons enumerated. Another point may be noted. LORD LORE-
- F BURN, L.C., pointed out in *Glenboig's* case (4), at p. 299 :

... the evidence given as to common meaning is evidence given of the common meaning at the present day. I should assume that it was the same at the time of the sale, unless sufficient ground was given for coming to a contrary conclusion.

- In the present case, however, the fact that no one thought of this shale
- G as capable of any valuable use at all, or as a commercial material, in 1703, or indeed until about 1883, when it was first used for brickmaking, might well be a ground for holding that, even if to-day the words had acquired the requisite vernacular meaning, the position must have been different in 1703. On this principle, it was held in *Linlithgow (Marquis)*
- H *v. North British Ry. Co.* (5) that a special species of shale—that is, oil shale—had become a commercial mineral by 1862, because the term was used by those concerned as equivalent to oil-bearing shale, whereas no such vernacular use could have existed in 1812, when the material was not recognised as of any commercial value at all, or as being anything but waste. However, it is here unnecessary to labour that point, because,

on a careful consideration of the record in this appeal, their Lordships have been unable to discover any substantial evidence of fact that the words flagg, slate or stone, or any one of them, are at the present time used, or have ever been used, in the vernacular of commercial, mining or landowning circles, to signify this shale. It is not clear from the record that that particular issue of fact was very precisely envisaged **A** in the course of the evidence. Some confusion was no doubt introduced because of the emphasis directed in the pleadings and the evidence to "mines and minerals," words which are now admitted to be irrelevant in this dispute. In general, however, it appears that, with perhaps one exception, no specific questions were put, and no specific answers were elicited, as to the vernacular use of the words of the reservation, either **B** in 1703 or 1704 or the present time, and in particular of the vernacular use of the words slate or stone, these being the words to which, before their Lordships, the appellant's claim was limited. The fact that this shale was not capable of being used for the ordinary purposes to which **C** slate or stone are respectively applied—such as roofing or building—is *prima facie* inconsistent with a vernacular designation of shale as slate or stone. So also is the fact that before 1883 shale was not regarded as of any commercial value at all. A similar conclusion seems to follow from the difference in physical character which distinguishes shale from **D** slate or stone. It is true that in three leases granted by the Crown since 1883 for the getting of shale for brickmaking the material is described as "shale or stone," but, in the special circumstances of the case, that cannot, in their Lordships' opinion, be regarded as evidence of a vernacular use of the word stone as including this shale. The manager **E** of the Glenfaba Brick Works said that he would not call the material slate or stone, a piece of evidence which seems to be an exception to the general absence of specific question or answer on the vernacular use of the words. A director of the same works said that "one can't call it a slate," and that he considered shale as a "sort of soft stone." It is **F** questionable how far the language used by scientific geologists is helpful in determining an issue of this character, but, for what it is worth, it may be noted that Professor Lamplugh, in his geological survey of the island, published in 1903, does not without qualification describe shale as either slate or stone, though he describes it as decomposed slate. **G** Their Lordships on the whole case see no reason to differ from the finding of fact of Deemster FARRANT, based on a careful and exhaustive examination of the evidence which it is here unnecessary to repeat—namely, that shale such as that now in question could not have been described as slate by mining experts, commercial men or landowners either in 1703-**H** 04 or to-day—or to differ from his similar finding that it would not have been included in a description of stone by any of the same classes of persons. These findings of fact, which their Lordships accept, are fatal to the appellant's case. The finding of Deemster FARRANT in respect of slate is concurred in by both Judges of Appeal. There is thus on this point

a concurrent finding of fact which is sufficient, on the established rule of the Board, to conclude the issue *quoad* slate before their Lordships. On the meaning of stone, there is not a concurrent finding, because the Judge of Appeal, differing from his colleague in the Court of Appeal, was of opinion that shale was stone. Their Lordships, with all deference,

A are unable, for reasons already given, to agree with him on this point.

This conclusion renders it unnecessary to decide two further contentions raised on behalf of the respondent. One was that the appellant's claim, if successful, would have the result that the reservation would nullify the estate granted. As the shale can be worked only by removing

B the surface soil and by open workings, the 25 acres which constitute the respondent's estate would be rendered worthless to her by the process of extracting the shale, and her enjoyment of it would be destroyed. On this ground, it was contended, on the authority of *Hext v. Gill* (6), that the court would not permit the Crown or its licensees to exercise the

C rights they claim under the reservation, even if the words of reservation, on their true construction, were held to include shale, and even on terms of paying compensation. Against this, it was pointed out that in *Great Western Ry. Co. v. Carpalla United China Clay Co., Ltd.* (7), at p. 85, LORD MACNAGHTEN seems to have been of opinion that the china clay

D which was there held to be a mineral might be worked, though such working might destroy or interfere with the use of the railway, and destroy the surface. That, however, was under a different type of statute, because the railway company could always prevent the working by paying the ascertained compensation. However, as their Lordships

E hold that the shale is not within the words of reservation, it is not necessary to express any final opinion on the matter. The second point raised by the respondent was that the words of reservation are expressly limited to mines and minerals and quarries and delfs of flag, slate or stone such "as now are or at any time heretofore have been vested" in the Lords

F of the Isle, and hence, as it was argued, only mines, quarries and delfs existing in 1703 are within the section, so that, as it was said, the Crown as Lord had no right to enter upon land and form a new quarry or delf not already existing in 1703. If, on the true construction, such a limitation of mining or of quarrying operations of flagg, stone or slate was

G imposed by the Act, the practical consequences might well be serious, but their Lordships, while not giving any express decision, see no reason, as at present advised, to differ from the judges of the courts below, who have all rejected that construction.

H Notwithstanding the able argument of the Attorney-General, which loses nothing in merit because it has not succeeded, their Lordships are of opinion, on the whole case, that the appeal fails, and should be dismissed with costs. They will humbly so advise His Majesty.

Solicitors: *Official Solicitor*, Commissioners of Crown Lands (for the appellant); *Linklaters & Paines* (for the respondent).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

Re NICHOLSON, CHADWYCK-HEALEY *v.* CRAWFORD.

[CHANCERY DIVISION (Crossman, J.), June 14, 16, 1938.]

Executors—Legacies—Abatement—Annuity—Direction to appropriate fund—Gift of so much of the appropriated fund as may not be required for annuity—Rights of annuitant.

The testator by his will gave certain pecuniary legacies. He also gave an annuity of £250 per annum free of duty and free of income tax. He directed his trustees to appropriate a fund sufficient to satisfy the annuity, and declared that after such appropriation the annuitant should have no right to resort to any part of his estate for the payment of the annuity except the income and capital of the appropriated fund. Upon the death of the annuitant, the capital, if any, remaining of the appropriated fund was given to the School of English Church Music absolutely. There was a deficiency of assets, whereupon the question of abatement arose as between the legatees, the annuitant and the School of English Church Music :—

HELD : the proper method of abatement was that the annuity on the one hand should be valued and the figure thus obtained should abate proportionately with the legacies. The sum, being the abated value of the annuity, ought to be invested, and the annuitant should be paid her full annuity of £250 per annum free of duty and free of income tax out of the income of this sum, the capital being resorted to in so far as the income was insufficient. The School of English Church Music would be entitled to the capital, if any, of this sum remaining at the death of the annuitant.

[EDITORIAL NOTE.] The question here is partly one of the construction of the will and partly one of administration. No real question arises upon the abatement of the capital value of the annuity and the legacies, but the determination of the respective rights of the annuitant and the legatee entitled to the appropriated fund in remainder upon the annuity is much more difficult. Thus the real question in the case is whether the annuitant shall receive her full annuity or an annuity of an amount abated in proportion to the reduction of the capital of the appropriated fund. This difficult question is resolved in favour of the annuitant.

AS TO ABATEMENT OF ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 358, 359, para. 669; and FOR CASES, see DIGEST, Vol. 23, pp. 420-423, Nos. 4913-4937.]

Cases referred to :

- (1) *Re Cottrell, Buckland v. Bedingsfield*, [1910] 1 Ch. 402; 23 Digest 421, 4924; 79 L.J.Ch. 189; 102 L.T. 157.
- (2) *Re Richardson, Richardson v. Richardson*, [1915] 1 Ch. 353; 23 Digest 420, 4914; 84 L.J.Ch. 438; 112 L.T. 554.
- (3) *Re Dempster, Borthwick v. Lovell*, [1915] 1 Ch. 795; 23 Digest 420, 4918; 84 L.J.Ch. 597; 112 L.T. 1124.
- (4) *Wroughton v. Colquhoun* (1847), 1 De G. & Sm. 357; 23 Digest 420, 4920.
- (5) *Wright v. Callender* (1852), 2 De G.M. & G. 652; 23 Digest 421, 4922; 21 L.J.Ch. 787; 19 L.T.O.S. 308.
- (6) *Re Tootal's Estate, Hankin v. Kilburn* (1876), 2 Ch.D. 628; 39 Digest 159, 518.
- (7) *Re Ellis, Nettleton v. Crimmins*, [1935] Ch. 193; Digest Supp.; 104 L.J.Ch. 53; 152 L.T. 370.

ORIGINATING SUMMONS for the determination of the principles to be applied in the abatement of an annuity directed to be paid out of an appropriated fund, there being a gift over, upon the death of the annuitant, of the fund or what might be left of it.

Evelyn Riviere for the plaintiffs, the executors and trustees of the will of the testator Archibald Keightley Nicholson.

R. H. Hodge for the first defendant, who claimed to be entitled to an annuity under the testator's will.

M. R. C. Overton for a pecuniary legatee.

- A *Gerald Upjohn* for the School of English Church Music, who claimed to be interested in any sum provided to meet the annuity, and also to be interested in residue.

J. S. Bennett for the Attorney-General.

Hodge : The annuity has to be paid in full before the School of English

- B Church Music takes anything. There is not sufficient to provide the annuity in full, and there must be a valuation and an abatement. It is quite plain, upon the construction of the will, that the abated fund is available as regards both capital and income for the payment of the annuity in full. [Counsel referred to *Re Cottrell*, *Buckland v. Bedingfield* (1), *Re Richardson*, *Richardson v. Richardson* (2), *Re Dempster*, *Borthwick v. Lovell* (3), and *Wroughton v. Colquhoun* (4).]

Overton referred to *Wright v. Callender* (5).

Upjohn : The annuitant and the School of English Church Music are both pecuniary legatees, and their rights rank *pari passu*. Equity

- D must be done between the annuitant and the remainderman of the settled fund. Therefore the annuitant would be paid the income of the settled fund. It was never intended that the annuitant should have priority over all other legatees. If there was no deficiency of assets, this direction for appropriation would be in derogation of her rights. It is a fundamental rule that, unless in the will there are some very strong words giving priority, all the pecuniary legacies abate proportionately, if there is a deficiency. It would not be fair to put the remainderman in the position of a residuary legatee. In any event, the annuitant should have an abated annuity, with a similar right of taking capital, and that leaves
- F my client with an abated amount of capital. [Counsel referred to *Re Tootal's Estate*, *Hankin v. Kilburn* (6), *Re Cottrell*, *Buckland v. Bedingfield* (1), *Re Ellis*, *Nettleton v. Crimmins* (7), and *Re Richardson*, *Richardson v. Richardson* (2).]

- G *Bennett* : If the gift were one of £5,000 to the School of English Church Music on condition that the school paid an annuity of £250, and if there were a deficiency, there would have to be an abatement of the capital, and consequently there would have to be an abatement of the annuity also.

- H *CROSSMAN, J.* : The first question raised by this summons is one which arises in the administration of the estate of Archibald Keightley Nicholson. The first question is whether it is a matter of administration, or partly one of construction and partly one of administration. I take the view that it is partly one of construction, and I think I have then to consider what is to be done in circumstances which the testator did not

contemplate when he made his will. The will was made on June 7, 1935. The testator appointed the plaintiffs his executors and trustees, and gave certain pecuniary legacies, including a legacy of £1,500 to the second defendant, Gerald Edward Roberts Smith. Then he gave to Leila Marion Crawford, the first defendant, an annuity of £250 per annum free of duty and free of income tax. The will reads :

5. My trustees shall appropriate and retain a sufficient part of my estate or of the investments representing the same as a fund for answering by the annual income thereof the said annuity hereinbefore given to the said Leila Marion Crawford and the expenses incidental to the payment thereof but without prejudice to the powers of sale and investment and transposing investments hereinafter contained and I declare that if the annual income of the appropriated fund shall at the time of appropriation be sufficient to satisfy such annuity such appropriation shall be a complete satisfaction of the trust or direction hereinafter declared to provide for such annuity and that the annuitant shall thereafter have no claim against or right to resort to any part of my estate (other than the said appropriated fund) for the payment of her annuity and further that if the income of the appropriation fund shall at any time prove insufficient for payment in full of such annuity resort may be had to the capital thereof from time to time to make good such deficiency and the surplus income (if any) of the said fund from time to time remaining after payment of such annuity shall be applicable as income of my residuary estate. As and when the said annuity shall cease I give the appropriated fund or so much thereof as shall not have been applied in payment of the said annuity to the School of English Church Music founded by my brother Sydney Hugo Nicholson or in the event of such school not being still in existence I direct that such money shall be given to some similar institution having for its object the same purpose namely the furtherance of music in church worship. A B C

Then there are other pecuniary gifts, and then another gift which does not affect the matter, and then follows cl. 12 of the will, which reads as follows : D

I give and bequeath all the real and personal property whatsoever and where-soever of or to which I shall be seised possessed or entitled at my death or over which I shall then have a general power of appointment or disposition (except property otherwise disposed of by this my will or any codicil hereto) unto and to the use of my trustees their heirs executors or administrators respectively upon trust to sell and convert the same into money at such time or times and in such manner as they shall think fit with power to postpone such sale and conversion during such period as they shall think proper and to retain any investments existing at my death without being responsible for loss. My trustees shall out of the moneys to arise from the sale calling in and conversion of my residuary estate and out of my ready money pay my funeral and testamentary expenses and debts and the legacies given by this my will or any codicil hereto and make provision for the payment of all duties. My trustees shall pay one-half of the income of the residue of the said moneys (which moneys and the property for the time being representing the same are hereinafter called "the trust fund") to my brother Sir Charles Archibald Nicholson baronet during his life and from and after his death I give one-half of the trust fund both capital and income to the School of English Church Music founded by my brother Sydney Hugo Nicholson or in the event of such school not being still in existence at my death I direct that such moneys shall be given to some similar institution having for its object the same purpose namely the furtherance of music in church worship. My trustees shall pay the other half of the income from the trust fund to my brother Sydney Hugo Nicholson during his life and from and after his death I give such half of the trust fund both capital and income to and for the same objects and purposes as are hereinbefore contained with regard to the half-share in which my brother Sir Charles Archibald Nicholson is given a life interest. E F G

The testator died on Feb. 25, 1937, and the will was proved on May 24, 1937. The estate available for the payment of pecuniary legacies and of the annuity is about £14,900. The pecuniary legacies amount to about £9,021, including the duty payable on those given free of duty, H

and the amount which would be required to be appropriated to provide for the annuity is about £9,500. The defendant Leila Marion Crawford was born on Nov. 29, 1904, and the value of her annuity, at the date of the testator's death, was about £7,646. Therefore the position is that there is not sufficient to provide for what the testator intended

A should be done. In these circumstances, on Feb. 22, 1938, the plaintiffs took out this originating summons, making Mrs. Crawford, Mr. Smith, the School of English Church Music, and the Attorney-General defendants, and asking by para. (1), as amended, for the determination of the question :

B Whether upon the true construction of the will, and in the event which has happened of a deficiency in the assets of the testator, the annuity of £250 per annum free of duty and income tax given by the will to the defendant Leila Marion Crawford ought to be provided for by assessing (a) the value of the said annuity as at the date of the death of the testator or (b) the amount of the fund by the said will directed to be appropriated for answering by the annual income thereof the said annuity and the expenses incidental to the payment thereof, and by the abatement of the amount of such value or fund along with the pecuniary legacies given by the said will or how otherwise the same ought to be provided for.

C That is the question which I have now to determine. There are two alternatives put forward. The annuitant and Mr. Roberts Smith by their counsel contend that, in the circumstances, the proper course is

D to value the annuity as at the date of the testator's death, and to treat the value as a pecuniary legacy, and to make this pecuniary legacy and the other pecuniary legacies abate proportionately, and pay the abated sum to the annuitant, and so destroy altogether the gift of the appropriated fund, after the death of the annuitant, to the School of English

E Church Music. Counsel for the annuitant in the alternative submits that, if the right view is that there is no right to have the abated amount in respect of her annuity paid over to her, the proper course is to ascertain the amount which would have to be set aside or appropriated if the will were carried out strictly, and then to treat that as a legacy, and then

F pay the annuity of £250 (with the addition of tax) out of the income of the fund and, so far as the income is insufficient, to pay the annuity out of the capital of the fund, the fund, on cesser of the annuity, to go over to the School of English Church Music. The School of English Church Music, on the other hand, contends that the right course to adopt is the

G second alternative which has been put forward—that is, to assess the amount of the fund which is to be appropriated, and to abate that, and to pay out of that abated sum in respect of the annuity an annual sum abated from the amount of the annuity in proportion to the reduction of the appropriated sum, making up that amount, so far as income is

H insufficient, out of the capital of the fund, the capital, decreased only in that way, to go over, on cesser of the annuity, to the School of English Church Music. I feel that this is not a case where the annuitant is entitled to have paid over to her the abated value of the annuity at the death of the testator. It is true that, in an ordinary case, where the estate is insufficient, that would apply, but it does not apply in the case of the

present will, because by cl. 5 in effect the annuity is to be paid out of the income of a settled fund. The fund is in terms given over to a legatee. It is as much a legacy, therefore, as are the other sums which are given. It is true that it may be reduced during the lifetime of the annuitant, but it is not residue. It is quite clear that there is a legacy to the School of English Church Music of this appropriated fund, which is not in the same position as residue. In these circumstances, I think that the answer to the first question must be that the annuity is to be provided for by assessing at the date of the death of the testator the amount of the appropriated fund required to be set aside to answer by the annual income thereof the annuity and the expenses incidental to the payment thereof, and by the abatement of the amount of that fund along with the pecuniary legacies given by the will. A B

What I decide is that it is not the proper course to value the annuity and pay that over to the annuitant, because that would unnecessarily defeat the intention of the testator, as expressed in cl. 5. The effect would be to destroy the pecuniary legacy to the School of English Church Music. It seems to me that the reasonable method of giving effect to cl. 5 is to ascertain the amount which would have to be set aside to provide for the annuity if it could be paid in full. Then the appropriated fund should be treated as a legacy, and abated with the other pecuniary legacies. They clearly must abate proportionately. The abated fund has to be set aside for the payment of the annuity and on the cesser of the annuity the fund, or so much thereof as has not then been applied in payment of the annuity, will go over to the School of English Church Music. I have now to decide how much of that fund is to be paid to the annuitant in the meantime. Mr. Upjohn contends that the annual amount of the annuity should be abated proportionately to the reduction in the amount of the capital sum. As Mr. Hodge says, I think that that is going too far. When I have cut down the appropriated fund, I have done all that is necessary in the way of reduction, and the annuitant ought to be paid her full annuity out of the fund set aside. This does not affect the pecuniary legatees at all, because they have got all to which they are entitled. The question then is only between the annuitant and the school which takes after her death. I think that the proper course is to pay her annuity in full, and, in so far as the income is insufficient, it must be paid out of capital. Even if that exhausts the capital in the lifetime of the annuitant, that is what the testator intended when he made his will. None of the cases to which I have been referred covers the question to be decided here. C D E F G

Solicitors: *Knapp-Fisher & Wartnaby* (for the plaintiffs); *A. & G. Tooth* (for the first defendant); *Knapp-Fisher & Wartnaby* (for the second and third defendants); *Treasury Solicitor* (for the Attorney-General). H

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

OLDS DISCOUNT CO., LTD. v. JOHN PLAYFAIR, LTD.

[KING'S BENCH DIVISION (Branson, J.), June 16, 1938.]

Moneylending—Financing hire-purchase agreement—Sale of book debts—Whether moneylending transaction—Moneylenders Act, 1927 (c. 21), s. 1.

A The defendants were credit drapers, selling goods upon terms that the price should be paid by instalments. The plaintiffs were a hire-purchase finance company. The defendants in consideration of the payment of a sum of money assigned to the plaintiffs certain debts, being the above instalments to become due. The defendants undertook to collect these debts at their own expense as agents of the plaintiffs, and to remit to the plaintiffs all money so collected. The defendants also gave a series of monthly bills for further securing these book debts. It was then provided that, when all the instalments and other moneys payable in respect of such book debts should have been paid, then the plaintiffs should pay a further sum in respect of the purchase price of the book debts. It was contended that this transaction was in effect a money-lending transaction, and was unenforceable, as the plaintiffs were not registered moneylenders, and the provisions of the Moneylenders Act, 1927, had not been complied with:—

C HELD: the transaction was a sale of book debts, and not a money-lending transaction, and it was therefore enforceable.

D [EDITORIAL NOTE. The agreement here entered into, as the judgment states, is one of the common forms by which hire-purchase agreements are financed. The actual transaction which is here financed seems to have been a sale where the purchase price was to have been paid by instalments rather than a hire-purchase agreement, but this does not affect the result of the case. The decision herein seems to make it clear that the ordinary method of financing hire-purchase transactions is not a moneylending operation, and that therefore finance companies engaging in these operations do not require to be registered under the Moneylenders Act, 1927.

E AS TO WHO IS A MONEYLENDER, see HALSBURY, Hailsham Edn., Vol. 23, p. 181, paras. 263, 264; and FOR CASES, see DIGEST, Vol. 35, pp. 202, 203, Nos. 282-291.]

Cases referred to:

(1) *Re George Inglefield, Ltd.*, [1933] Ch. 1; Digest Supp.; 101 L.J.Ch. 360; 147 L.T. 411.

F (2) *Olds Discount Co., Ltd. v. Cohen* (1937), Unreported; Oct. 22.

CONSOLIDATED ACTIONS. The point at issue in these actions is whether or not the financing of a hire-purchase agreement by means of an assignment of book debts is a moneylending transaction.

G *Neville Laski, K.C.*, and *Sylvester Gates* for the plaintiffs.

H. C. Leon for the defendants.

H BRANSON, J.: In the first of these two consolidated actions, the plaintiffs sue the defendants as acceptors of a bill of exchange for £195 6s. 8d. which has been duly presented and dishonoured. In the second one, the plaintiffs claim a declaration that the defendants are trustees for the plaintiffs of all moneys received and to be received by them in respect of the book debts assigned by them to the plaintiffs by four assignments in writing dated Sept. 6, Sept. 16, Sept. 26 and Dec. 15, 1937, and specified in the schedules to the said assignment. They also

ask for an account, and for an injunction restraining the defendants from paying away or parting with any moneys received or to be received by them in respect of the said book debts otherwise than by paying them to the plaintiffs. They also ask for the appointment of a receiver to collect the book debts.

The defences to both these claims are, first of all, a general denial of the indebtedness, a denial that the defendants accepted the bills sued upon, and then an allegation that, if they accepted the bills, the bills are collateral security for a moneylending transaction. There is an allegation that the plaintiffs are, at all relevant and material times, moneylenders, and carry on business as such, but are not licensed as moneylenders, and there is an allegation that the plaintiffs have not complied with any of the provisions with which, as moneylenders, they are bound to comply. A
B

The facts on which the case arises may be shortly stated in the following manner. In Sept., 1937, the defendants, who carried on business as credit drapers, were desirous of obtaining a loan against book debts. As I understand it, the defendants' business consisted in selling goods to people upon terms that they should be paid the price of those goods by instalments spread over various periods, and, in order to enable them to continue that business, they wanted money. They wanted to be able to have in their hands for use some of the price for which they had sold their goods, at a period earlier than that at which the purchasers of those goods had contracted to pay them. In those circumstances, they approached the plaintiffs. C
D

The plaintiffs are a company who are not registered moneylenders, and who deny that they carry on a moneylending business. Their business is one which is well known from many cases in these courts—namely, the business of financing hire-purchase agreements. In order to carry on that practice, they have certain printed forms of agreement into which they are accustomed to enter with people who are desirous of obtaining the facility which they are prepared to afford. E
F

In these circumstances, meetings took place between representatives of the plaintiffs and of the defendants, and, as the result of those meetings, certain documents came into existence to which I shall have to refer in further detail. I may say at once that, upon the face of those documents, it is perfectly clear that the transaction entered into between these parties was not a moneylending transaction at all, but a transaction under which the plaintiffs purchased from the defendants certain book debts for certain payments, with the arrangement that, when the plaintiffs had been repaid, either by direct collection by them of the book debts or by the operation of the agreement entered into, under which in the first instance the defendants were to collect the book debts and pay over to the plaintiffs the sums received by them in respect of them—when the plaintiffs had been paid off the amount at which they had purchased the book debts, plus the expenses, if any, which they had incurred, the G
H

rest of the book debts should be collected by the defendants, and should be retained by them in discharge of a further sum of purchase money which, in those events, would become payable from the plaintiffs to the defendants.

After the decision of the Court of Appeal in *Re George Inglefield, Ltd.* (1),
 A and the decision of PORTER, J., as he then was, in *Olds Discount Co., Ltd.*
 v. *Cohen* (2), there is no doubt that, if it be the fact that the agreement
 entered into between these parties was an agreement for the purchase
 of book debts, the agreement is a perfectly good and lawful agreement,
 notwithstanding that the operative reason in the minds of the defendants
 B for entering into it was that they desired to raise money as a temporary
 matter in the same way as they would have raised it if they had merely
 entered into a transaction of loan. In other words, it is the nature of
 the agreement entered into, and not its object, at which the court has
 to look in order to decide whether in any particular case the agreement
 C is a moneylending agreement or otherwise.

I do not think that it is necessary for me to refer in any further detail
 to the two cases which I have cited. There is no distinction between
 them, and they both lay down the law in perfectly clear language. What
 remains for me to do is to look at the circumstances of the present case,
 D and to see whether or not the allegation made by the defendants that
 this was a moneylending transaction is made out. As I have said, there
 is no doubt that, if the agreement between the parties is properly repre-
 sented by the contracts into which they have entered, then beyond
 question it is not a moneylending agreement, but an agreement for the
 E purchase and sale of certain book debts.

There are several agreements—four, to be exact—under the last of
 which this present case arises. They were all in the same terms except
 for figures, and it is only necessary for me to refer to the provisions of
 any one of them. According to the agreement—which, I think it is quite
 F plain from some of the phrases in it, is a printed form used by the plaintiff
 company in connection with the business of financing hire-purchase
 agreements—the scheme of it is as follows. In the first clause in one
 recital, it is stated that the vendor—that is in this case the defendant
 company—has for some time past carried on the business of selling
 G goods on easy payment terms, and in connection with such business has
 become entitled to the book debts particulars of which are set out in
 the schedule. Then it recites that payments amounting to the totals
 set out in the schedule are due, or will become due, to the vendor in
 respect of the book debts. Then by cl. 3 it recites that the vendor has
 H agreed with the purchasers for the absolute sale to them of the moneys
 due from the said customers and the benefits of the said book debts at
 the price named. Then it provides that it has been further agreed that,
 when all the terms and conditions hereof to be observed by the vendor
 have been fully observed and complied with, the vendor shall be entitled
 to be paid the further sum named. Then, under cl. 4, it is recited that,

for the purpose of facilitating the collection by the purchasers of the instalments and amounts due, and to become due, in respect of book debts, it has been agreed that the vendor shall, as agent of the purchasers, collect them. I am not reading that further. It is also recited that it is intended that, upon the execution of this agreement, the purchasers shall forthwith give the customers notice of this assignment, and that A
all instalments and amounts now due, and henceforth to become due, are the property of the purchasers, but are, until notice from the purchasers, to be paid to the vendor. Then it is recited that the vendor has further agreed, in order to ensure the punctual payment by the customers of such instalments and amounts now due, and henceforth B
to become due, and also to ensure the punctual remittance thereof to the purchasers, to give to the purchasers a series of monthly bills of exchange, and to give the guarantee as hereinafter mentioned.

Then, having made those recitals, the agreement goes on to provide that, in consideration of a named sum, now paid, the vendor as beneficial C
owner assigns to the purchasers all the debts and other moneys set out in the schedule. Then there are various declarations made by the vendor as to the accuracy of the schedules, and as to the delivery to the customers of the goods in respect of which the book debts have arisen. Under subcl. (3) the vendor undertakes at his own expense to act as D
the agent of the purchasers, and as such agent to collect, on behalf of the purchasers, and receive from the customers, all instalments and amounts now due, or henceforth to become due, from time to time as arranged, and to remit to the purchasers all moneys so collected by him. Then, under subcl. (5), provision is made for the giving of a series of E
monthly bills by the vendor to the purchasers for the purpose of further securing to the purchasers the payment of all moneys due, or to become due, under the said book debts. Then it is agreed that the liability of the vendor in respect of the bills is to extend only to such a total sum as shall be equal to the total amount which ought to be paid, and is F
not in fact paid, under the said book debts, and that, upon receipt by the purchasers of payments equal to a named sum, the bills of exchange shall be delivered up to the vendor for cancellation.

Then it is provided that, when the whole of the instalments, sums and other moneys payable in respect of the book debts, including the option G
purchase price—I read those words as being the words that indicate that this form is intended to apply to a hire-purchase agreement in the first instance—shall have been duly and regularly discharged by the customers according to the terms and conditions thereof, and shall have been received by the purchasers either directly or through the agency H
of the vendor, and when the obligation of the vendor under his guarantee shall have been wholly performed, then the purchasers will pay to the vendor a further sum in respect of the purchase price of the book debts in question. That is the frame of the agreement. As I have said, it seems to me to be exactly within the decision of the Court of Appeal

in the *Inglefield* case (1) and that of PORTER, J., in *Olds Discount Co., Ltd. v. Cohen* (2).

However, it is said on behalf of the defendants : “ In spite of the fact that we have entered into the agreements which are before the court, and which in express terms are agreements for the purchase and pay-
 A ment of book debts, we ask the court to say that that does not represent the real transaction between the parties, and that the real transaction between the parties was not a transaction of purchase and sale, but a mere moneylending transaction to be repaid by monthly payments secured by bills of exchange.”

B No evidence has been called by the defendants of anybody who was a party to these agreements who has dared to come into the witness-box and say that that was the fact of the case. That is not surprising, because, when people of sound understanding and business experience put their hands to an agreement which expressly says that it is an agree-
 C ment for the absolute sale and purchase of book debts, it is asking a good deal for those persons to come before the court and to say : “ Notwithstanding that we entered into that agreement, it is quite untrue to recite, as we have recited, that the fact was that we were entering into an ordinary transaction of loan, and the reason why we want the
 D court to believe us when we say that is that we shall be able to take advantage of the Moneylenders Act and repudiate the agreement into which we have entered.”

The points on which I am asked to come to that conclusion are the following. Mr. Leon says, in the first place : “ Look at the letter of
 E Sept. 2, 1937, and you will see, first of all, that the plaintiffs themselves use the word ‘ repayable,’ and, when you see the word ‘ repayable,’ you must ask yourself what is to be repaid, and the answer can only be the loan that has been made.” Exactly the same argument was used in the case before PORTER, J., as he then was. The same sort of use was
 F made of the fact that the word “ repayable ” appeared in that case, and PORTER, J., thought that the mere fact that that word was used, when he had got before him an assignment in almost exactly the same, if not exactly the same, form as that which is before me, was not a matter which ought to influence him to disregard the transaction into which the
 G parties had entered, and to say that it did not represent the transaction to which they had agreed. The next point was that, whereas cl. 4 of the recital says that it is intended that the purchaser shall forthwith give customers notice of the assignment, no such notice was given. One can well see that the giving of notice to customers might seriously have
 H affected the business of the defendant company, and, though no doubt one would expect to find, in an agreement for an assignment of the book debts, power reserved by the purchasers of the book debts to give notice forthwith, it is going a very long way to say that, because they did not stand upon their rights and give such a notice while matters were going smoothly between the two companies, that is any indication that the

agreement which they are entering into was not intended to be an agreement between the parties, but was a mere cloak for some other agreement, which was the real contract into which they were entering.

Exactly the same thing applies to the next point that is taken, which is that, whereas cl. 3 of the operative part of the deed indicates that the vendors are to remit the moneys collected by them from time to time to the purchasers as arranged, there was no arrangement made as to the remission *in specie* of the money collected, the parties being content with the payment month by month of the monthly bills, which the agreement provides shall be given in order to secure the payment by the debtor of the book debts, and their handing over by the defendant company to the plaintiffs. Again, one can quite see how very much simpler it was, as a matter of practice, that, instead of an account being kept of the exact amount which was received in respect of the book debts in any particular month, and that amount being paid over, with some kind of addition if it did not amount to the full periodical payment of the debts accruing from the debtors to the defendant company, the matter should be dealt with in this way. Parties are perfectly entitled to carry out an agreement not in the exact form in which they have contracted to do it, but in an equivalent form, so long as it is done by agreement between the parties, and the fact that a simpler method of carrying it out is used in practice is not one, it seems to me, that the court ought to seize hold of in order to say that the document which has been entered into does not correctly represent the agreement between the parties. Another argument on exactly the same lines is based upon a provision in cl. 5 about the monthly bills of exchange. What I have said about the adoption of the plan of receiving payment by means of those monthly bills of exchange is sufficient to deal with that argument also.

The result of the whole thing is that I have before me formal agreements formally entered into and signed by the parties on both sides, and those agreements, if they represent the true agreement between the parties, are clearly not moneylending agreements. Unless there was evidence upon which it would be proper for the court to act that the parties had deliberately entered into those documents knowing that they did not represent what had been agreed between them, but that what had been agreed between them was something quite different, it seems to me that the proper course for the court to take is to accept the formal agreements between the parties, and to decide their rights according to those agreements.

As I have already said, there seems to me to be no reason which can be assigned for there being a hidden agreement at the back of these documents, unless it be the reason suggested by Mr. Leon—namely, that to deal with the matter in this way would allow the defendant company, instead of having to submit to a registration of the charges to secure the loan which would have to be registered in order to provide security, to keep their creditors in ignorance of the fact that they were

charging their book debts, and yet get the advantage of getting a loan upon them. I do not see why I should, at the request of the company, be anxious to hold that the directors of the company were guilty of a fraud of that kind. They may think it worth while to allow it to be suggested in order to get out of having to pay their just debts, but I have considered the matter, and have come to the conclusion that it is plain that the form of a sale of the book debts was deliberately adopted by these persons in order to avoid having to take a loan or make a loan, and so in order to avoid any danger of its being held that they were indulging in a moneylending transaction, and therefore that they ought to have been registered as moneylenders. For these reasons, I have come to the conclusion that the defence fails, and that the plaintiffs are entitled, first of all, to judgment for £198 19s. 2d. upon the bills of exchange.

Solicitors : *Sidney Pearlman* (for the plaintiffs) ; *Lucien Fior* (for the defendants).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

NOTE.

The following is the judgment of PORTER, J., in the unreported case, *Olds Discount Co., Ltd. v. Cohen*, so far as it deals with the question whether the financing of a hire-purchase contract is moneylending within the meaning of the Moneylenders Acts. It will be noted that in this case the finance company buys the goods, whereas in the case above reported it buys the book debts, being the instalments to be paid in respect of the purchase price.

PORTER, J. : It is said by the plaintiffs : " Under our arrangement with the company (Bright's Furniture Depositories), we have purchased these goods, and we are the owners of them, and we have let them out on hire through Messrs. Bright's Furniture Depositories as our agents, and we are entitled to the ownership of the goods all the way through, and to collect the money for the same, although we have made such arrangements with Messrs. Bright's Furniture Depositories as may not compel us to do so."

On the other hand, the defendants say that in fact there was no such sale at all, that this so-called sale was merely a sham, and that this transaction was merely a method of borrowing money by Messrs. Brights from the plaintiffs, and that, therefore, the plaintiffs were moneylenders, and, not being registered as such, they cannot recover the money. There is something to be said for that argument, but what one has to remember—and I think that this might be said of almost all bodies which finance hire-purchase agreements (and they are very numerous at the present time)—is that their real function is the lending of money, and it must necessarily be so. Although that may be the object and the intention for which they exist, the question is not with what object they employ their money, but the method they have of employing it. If the method employed constitutes a sale, then the transaction is not only the lending of the money but also a purchase of the goods, even although it is only for the purpose of lending money that it is being done in that way. Therefore it seems to me that the question to be decided in this case is whether the plaintiffs have succeeded, by means of the form they adopted, in making a real, though technical, purchase of the goods, or whether they have merely had a security on the goods, the goods always remaining the property of Messrs. Bright's Furniture Depositories, and never having passed to Messrs. Olds Discount Co., Ltd.

If I may put it roughly, the method which I think the plaintiffs have adopted is this. They said to the defendants : " If you enter into a hire-purchase agreement on our behalf, you must get the signature of your customers to the purchase of certain goods, and, having done that, you must then send us the names of the people with whom you are dealing, in order to discover whether those customers are the kind of people with whom business should be done. You must obtain what is called a 'status report,' and, having got that status report, you must send it on to us, together with a document which is called a schedule, and which in the agreement is called an offer of sale. You must send the offer of sale and the status report

to us, and we will accept them, if satisfactory." If Messrs. Olds Discount Co., Ltd., approved of the contract made, they sent back the schedule approved, they kept the hire-purchase agreement, and they provided the money to the extent of two-thirds of the amount outstanding, Messrs. Brights receiving the deposit and keeping it as part of the price of the goods so purchased. As I say, Messrs. Olds Discount Co., Ltd., advanced two-thirds, less a certain discount for their profit, and, at the end of the time, when that two-thirds had been paid by the purchasers, Messrs. Olds would be entitled to receive the rest of the payments and to hand them over to Messrs. Bright's Furniture Depositories as being the remainder of the advance which had been made. However, by way of simplifying the matter, they in fact permitted Messrs. Brights to collect the remainder and keep it as part of the purchase price. Then, to complete the picture, it is provided by the agreement that Messrs. Bright's Furniture Depositories shall be *del credere* agents—that is, that Messrs. Brights shall guarantee the payment of the instalments to Messrs. Olds Discount Co., Ltd. Therefore, in saying, "You may collect that as part of the price, and we will complete our payment by allowing you to collect the rest of the instalments," Messrs. Olds are not subjecting Messrs. Brights to the danger of losing the money, because Messrs. Brights owe the money to Messrs. Olds Discount Co., Ltd., being *del credere* agents. I am not saying that that does not run rather close to the line, but I think that they have just managed to make a water-tight agreement by which there is a sale to them of the goods, and by which, if it came to a question of seizing the goods at any time, they would be the persons entitled to seize the goods, even after the whole of the amount which they had advanced in cash had been paid, and even at a time when the collection of the rest of the instalments was being made by Messrs. Brights and kept by them under the agreement as part of the amount which Messrs. Olds Discount Co., Ltd., had contracted to pay.

That kind of scheme is obviously a scheme designed to get round the dangers of the Act. In a sense, I suppose that these financing companies, in advancing money to another company, do not want to be bothered with the goods themselves, and, if they adopt that form of procedure, it seems to me that they have done sufficient to keep themselves out of the dangers of the Moneylenders Act.

I have been referred by Mr. Lewis to two cases, one of which was decided by the House of Lords and is quoted in *EARENGEY ON HIRE PURCHASE*, p. 22. Each case must, of course, depend on its own merits and on the facts in that particular case, and I would point out that a certain amount of criticism in regard to a general application is made in *EARENGEY ON HIRE PURCHASE*, in the second paragraph, from p. 24 to the end of that part of the section.

The other case quoted to me by Mr. Lewis was *Re George Inglefield, Ltd.* (1). This was a case in which EVE, J., held that the agreement in that particular case was merely a device to avoid registration, but the Court of Appeal took a different view. In principle, the case decided by the Court of Appeal is like the present one, although each case must depend on its merits, but there is something to differentiate that case from the present case, and, as I pointed out in the course of the argument, the position of the plaintiffs in the present case is, in my view, rather stronger than it was in that case.

That being the position, and, as I hold, the question being, not what the object of the plaintiffs was, but the method by which the object was achieved, what I have to determine is whether or not there was a sale to Messrs. Olds Discount Co., Ltd., by Messrs. Bright's Furniture Depositories. Mr. Lewis in his argument said that there was no sale, that no property was ever sold, and that no offer and goodwill were ever accepted. He said that there was only one schedule sent, and that that was not an offer. I think that the schedule sent was an offer, and, as far as I have had evidence, what appears to have happened is that that form was sent, together with the hire-purchase agreement, stating that the goods had been sold under the agreement. It is quite true that it uses the word "sold," and not "offered for sale," but that does not seem to me to make a substantial difference, and I do not see why it is not an offer accepted by its return. As far as I know, the signature put by Messrs. Brights on the hire-purchase agreement was not put on until after the schedule was returned. I have no evidence to the contrary. In any case, I think that there was an offer, that it was accepted by the return of the schedule, and that the property passed to Messrs. Olds. The date on which it passed, however, must depend on evidence which I have not got as to when the signature on the hire-purchase agreement was put there, the general scheme being, as I understand, that, subject to Messrs. Olds' concurrence, Messrs. Brights were authorised to make hire-purchase agreements with the customers for goods which were the property of Messrs. Olds.

The second argument put forward was that it appears from the correspondence that there was in fact no sale. I cannot think that one can say that the agreement is upset by the terms of the correspondence. The force of the argument by

Mr. Lewis was put on the word "repayable," which he said was inconsistent with the word "purchase," because one cannot repay money advanced by way of purchase, but only money received by way of loan. There is some force in that argument, but I do not think that it is sufficient to enable me to say that this was a sham agreement, or that the goods did not become the property of Messrs. Olds Discount Co., Ltd. The same argument applies to the method of book-keeping employed by Messrs. Olds. It was said that in truth and in substance they kept their books in such a way as to make them a finance company rather than the owners of goods for sale, but, even if it was convenient for them to keep their books in that way, if in fact the transaction between them and Messrs. Brights amounted to a purchase, the fact that they kept their books in a particular way would not prevent it from being a sale to them. In other words, if I choose to purchase goods and agree that the sellers shall repurchase them at a later stage, the fact that I put that transaction down in my books in such a form that it looks like a loan will not make it any the less a transaction of sale and an agreement to repurchase, since in that transaction the goods would be mine at the time of the original sale, although both the parties contracted for their resale at a later date.

There was one further proposition put forward by Mr. Lewis—namely, that, the money being advanced in cash, and that cash being repaid, therefore, so far as Messrs. Olds are concerned, the transaction was closed when the repayment was made, more particularly as the hire-purchase agreement and other documents were sent back, and the books were closed at that time. That is quite true, but the question is whether that makes the transaction a loan, and not a sale. Here again I think that the question is not what the object of the parties was, whether it was to provide money on loan or to buy goods, provided that in fact by the agreement there has been a purchase of the goods. It is quite true that one has to look narrowly at this return of the hire-purchase agreements. If, however, the goods had been purchased at the time stipulated in the agreement, the return of the hire-purchase agreement is not unnatural, inasmuch as Messrs. Olds, the owners of the goods, stipulate that part of the means by which the price of the goods should be paid by them to Messrs. Brights should be by allowing Messrs. Brights to collect the money which belonged to Messrs. Olds and keep it themselves, instead of handing it over to Messrs. Olds after they had collected the whole amount and receiving back that portion of the purchase price which was unpaid. That is consistent with the form of the hire-purchase agreement, and, though the size of the print is not very large, it is as large as most of the rest of the contract of hire purchase. It reads: "Messrs. Bright's Furniture Depositories, agents for Messrs. Olds Discount Co., Ltd., hereinafter called the owners." Then they make the contract. That seems to me to be carrying out the agreement, and it seems to me that in fact the contract was made with Messrs. Olds Discount Co., Ltd., and not with Messrs. Brights, and on the face of it it shows to the hire-purchaser that he is contracting with Messrs. Olds, and that Messrs. Olds are the persons who own the goods. Supposing that Messrs. Olds should be minded to say to him, "You need not pay any more of the price of these articles," he would be entitled to say to Messrs. Brights, when they came to him to ask him to pay the money: "No. My contract is with Messrs. Olds Discount Co., Ltd., and not with you. You are agents for them only to collect the money, and you must take your remedy against Messrs. Olds, and not against me." I think that that is sufficient to enable them to escape the dangers of the Act

INLAND REVENUE COMMISSIONERS v. BRITISH SALMSON AERO ENGINES, LTD. BRITISH SALMSON AERO ENGINES, LTD. v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
May 11, 12, 1938.]

Income Tax—Royalties—Licence to construct and use—Consideration—Lump sum payable in instalments and further sum payable each year during continuance of licence—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 21.

An English company acquired by licence from a French company the sole right to manufacture and sell in the British Empire for a period of 10 years the aeroplane engines made by the French company. In

respect of this licence the English company was to pay to the French company a lump sum of £25,000, payable as to £15,000 on the execution of the licence and as to the remainder by two further sums of £5,000 payable respectively six months and twelve months thereafter. In addition to the foregoing payments, an annual royalty of £2,500 was to be paid during the following 9 years. Payments were to be made in Paris :—

HELD : (i) the lump sum of £25,000 was a capital payment, and not assessable to income tax.

(ii) the royalty of £2,500 was assessable to income tax.

(iii) (*per* SCOTT, L.J.) where the special commissioners have found that a certain payment is a capital payment, the court ought to be very slow to disagree with that skilled opinion.

Decision of FINLAY, J. ([1937] 3 All E.R. 464), *affirmed*.

[EDITORIAL NOTE. It will be noted that Rule 21 itself uses the word “royalty,” and, as the annual payment is here described as a royalty, it would be very difficult to resist the conclusion that this payment is within the rule, and therefore must be made subject to deduction of tax. So far as the lump sum payment is concerned, there was a finding by the commissioners that it was of a capital nature, and the court have felt themselves bound by this finding.

AS TO ROYALTY PAYMENTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 236, 237, para. 476 ; and FOR CASES, see DIGEST, Vol. 28, pp. 18-20, Nos. 92-98, and Supp.]

Cases referred to :

- (1) *Lanston Monotype Corpn., Ltd. v. Anderson*, [1911] 2 K.B. 1019 ; 28 Digest 51, 261 ; 80 L.J.K.B. 1351 ; 105 L.T. 398 ; 5 Tax Cas. 675.
- (2) *Constantinesco v. R.* (1927), 43 T.L.R. 727 ; 28 Digest 19, 97 ; 11 Tax Cas. 730.
- (3) *Mills v. Jones* (1929), 142 L.T. 337 ; Digest Supp. ; 14 Tax Cas. 769.
- (4) *American Thread Co. v. Joyce* (1913), 108 L.T. 353 ; 28 Digest 30, 157 ; 6 Tax Cas. 163.

APPEAL by the inland revenue commissioners from an order of FINLAY, J., dated June 22, 1937, and reported [1937] 3 All E.R. 464. The facts are fully stated in the judgment of SIR WILFRID GREENE, M.R.

The Attorney-General (Sir Donald Somervell, K.C.) and *Reginald P. Hills* for the inland revenue commissioners.

Raymond Needham, K.C., and *F. Alan Martineau* for British Salmson Aero Engines, Ltd.

SIR WILFRID GREENE, M.R. : These two appeals arise out of five assessments to income tax made upon British Salmson Aero Engines, Ltd., under All Schedules Rules, r. 21. The assessments were in respect of certain payments made by the taxpayer, the company (I will call it “the English company”), under an agreement of Oct. 25, 1929. It appears that the English company was incorporated, shortly before that agreement was executed, for the purpose of entering into it, the object of the agreement and that of the incorporation being to acquire the sole licence to manufacture and sell in the United Kingdom of Great Britain and Ireland and its Dominions, colonies and dependencies the aeroplane engines made by a French company, the other party to the agreement, called Société des Moteurs Salmson. The agreement

provides for certain payments to be made by the English company to the French company and it is in respect of those payments that the assessments now under consideration were made. The agreement, which was in the French language, provided in art. 1 that its object was to grant to the licensees—that is, the English company—the exclusive right for the

A period of ten years from Oct. 25, 1929, until Oct. 24, 1939, to construct, use, and sell in the territory which I have mentioned certain Salmson aero engines. Then there were certain other provisions of the agreement to which I must just refer. Clause 4 of that article provides for the free use of certain patents in use in the types of engine described,

B and art. 2 provides :

As consideration for the licence thus granted to them the licensees shall pay to the constructors [the French company] the sum of £25,000 payable as follows : £15,000 on the signing of this agreement. .£5,000 six months after the signing of this agreement. £5,000 twelve months after the signing of this agreement. There shall be paid in addition to the foregoing payments and as royalty £2,500 twelve months after the signing of this agreement, and a like sum each twelve months during the following nine years.

C

The payments are to be made at an address in Paris.

Art. 3 provides that the French company shall give to the licensees necessary information and help, and under it they undertake to disclose improvements. That, of course, is a common form of obligation in

D agreements of this kind. Then in art. 4 there is a provision under which the French company agree to maintain the patents in England, and, in the event of infringement, the French company and the licensees agree to take all necessary proceedings to protect the patents and prevent any infringements. Art. 5 gives the licensees power to grant sub-licences.

E Art. 7 provides :

The constructors shall not during the life of this agreement manufacture or sell directly in the countries granted to the licensees any engine of the above-mentioned types, or any of the subsequent improvements.

There is a corresponding undertaking by the English company not to

F go outside its own territory. I do not think that there is anything else to which I need refer, except that there is an arbitration clause providing for arbitration in France. The agreement is expressed to have been made in Paris on Oct. 25, 1929.

Under that agreement, payments were made by the English company

G to the French company. The payments were not made out of profits brought into charge, and, accordingly, if the Crown is right in its contention that these payments are payments in respect of which, as such, tax is chargeable, the position was, under All Schedules Rules, r. 21, that the company was bound to deduct a sum representing the amount

H of tax, and was bound to account for it to the Revenue. On the face of the agreement, the payments which fall to be made under it in terms fall under two heads. One is what is expressed to be consideration for the licence granted, a lump sum of £25,000 payable in specified instalments, and the other is what is described as an additional payment of £2,500 a year as royalty.

The special commissioners, on appeal to them, decided in favour of the company with regard to the first of those two classes of sums. Those sums, they held, were instalments of the capital sum of £25,000, whereas the sums under the second class, they held, were sums paid in respect of the user of the patent, and the appellants were assessable in respect thereof under r. 21. Both the Crown and the company appealed to the King's Bench Division. FINLAY, J., affirmed the decision of the commissioners, and both sides appeal to this court. A

In my opinion, the commissioners and FINLAY, J., came to a right conclusion. The argument for the Crown is based upon the language of r. 21, which provides this : B

(1) Upon payment of any interest of money, annuity, or other annual payment charged with tax under Sched. D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment. C

The words on which the Crown relies are "royalty or other sum paid in respect of the user of a patent." Both classes of sums, they say, were paid in respect of the user of a patent, and they say that the effect of this language is that, whether or not a sum paid in respect of the user of a patent is in reality of a capital or of an income nature, the language of the legislature has definitely attributed to it the latter characteristic for tax purposes. Another way in which the argument is put is that any sum paid in respect of the user of a patent, whether it be called a royalty or not, and whether it be a lump sum or not, is of necessity stamped with the character of income, because it is paid in respect of user. D E

Before I come to examine the argument, and the authorities upon which reliance is placed, a little more closely, there are one or two matters with regard to the agreement itself which must be borne in mind. The first thing to notice about it is that it is not merely an agreement under which the English company receives the right to use a patent. Under this agreement the English company is entitled to restrain the patentees themselves from exercising the patent in the territory, and to call upon the patentees to take steps to prevent others from exercising the invention within the territory. Those rights are, to my mind, in essence different from the mere right of user. A licensee under a patent is a person who is put into such a position that the patentee disentitles himself to complain of what would otherwise have been an infringement. That is all a patent licence is. On the other hand, where the patentee undertakes not himself to exercise the invention, that is something quite different. He is restraining himself by a covenant or contract from exercising his monopoly rights, and, further, if he undertakes to prevent others from infringing his monopoly rights, he is giving an undertaking which also in its nature is quite different from what is given by a patent licence, which in effect is an undertaking not to complain of what would other- F G H

wise have been an infringement. I merely mention that fact as one of the circumstances in this case to which it is necessary to have regard.

- The other circumstance to which I wish to call attention is this. There is in the article relating to payment a fundamental difference in the nature of the two classes of sums, in the sense that the former class starts
- A off by being a lump sum payment, definite and fixed, which is then to be payable by instalments. The other class is not of that description. No lump sum payment is referred to. It is, on the face of it, nothing but an undertaking to pay yearly sums as royalty. Speaking quite apart from any close examination of authority, and simply regarding the distinction between those two things, it would appear upon the face of it that, with regard to the latter class, the parties are creating an obligation as between themselves which they choose to describe as a royalty payable each year at a fixed rate. I should have found it very difficult, in the face of so strong an indication as that, to appreciate an argument
- C which said that those sums were not in the nature of income payments. They do not start from a capital sum which is afterwards split up into instalments. Their existence from beginning to end is an annual existence, and nothing else, and the parties have indicated what, to their minds, is the nature of that annual payment.
- D Here I may get rid of one point that has emerged in the course of the argument. There were before the commissioners certain letters written between the parties before the agreement was executed. Those letters suggest that, at any rate at the time when they were written, the proposal was that there should be a lump sum of £50,000 payable by instalments, which would have corresponded with the payments to be made
- E under this agreement. Nothing that I say must be taken to be expressing the view that, in ascertaining the answer to the question whether or not a payment is to be regarded as a capital or an income payment, it is illegitimate to look outside the terms of a contract. I do not wish to
- F lay down any such proposition. What has to be ascertained in these cases is the true nature of a payment—that is to say, the true nature from an accountancy point of view—and that is a question of fact. I do not wish to say anything which will have the effect of circumscribing the matters which may properly be looked into in answering that question
- G of fact. On the facts of this particular case, I take the view that the commissioners were right when they said that those were documents which they could not look at, but for the reason that those documents are not documents which resulted in the creation of a lump sum liability of £50,000 at all. It may have been the intention of the parties when
- H those letters were written, and it seems likely that it was, that they should first of all create a lump sum obligation and then provide for it by payment by instalments. If they did that, the agreement shows us on its face that they subsequently changed their minds, because, instead of adhering to that scheme, they have deliberately, as we must assume, divided the payments into two categories differently described. I make

those observations in order to explain the reasons why, in my opinion, the cross-appeal of the tax-payer must be dismissed. I agree with the views of the commissioners and of the judge upon that matter. I have said what I have said with regard to it upon the assumption that the question whether a sum is a capital or an income payment is one which may legitimately be inquired into, and, indeed, must be inquired into, A in cases of patents.

That brings me to the substantial matter raised by the Crown's appeal. Before I come to it in a little more detail, it is necessary to remember the history of this particular reference in r. 21, and the corresponding reference in r. 19, to royalties or other sums paid in respect of the user B of a patent. They have their complement in Sched. D, Cases I and II, r. 3 (m), under which, in computing the amount of the profits or gains to be charged, deductions are prohibited in respect of "any royalty or other sum paid in respect of the user of a patent." The scheme therefore is that, where a business is being carried on with the use of patents, C in respect of which royalties or other sums fall to be paid, the person carrying on the business, in computing his profits, cannot deduct the sums in question. On the other hand, he is entitled under r. 19, and bound under r. 21, when he comes to make the payment, to deduct the tax. Although it now appears broken up into two parts of the Act of D 1918, it originated in the Finance Act, 1907, s. 25. That section prohibited such a deduction in calculating profits and gains, but authorised the person paying to deduct tax when he paid. It is not suggested on behalf of the Crown that the position since the Act of 1918 is in any way different, with regard to the matters with which we are concerned, from E what it was under sect. 25 of the Act of 1907. The re-arrangement under the Act of 1918 has not affected the law. That section came up for consideration before this court in *Langston Monotype Corpn., Ltd. v. Anderson* (1). The question there arose in rather a special and indirect manner, and I need not go into the details of that case, showing F how the question arose. The important matter for the present purpose is that, in deciding that case, and, as I read the judgments, as an essential step in the reasoning which led to the decision, the Court of Appeal, or at any rate two members of it, expressly, and I think SIR H. H. COZENS-HARDY, M.R., impliedly, took a view which I find most conveniently expressed in the language of FARWELL, L.J., at p. 683 : G

I think it is plain that this is a mere collecting section for the improvement of the machinery for collecting the tax, and not a charging section at all. Starting with that proposition, it appears to me on the true construction of it, that the words "any royalty or other sum paid in respect of the user of a patent" are necessarily confined to the royalty or sum which is spoken of two lines below, on H making payment of which the person paying is entitled to deduct.

KENNEDY, L.J., in a reference to the judgment of HAMILTON, J. (who had, as I read his judgment, negatived that view), takes the same view as that of FARWELL, L.J. SIR H. H. COZENS-HARDY, M.R., disagrees with the conclusion to which HAMILTON, J., had come. That case being

in the reports, when the legislature in 1918 codified the Income Tax Acts, it seems to me that we must assume that it codified them with the law as so declared in its mind, and with no intention that the law as expressed in that judgment should in any way be altered. Accordingly, I start the examination of this question by basing myself on the proposition

A that sect. 25 of the Act of 1907 did not alter the law by bringing into charge to income tax a subject-matter which, previous to the passing of that section, would not have been charged. Income tax, as has been said over and over again, is a tax on income. It does not tax capital. As the corollary to that, in ascertaining profits, payments of a capital

B nature may not be deducted. It is income all the time that has to be considered under the Income Tax Act, and, when I find that in sect. 25 the legislature in terms prohibit deductions on account of any royalty or other sum in computing profits, I can read that only as meaning that they are prohibiting a class of deduction in the ascertainment of profits

C which, but for such prohibition, would have been legitimate—that is to say, a class of deduction which was of an income, as distinct from a capital, nature. Similarly, the direction to the person paying the royalty or sum to deduct, or the authority to deduct, the tax, relates to royalties or sums of the same character—that is to say, sums of an

D income nature. Nobody is going to dispute that the general type of payment there described, “royalty or other sum paid in respect of the user of a patent,” is of an income nature, and payments of that kind, in the form of a royalty per machine, or based on turnover, and so forth, are common commercial payments, and are unquestionably

E of an income nature. I am unable, however, to read this machinery enactment, which was enacted merely for the purpose of altering the method by which the tax should be collected, as being something which brings into charge something of a capital nature which otherwise would not have been chargeable.

F There were in 1925, and there have been since, many cases where this matter of capital or income has been debated. There have been many cases which fall upon the borderline. Indeed, in many cases it is almost true to say that the spin of a coin would decide the matter almost as satisfactorily as would an attempt to find reasons. However, that class

G of question is a notorious one, and has been so for many years. I am unable to read this legislation as deciding that class of problem in the matter of patents once and for all by declaring in some way that every payment in respect of the user of a patent must of necessity be of a capital nature. I not only cannot extract any such proposition from

H the language of the section, but I also fail to find any such proposition asserted in the authorities to which we have been referred. It seems to me that, in the case of patents, as in the case of any other matters, the fundamental question remains, in respect to any particular payment: Is it capital or is it income? That question has to be decided, as it has to be decided in reference to other subject-matters, upon the par-

ticular facts of each case, including, of course, in those facts the contractual relationships between the parties. It has been said that the question is one of fact, and it is, when one gets to the bottom of it, an accountancy question. Of course, in saying that it is a question of fact, it does not mean that, in deciding it, questions of law may not have to be discussed and decided. For example, the construction of a contract may be one of the elements which must be taken into consideration in deciding that question. There may be cases where the construction of the contract is of itself the really decisive matter in answering the question, and in this case, of course, the question of the contract and the terms of the contract are of cardinal importance, as I have already endeavoured to indicate in saying what I have said on the question of the cross-appeal. A B

In support of the Crown's argument that a payment in respect of the user of a patent must of necessity be of an income nature, and that that is in any case what the legislature has enacted, the authorities relied upon begin with the well-known case of *Constantinesco v. R.* (2). That was a case where a patentee had an award made in his favour by the Royal Commission on Awards to Inventors. The only jurisdiction which that commission had—at any rate so far as that case was concerned—was to settle the terms of user by the Crown of the patentee's patent, which otherwise would have fallen to be decided under the Patents and Designs Act, 1907, s. 29. That section provided that any Government department might : C D

... use the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the department and the patentee, or, in default of agreement, as may be settled [by the Treasury after hearing the parties interested.] E

One of the functions of the Royal Commission, over which SARGANT, L.J., used to preside, was to settle the amount of payment, in lieu of having it settled by the machinery laid down by that section. The only matter with which they had to concern themselves, however, was the terms of user. In *Constantinesco v. R.* (2), the user had taken place before the terms were settled. The claimant, Mr. Constantinesco, had put forward a claim for a royalty, based on £10 per gear manufactured on behalf of the government. In point of fact, he received a lump sum award, which began, at p. 731, with the expression : F G

The commission have settled the terms of user of this invention as follows . . .

They awarded him £50,000 and £20,000, making £70,000. In that case, it was as clear as anything ever could be that the government had in fact used the patent. They had manufactured a number of gears. The consideration to be paid, or the award to be made, in respect of that user had to be settled after the event. It could have been settled on the basis of so much a gear. It could have been settled on the basis of a lump sum. To say that some difference for tax purposes would result, according to whether the commission awarded a lump sum or H

awarded so much per gear, or took the aggregate sum which the inventor was claiming on the basis of so much per gear and reduced it by half, leaving it as a lump sum, appears to me, if I may humbly say so, as preposterous as it appeared in that case to VISCOUNT DUNEDIN. Differences of technique of that kind could not alter the substantial nature of

A the payment. Be it observed, however, that the decision in that case was not based on any such broad proposition as that for which the Crown now contends. It would have been sufficient, if the Crown was right, to say: "This is in respect of the user of a patent." That was the ground for making payment under sect. 29 of the Patents and Designs

B Act, that was the matter in respect of which the Royal Commission had jurisdiction to make an award. That was the matter in respect of which it did make an award. Therefore, it would have been sufficient to say that that concludes the whole matter, because the legislature, as the Crown now says here, has asserted that every sum paid in respect of

C the user of a patent is of necessity of an income nature. However, there was no such approach to that case, either in the Court of Appeal or in the House of Lords. It is sufficient just to look at the passage in the opinion of VISCOUNT CAVE, L.C., which is particularly relied upon by the Crown. He says, at p. 745:

D My Lords, three points are raised on behalf of the appellant. First, it is said that the sum of £70,000 was not annual profits or gains within the meaning of the Income Tax Act but was the payment of a capital sum.

E There the point emerged as neatly as any point could. If the Crown were right, it would have been sufficient for VISCOUNT CAVE, L.C., to say: "The short answer to that argument is that it was in its nature, and of necessity, an income payment, being a sum paid in respect of the user of the patent." But what does he do? He proceeds to examine the circumstances of the case in order to disprove the appellant's

F contention. First of all, he notes the period over which the invention was to be used, for which this payment was made. Then he says, at p. 746:

The claim put in was a claim as for royalty in respect of the successive uses of the invention.

G There he is referring to the claim, which was a claim for successive uses—that is to say, for each gear manufactured. That is what VISCOUNT CAVE, L.C., is quite obviously referring to as "successive uses." He then refers to the practice of the commission "to take as a basis of their award a fair royalty as between a willing licensor and a willing

H licensee," and he says that he has no doubt that that basis was accepted. Then he says, not as a necessarily determining factor, but as one of the facts in the case, that the corpus of the patent was not taken away from the appellant. Then what does he say next? He says, at p. 746:

In view of all the facts [which he has very summarily stated] I am satisfied that

the sum awarded is to be treated as profits or gains, and annual profits or gains, within the meaning of the Income Tax Act.

I find great difficulty in understanding how it can be said, in the light of that passage and that reasoning, directed as it was to the specific argument that the sum was a capital sum, and resulting in the conclusion, based on an examination of the facts, that it was not a capital sum, but was annual profits and gains, that that case is an authority for the proposition that the matter is concluded once and for all, once one asserts of a payment that it is a payment in respect of a user of a patent. I cannot appreciate myself how any such argument as that can really stand.

The next case of importance that is relied upon is the Mills bomb case, reported under the name of *Mills v. Jones* (3). That was a case where an award had been made to an inventor. The only point of difference between that case and the *Constantinesco* case (2) was that the actual award itself awarded a lump sum (p. 776):

in respect of all user past, present and future, by or for the purposes of H.M. Government (including user by way of selling for use, licensing or otherwise dealing) [with the Mills bomb].

The inclusion of the future, whether it was within the jurisdiction of the Royal Commission or not, was agreed upon by the parties. The general commissioners of income tax found as a fact that the amount included in respect of future user was negligible. An attempt was made to distinguish that case from the case of *Constantinesco* (2). The way in which the argument was put is most conveniently stated in the opinion of LORD BUCKMASTER in the House of Lords, at p. 786:

The real ground upon which the appellant complains of those judgments [of ROWLATT, J., and of the Court of Appeal] is this: He says that the award itself shows that part of the sum was in effect payment for the right to use the invention for the future, which means that there were capital monies involved in the £37,000 which are in no way distinguished from the income, and that, as they have not been distinguished and cannot at present be distinguished, a surcharge cannot properly be made for the total sum and, consequently, the surcharge was wrong and ought to be discharged.

The tax-payer, therefore, was saying there: "This is a sum which contains in it a capital element, in that part of it is attributable to future user. You cannot disintegrate it and say how much is referable to each kind of user, and therefore you cannot tax any of it." I suppose it might also have been said that there must be some sort of apportionment claim on some basis. That is the case which was being put there. That was the distinction which was attempted to be drawn between that case and the *Constantinesco* case (2).

It is said that the Court of Appeal, in its judgment in that case, decided against the claimant upon the ground now asserted by the Crown—that any payment in respect of the user of a patent, be it past user or be it future user, be it a lump sum or be it a lump sum payable by instalments, or whatever form it takes, is of necessity an income payment. Expressions in the judgment of GREER, L.J., are relied on in support of that

argument. I am quite unable to extract from the judgments in the Court of Appeal any such sweeping proposition. The language used must be construed in reference to the particular facts of that case and the particular arguments which were being there put forward. I cannot agree that the paragraph on which so much reliance is placed is one which bears anything like the construction which is sought to be placed upon it. GREER, L.J., himself, in a later passage, is quite clearly keeping open, to put it at the lowest, the case of exclusive licence, because he says so in terms. He draws a distinction between the ordinary licence to use and an exclusive licence. There is a very good ground for that distinction, I venture to think, because, as I have already pointed out, directly one has an exclusive licence granted, one is getting into a category of right different altogether from that of a mere right of user. However that may be, the fact that GREER, L.J., guarded himself in that way makes it impossible for me to treat what he said as laying down some general proposition as sweeping as the Crown would suggest it is, and in particular as laying down a proposition which would govern a case where one of the relevant facts in the case is that the licence is an exclusive one.

I am fortified in that attitude towards that case, because I find that, when the matter came to the House of Lords, the House of Lords did not deal with it in the way in which they could have dealt with it, and ought to have dealt with it, if the Crown's contention here be right. LORD BUCKMASTER, who delivered the leading opinion, instead of answering the question which he formulated, as I have already said, in the short way in which it could have been answered, proceeded to base his decision upon the findings of fact of the commissioners—that the amount of future user included in the payment was negligible. He therefore treats it as being a sum which can be disregarded. That is to say, there is nothing left in the point that, wrapped up in this award, there is an element of a capital nature, because that capital element is a negligible element, and therefore we can disregard it. That opinion of LORD BUCKMASTER is far from asserting the proposition that every payment in respect of the use of a patent must necessarily be an income payment.

I may refer to this circumstance also. VISCOUNT DUNEDIN agreed with the opinion of LORD BUCKMASTER, and then added this, which I venture to think is significant, at p. 787 :

I think the finding of fact is conclusive.

What LORD DUNEDIN ought to have said, according to the Crown's present argument, was that as a matter of law the commissioners were bound to find against the claimants. Instead of that, however, both of those noble and learned Lords (and the other noble and learned Lords, VISCOUNT SUMNER, LORD BLANESBURGH and LORD ATKIN, agreed, without delivering any opinions of their own) treated the decisive matter,

not as a matter of law, as to which the commissioners were bound to decide in a particular way, but as a matter of fact, with regard to which their finding of fact was final and binding on the House. That being so, it seems to me that there is nothing to prevent the commissioners in the first place, or the court, from examining the facts in the case of a payment made in respect of a royalty, and from saying what its true nature is. If the answer is that its true nature is that it is a capital payment, then that is equivalent to saying that it is not chargeable with tax. A

I do not propose to add anything by way of expression of my own views on the principles on which that question ought to be determined. It is a question which has been investigated very carefully in a number of different connections, and different matters of fact have been regarded in different cases as of importance and of weight. It seems to me that, on all the facts of this case, including the terms of the contract itself, which is the important, and, indeed, the essential, fact in the case, the commissioners were perfectly entitled to come to the conclusion that they did—that this class of payment was not of an income nature, but of a capital nature. I can find nothing in the facts of the case, or in the construction of the documents, which would justify me in saying that the commissioners' conclusion is wrong in law. In my judgment, their conclusion is the right one. B

There is one further matter which I should mention. In the *Constantinesco* case (2), ROWLATT, J., had said that, as in the similar case of annuities, and so forth, so in the case of a patent, one may have a lump sum payment which will not be an income payment, but will be a capital payment. He summarises very succinctly the familiar class of principle which applies to the determination of those matters. It is said that ROWLATT, J., in that respect had wrongly appreciated the Income Tax Acts, so far as they relate to patents. I do not propose to examine what he said. One may find, perhaps, somewhat loose language in a very concise statement, which might be thought possibly to go a little too far, or to be too comprehensively expressed. It would not serve any useful purpose to examine those statements. In my opinion, subject to any closer examination of their language, they refer to a principle which is just as much applicable to a payment in respect of a patent as it is in respect to other subject-matters—namely, that, if the payment, when its true nature is looked at, is not an income payment, but a capital payment, it is not chargeable to tax. That question, however, is to be answered on the facts of each particular case. ROWLATT, J., did not intend to go further than that. His opinion was followed by MACKINNON, J., as he then was, in a case which was cited to us, and which was cited to the judge. I see no reason for criticising that decision. Quite apart from that matter, however, for the reasons which I have given, I have come to the clear conclusion which I have stated, and, therefore, both the appeals must be dismissed with costs. C
D
E
F
G
H

SCOTT, L.J. : I agree with the conclusion arrived at by SIR WILFRID GREENE, M.R., and with the whole of the reasoning of his judgment, and I do not propose to add anything on the general principles which he has discussed. There is one particular aspect of the case, however, upon which I think it may be useful to add a word, and that is the value

A in this case in this court of the decisions of the commissioners, when they heard the appeal in the first instance. They have decided that the first three payments in question were capital payments. The question which is raised here is how far, on the facts of this case, we ought to be guided by that finding, or give it weight, or feel bound by it. The rule as to

B the power of the Court of Appeal, on a case stated upon a question of law, in regard to which the disappointed party has expressed dissatisfaction before the commissioners on the point whether it is a question of fact, as to which the court cannot inquire, or an issue involving a question of law, into which the court can inquire, was dealt with very

C fully by HAMILTON, J., as he then was, in *American Thread Co. v. Joyce* (4), which was subsequently approved both in the Court of Appeal and in the House of Lords. The gist of what he said, I think, is this. Where the commissioners put before the court in the special case the whole of the materials from which they drew their final inference, then

D it is a question of law as to whether, from that material, their inference was correct or not. However, that conclusion seems to me, subject to this further qualification—which I do not think that the judgment of HAMILTON, J., as he then was, and the other courts who agreed with him, intended in any way to exclude—that, in so far as the special com-

E missioners are skilled persons in matters of business, if, on an analysis of the business arrangements that have been made, out of which the case has arisen, they come to the conclusion as business men that a particular payment has what Sir WILFRID GREENE, M.R., has called the accountancy quality of a capital payment or an income payment, that is a view

F to which, in my opinion, the court is entitled to give great weight. The position is analogous to the case of a trial in the commercial court before a City of London special jury, on a question of business and keeping of accounts, where the special jury have expressed a view on the issue whether a particular payment is a capital payment or an income payment.

G In such circumstances, the court ought to be very slow to disagree with that skilled opinion. In my view, that kind of weight ought to be attached to the findings of the commissioners in the present case. It is quite true that they put before us the whole of their material, and that that material in substance is of an agreement made between the licensees

H and the patentees, and nothing more, but they have taken the view, without hesitation, evidently, that these lump-sum payments were in the nature of capital payments. If there be any doubt from the purely legal point of view—which I do not think that there is—that opinion of the commissioners ought to weigh in the balance. In my opinion, it is an additional reason for upholding their findings.

CLAUSON, L.J.: For the reasons stated by SIR WILFRID GREENE, M.R., and supplemented by SCOTT, L.J., with which I agree, I concur in the order which is proposed.

Unconditional leave to appeal to the House of Lords granted to the Crown.

Solicitors: *Solicitor of Inland Revenue* (for the Inland Revenue Commissioners); *A. J. Adams & Adams* (for British Salmson Aero A Engines, Ltd.).

[Reported by REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

MORLEY (INSPECTOR OF TAXES) v. TATTERSALL.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
May 24, 25, 26, 1938.]

Income Tax—Unclaimed balances—Carried into partners' current accounts—Trade receipt.

A firm of auctioneers by their conditions of sale provided that vendors should receive the purchase money on the Monday week following the sale, and that no money would be paid or remittance sent by post without a written order. As a result of the operation of these conditions, large sums of money from time to time remained unclaimed in the hands of the firm. Upon the admission of a partner in 1922, £13,022 6s. 4d. in respect of unclaimed balances for years prior to 1908 was transferred to the capital account of the old partner; and in 1935, upon the admission of a further partner, £10,406 10s. 1d. in respect of unclaimed balances between 1922 and 1928 was transferred partly to the current accounts and partly to the capital accounts of the former partners. A partnership deed in 1936 provided that such liability as subsisted in respect of these sums should be assumed by the partnership, that such unclaimed balances as first arose 6 years before the taking of each annual account should be transferred at such account to the credit of the partners in accordance with their shares in the partnership, that all liability in respect thereof should be borne by the partnership, but that the liability of the partnership should not appear in the annual general accounts:—

HELD: the unclaimed balances so received had not by the terms of the partnership deed of 1936 and the preparation of accounts in accordance therewith become trading receipts. These sums remained the money of the firm's clients and were not assessable to income tax.

Decision of LAWRENCE, J. ([1937] 4 All E.R. 339) reversed.

[EDITORIAL NOTE.] It has been decided that, when an unclaimed balance is released by the creditor, it cannot be assessed to tax in the year of release, nor can the tax account of the year in which the money was received be re-opened. The suggestion here was not that the balances had been released, but that they had been treated as released by the different method of accounting adopted by the partners. The court have, however, found that the partners had in fact treated the liability as a continuing one, and the balances did not become liable to tax.

AS TO TRADE RECEIPTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 95, 96, para. 190; and FOR CASES, see DIGEST, Vol. 28, pp. 17-21, Nos. 87-107.]

Cases referred to:

- (1) *Lambert Bros., Ltd. v. Inland Revenue Comrs.* (1927), 12 Tax Cas. 1053.
- (2) *British Mexican Petroleum Co., Ltd. v. Jackson, British Mexican Petroleum Co., Ltd. v. Inland Revenue Comrs.* (1932), 16 Tax Cas. 570; Digest Supp.

(3) *Taxes Comr. v. Melbourne Trust, Ltd.*, [1914] A.C. 1001; 28 Digest 18, case 92i; 84 L.J.P.C. 21.

APPEAL by Messrs. Tattersall from an order of LAWRENCE, J., dated Nov. 5, 1937, and reported [1937] 4 All E.R. 339. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

A *A. M. Latter, K.C.*, and *Cyril King, K.C.*, for the appellants, Messrs. Tattersall.

The Solicitor-General (Sir Terence O'Connor, K.C.) and *Reginald P. Hills* for the respondent, the inspector of taxes.

B SIR WILFRID GREENE, M.R. : The appeal before the commissioners related to two assessments, one for the year ending Apr. 5, 1930, and the other for the year ending Apr. 5, 1936. The special commissioners decided against the Crown on both those assessments. The Crown did not contest the correctness of that decision with regard to the earlier
C assessment, and accordingly that matter does not fall for consideration, and the only assessment with which we have to deal is an additional assessment for the year ending Apr. 5, 1936. In that assessment, there was included what has been described as a token sum, which was inserted
D for the purpose of bringing into charge certain sums described as unclaimed balances. To understand exactly what that means, it is necessary to refer shortly to the nature of the business carried on by Messrs. Tattersall. They are auctioneers who carry on business at London, Newmarket and Doncaster. They also have a training establishment, but that does not come into this case, because the profits of that business
E are separately assessed. We are concerned with the auctioneering business only. The main income of that business consisted of commissions, but Messrs. Tattersall received, on behalf of clients who sold their animals through them, the purchase price paid by the purchasers, and from that purchase price they deducted their commission and any
F other expenses which they were entitled to deduct.

The terms on which they conducted sales, and still conduct them, are contained in certain conditions, and the only condition to which I need refer is the seventh :

G The vendor shall be entitled to receive the purchase money of each lot sold on the Monday week following the sale, provided that the auctioneers shall then have received the purchase money, or delivered the lot out of their custody, but not before. Delivery of a lot by the owner or his agent without a written order from the auctioneers shall not be deemed delivery by the auctioneers within the meaning of this condition. . . . No money paid, or remittance sent by post, without a written order.

H It appears that with comparative frequency the vendors of the blood-stock animals which have been sold by Messrs. Tattersall do not immediately call for payment of their money. Various reasons for that were suggested in evidence, but the only finding of the commissioners on that matter is set out in para. 5 of the stated case :

For various reasons, vendors have from time to time neglected to send a written

order to the firm for payment over to them of purchase money received on their behalf by the firm on the sale of horses, and consequently money (hereinafter called "unclaimed balances") have remained in the hands of the firm to the credit of the said vendors.

Mr. E. S. Tattersall, in evidence, said that in his view there might be various reasons—among others, that clients in some cases liked to keep a balance due to them with the firm. Whatever the reasons may be, A we have no finding with regard either to any specific balance or to any mass of balances, and therefore the only matter with which we are concerned is the fact that balances have not been claimed. Many of those balances have remained unclaimed for a considerable number of years, but the Solicitor-General quite properly admitted that the vendors B in question were entitled to claim payment of their money at any time, unaffected by the Statute of Limitation, which has not yet begun to run, owing to the absence of any written order as required by the conditions. We are dealing, therefore, with obligations which, as a matter of law, are existing obligations, which the firm can be called on to perform C at any moment. That is a matter not without importance in the examination of this case.

Before Feb. 23, 1922, the business was carried on by Mr. E. S. Tattersall alone. By a deed of partnership of that date he took into partnership Mr. G. H. Deane, and by a later deed of Mar. 23, 1936, those D two partners took into partnership Mr. Needham. When Mr. Deane was taken into partnership, an arrangement was made under the deed of partnership in relation to certain amounts standing in the accounts of the business in respect of unclaimed balances for the years before 1908. The receipts from purchasers had been paid, quite obviously— E and there was no need for any finding of fact on that point—into the banking account of the firm. The way in which the firm had dealt with the matter in its accounts was that in the balance-sheet they inserted a heading: "Auction Sales Suspense Account"—that was the title before Mr. Deane was brought into partnership—which represented F the outstanding balances at the date of any particular balance-sheet. I mention this fact because Mr. Hills in the course of his argument appeared to assume that in the firm's balance-sheet the proceeds of sale received by the firm were nowhere to be found, and that they existed somewhere outside, and in some way had been brought into the accounts G by the later transactions with which I shall presently have to deal. That, in my judgment, is quite clearly a misconception, because the presence on the left-hand side of these balance-sheets of a liability item representing the amount received in respect of sales necessarily implies that the actual cash received in respect of those sales had gone into the H mass of the firm's assets appearing on the right-hand side of the balance-sheet, and there appeared. It is quite impossible to suppose that any accounts would be drawn up on the basis that a liability item was inserted in respect of something which had never gone into the assets side. There was nothing improper about that, because, by the contract between

themselves and their clients, there was no obligation at all on Messrs. Tattersall to keep these moneys in any way distinct, or to pay them into some separate, or some trust, account. They were perfectly entitled to pay them into their ordinary account, with the result that in their accounts the cash received would be merged in the general mass of assets, and there would be on the liability side an item representing the liability of the firm to the persons on whose behalf those moneys had been received.

When Mr. Deane was taken into partnership, an arrangement was made and embodied in the partnership agreement to the effect that any unclaimed balances for the years before 1908 should, as on Jan. 1, 1921, be transferred to Mr. E. S. Tattersall's capital account. The amount so transferred was £13,022 6s. 4d. The effect of that was that, whereas, previously to that alteration in the method of keeping the accounts, the business had been carrying as a liability on the face of its accounts the entire amount which it had received but had not yet paid over, it now determined to treat some portion of that liability as not being an effective liability. Of course, a transaction of that kind could have no effect whatsoever on the right of the client to call for his money if he were minded so to do. It was merely a private arrangement between the partners as to the way in which their assets and liabilities should be dealt with in the accounts, and had no effect on the legal position at all *vis-à-vis* the clients.

When Mr. Needham was taken into partnership, an arrangement of a similar character was made, and appears in the articles of partnership. In substance it was this. As at Dec. 31, 1934, the amount standing in the partnership accounts in respect of unclaimed balances arising in the period 1908 to 1928 inclusive, amounting in all to £10,406 10s. 1d., was transferred as to £9,088 2s. 1d. to Mr. E. S. Tattersall's current account as on Dec. 31, 1934, and as to £1,318 8s. to Mr. G. H. Deane's current account as on Dec. 31, 1934. There, again, with regard to those matters, the effect of the transaction was exactly what I have described with regard to the earlier transaction. They merely treated what had previously been entered as a liability as no longer a liability in respect of that sum of £10,406 10s. 1d. For the future, the partnership articles made certain arrangements. It was provided that such liability as subsisted in respect of the unclaimed balances of £13,022 6s. 4d.—the amount transferred in 1921—and £10,406 10s. 1d.—the amount transferred in 1936—should be assumed by the partnership, and any payments actually made in respect thereof should be borne by the partners in proportion to their shares of profits at the time when the payment was made. The partners, therefore, were providing that, in the event of claims being made, the claims should be met by the partners in that way. That, in certain respects, amounted to an indemnity by the new firm, in the sense that these liabilities were liabilities of the person or persons carrying on the business at the time when the moneys were

received. Moneys received before 1921 were received by Mr. E. S. Tattersall, and, in the absence of some novation, he was the person liable to repay them. Changes in the firm after that date—the taking in of a new partner or partners—could not affect the right of creditors to go to Mr. E. S. Tattersall. Similarly, sums received during the partnership between Mr. Tattersall and Mr. Deane, and before Mr. A Needham was admitted, were sums which could be claimed from those two men alone. The result is that, when Mr. Needham was taken in, the articles provided that the new partnership should take over that liability, and, accordingly, what they were really doing when they continued to carry that liability between them was that they were carrying B a liability in respect of which the firm, as such, was not liable to the customer, but which, as between themselves and the old partners, the new firm undertook to discharge. Those were the arrangements made with regard to balances down to 1928. With regard to the future, the partnership articles provided that in the general account of each year, C beginning with the year ending Dec. 31, 1935, all such unclaimed balances existing on Dec. 31 in the year of account as first arose not less than 6 years previously to that day and should not already have been transferred should be transferred to the credit of the partners in the proportion in which on Dec. 31 in the year of account they were entitled to share D in the profits of the business. Sums so transferred were to be placed to the credit of the capital account of the several partners up to a certain extent, and were thereafter to be placed to the credit of their current account. There, again, that arrangement had no effect whatsoever on the customers, and did not diminish their legal rights, and it was provided that the liability should continue to be borne by the partnership. E That liability, they agreed, however, should not be entered in the accounts, notwithstanding the fact that the partners still bore it.

Pausing there for a moment, and eliminating, for the purpose of simplicity, the changes in the partnership agreement, it is of the utmost F importance in this case to appreciate the real nature of what was being done. I say that because, in the arguments addressed to us on behalf of the Crown, various metaphorical expressions were used, such as “holding a sum,” “changing the capacity in which a sum is held,” “turning a sum into an asset,” and so forth—expressions which, to my G mind, are both inaccurate and misleading. What happened was that the partnership, being indebted to outside persons in respect of sums which it had received, and which had passed into the general mass of its assets, and having carried in its balance-sheet a proper liability item to express that liability, decided at a certain point, and on certain principles H laid down, that that liability item should be written down and diminished. That is what happened in 1921, in 1934, and year by year after the provisions of the new partnership agreement came into operation—merely the alteration of a debit item in the balance-sheet by eliminating from it certain liabilities which had previously gone to make it up. If

that matter had stayed there, the only result on the balance-sheet would have been to increase the credit balance. It would have shown a greater surplus of assets over liabilities than it had shown prior to that writing down. It so happened that, for domestic reasons of their own, the partners, instead of leaving the matter in that way, with an increased credit balance, decided that that increase in the credit balance should be carried in the balance-sheet to the partners' accounts. That does not alter the reality of the position one jot. The true position is—and I repeat it, because it is only when that is appreciated that what I, with respect, conceive to be the fallacies underlying the Crown's argument are perceived—that the only thing which was done on these occasions was the elimination from the liabilities side of the balance-sheet of something which had previously appeared as a liability therein.

The Crown put forward two arguments. The Solicitor-General put forward one argument and adumbrated another. Mr. Hills would have none of the Solicitor-General's argument, and developed at considerable length the argument which the Solicitor-General had only adumbrated. Both arguments proceeded on the footing that it was impossible to say that the sums when received were trading receipts. That was subject to a qualification, I think, in the Solicitor-General's argument, as will appear when I come to describe it. It might be more convenient to deal with Mr. Hills's argument first, because that is the one which starts off with the perfectly clear admission that the money, when received from the purchasers, was not a trading receipt. That proposition, I should have thought, was, in any case, quite incontestable. The money received was money which had not got any profit-making quality about it. It was money which, in a business sense, was the clients' money, and nobody else's. It was money for which Messrs. Tattersall were liable to account to the clients, and the fact that Messrs. Tattersall paid it into their own account, as they clearly did, and the fact that it remained among their assets until paid out, do not alter that circumstance. It would have been, for income tax purposes, in my judgment, entirely improper to have brought those receipts into the account at all for the purpose of ascertaining the balance of profits and gains. Indeed, as I have said, the Crown did not suggest that that would have been proper. What was said, however, was this. Mr. Hills's argument was to the effect that, although they were not trading receipts at the moment of receipt, they had at that moment the potentiality of becoming trading receipts. That proposition involves a view of income tax law in which I can discover no merit except that of novelty. I invited Mr. Hills to point to any authority which in any way supported the proposition that a receipt which at the time of its receipt was not a trading receipt could by some subsequent operation *ex post facto* be turned into a trading receipt—not, be it observed, as at the date of receipt, but as at the date of the subsequent operation. It seems to me, with all respect to that argument, that it is based on a complete misapprehension of what is

meant by a trading receipt in income tax law. No case has been cited to us in which anything like that proposition appears. It seems to me that the quality and nature of a receipt for income tax purposes is fixed once and for all when it is received. What the partners did in this case, as I have said, was to decide among themselves that what they had previously regarded as a liability of the firm they would not, for practical reasons, regard as a liability. That does not mean, however, that at that moment they received something, nor does it mean that at that moment they imprinted on some existing asset a quality different from that which it had possessed before. There was no existing asset at all at that time. All that they did, as I have already pointed out, was to write down a liability item in their balance-sheet, and how by effecting that operation it can be said that a sum received years ago has been converted into something which it never was is a thing which, with all respect, passes my comprehension. A

Mr. Hills, when challenged for an authority, committed himself to the proposition that *Lambert Bros., Ltd. v. Inland Revenue Commissioners* (1) was a clear authority in his support. When pressed about that, I think that he resiled slightly from it, but he still nailed *Lambert's* case (1) to his mast. I must therefore examine that case, which arose out of the government arrangements made during the War in respect of the bunkering of merchant vessels at Gibraltar. For that purpose, a pool was set up under a committee of the Gibraltar coal-merchants, and arrangements were made by which they were provided with supplies of coal which they were to sell to the vessels requiring bunkers at prices agreed, with a provision for the profit which they were entitled to make, a profit which the government was entitled, if it were so minded, to increase. It so happened that, at the conclusion of hostilities, when stock was taken, there was a very large surplus stock of coal left in the pool. It is important to note with regard to that the facts found by the commissioners, at p. 1057 : B

It was impossible to determine how the surplus arose, but three causes were suggested—under-estimate of the existing stocks, over-shipments to the pool or short deliveries out of the pool. C

There was therefore the finding of fact that it was impossible to determine how the surplus arose. After negotiations with the government; an arrangement was come to under which the coal-merchants were entitled to retain for their own benefit part of the sums received—I forget what the actual proportion was, but it does not matter—on the sales of that surplus, and the Revenue claimed income tax in respect of those receipts. It is to be remembered that those receipts were receipts from the sale of coal by coal-merchants. The commissioners took the view, at p. 1064, that, although the settlement effected by the government did not purport to increase the permitted scale of profit under the agreement between the merchants and the government : D

the effect of granting to the members of the pool half of the surplus account and E

address commission [that was another matter which came into the case] had the effect of increasing the profits arising to them from the trade of the pool period.

That, as a proposition of fact, when the facts of the case are realised, would appear to be incontestable, and the effect of that finding—and, indeed, the effect of the facts set out in the case on which that finding is

A based—is that this money was a trading receipt from the moment it was received. That was its quality, and it never became anything else. In my judgment, and with all respect to the argument addressed to us, that case appears to me to be as far from the present case as any case can possibly be. A trading receipt, in its nature a trading receipt at the moment of receipt, naturally fell to be brought into the accounts for tax purposes. How that can lend any support to the proposition that a receipt which in its nature never was a trading receipt can, years after, by some alteration in the accounts of people who received it, become a trading receipt I am quite unable to follow.

C The real fact of the matter is (if I may say so with great respect to the argument addressed to us) that it is based, as I indicated earlier in this judgment, on the misleading metaphors employed to describe the transaction carried out between the partners. The object of that metaphorical language quite clearly was to give to the transaction the quality of a receipt of something at the moment the transaction was effected. It was essential for the argument, of course, to discover some act of receipt within the income tax year for which the assessment was made, and to get an act of receipt the metaphorical expressions, such as I have described, were used—the holding in a new capacity of something which the partners had previously held in a different capacity, the turning into a trading asset of something which had previously not been a trading asset, and things of that kind, which, if they accurately represented the facts, might form some basis for an argument that, at the moment when they took place, a receipt had taken place. However, once it is realised that this money was received years before, and had merely remained where it stood, among the assets of the firm, and that all that the firm had done was a domestic act *inter socios* by which they had re-cast the method of entering liabilities in their accounts, the whole basis of the argument appears to me completely to disappear.

G The result of Mr. Hills's argument is a very curious one. In effect, he was saying (and here, again, reappears the metaphorical use of language): "Here was an asset subject to a clog, and the clog was the right of the creditor to demand payment." I do not pause to examine that metaphor, because, in my opinion, there is no warranty whatever for its use, but, H having asserted that, Mr. Hills then said that this asset became a trading receipt so soon as the partners treated it as a free asset. That is to say, so soon as they decided that they could disregard that clog, it became a free asset, and therefore became at that moment a trading receipt. It has been settled by authority which binds us that, where a liability which has properly entered into accounts in a previous year is released

by the creditor in a subsequent year, that does not justify either reopening the accounts for the previous year or treating that release as creating a trading receipt in the year in which it took place. That was clearly settled in *British Mexican Petroleum Co., Ltd. v. Jackson* (2). The result of the argument is this. Mr. Hills' proposition is that, when the partners treat the asset as free, although it is not free, because the liability to the creditors still remains, it becomes a trading receipt. If the creditor had released the debt so that it was in fact free, it would not become a trading receipt. In other words, when partners treat as free a thing which is not free, it is a trading receipt. When they treat as free a thing which is free, it is not a trading receipt. It seems to me that that brings out very clearly the inadmissible nature of the argument addressed to us by Mr. Hills.

I now turn to the different argument advanced by the Solicitor-General. He, again, was not prepared to suggest—and, indeed, he could not have suggested—that the sums on their receipt were trading receipts, but he said that in respect of each year's receipts from purchasers there was always present an unascertained proportion, which I may call X, which ultimately would never be claimed, and that therefore it was permissible to treat the partners, in each year in which they received (let me say) £10,000, as having received as a trading receipt X. He said that one could not at the moment of receipt say what X was, because *non constat* in any particular year that there would be any customer who failed to call for his money, and he could not say of any customer that a proportion of his money would ultimately not be claimed, nor could he say of the aggregate of the whole that any definite proportion would not be claimed. From business experience, however, he said that it was possible to estimate each year that X would not be claimed. He then said that ultimately X became quantified, and it became quantified, not by any extinction of the liability, but by the act of the partners in deciding that they could disregard the possibility of claim in respect of the amount X, which by that time they had quantified at so many pounds, and he said that that act of the partners was evidence of the value of X. That proposition appears to me, again, to be completely devoid of foundation. The real fact of the matter is that X is a figment of the imagination. At the moment of receipt, it is quite impossible to say of any sum received—and one must look at each sum received as it comes in—that, when Messrs. Tattersall receive from the purchaser of a particular horse £500, a proportion of that, X, must be treated as something which will not be claimed. Each sum as it comes in is received, and, when that sum is received, it is perfectly impossible to say of that sum, either of the whole of it or of some proportion of it, that it never will be claimed. Similarly, to treat the aggregate of receipts over the year as a thing which contains this unascertained X within itself appears to me to be quite inadmissible.

Another difficulty inherent in that proposition is that, if it were the

true view, then the year in which X was received was the year in which the global sum in which X is wrapped up was received, and that would be the year of receipt, and the subsequent quantification could not constitute a receipt in the year of quantification. That result would not suit the Crown at all, because it could never hold these assessments.

- A One answer to that which the Solicitor-General put forward, if I understood him rightly, was that in the year of receipt quantification was impossible. Just see what that means. It means that a trader in a particular year has received a trade receipt, X. He, I should have thought, was entitled to say: "That trade receipt X must be brought
- B into the year in which the sum in which X is wrapped up was received, and I will now proceed to value it, and that is the value which must be carried in for income tax purposes." It would not be permissible, it seems to me, for the Crown to say: "No. We are not going to do that now. We are going to wait until some future date, the date when
- C you choose to quantify X by treating certain sums as not recoverable, which may be 1 year, 6 years, or 20 years, according to your taste, and then, when you have finally decided, we are going to say that the value of this X is now ascertained." I apprehend that, if there were any
- D foundation for the argument, the valuation must take place in the year of receipt, and, if (which is admitted, and is clearly the case) X is a thing which cannot be valued at that time, the answer to it is that X equals nought, and that, I should have thought, was the end of that matter. Quite apart from that, however, it appears to me, with the greatest respect to the argument addressed to us, a really fantastic idea that
- E each year's receipts are to be treated as having this mysterious element wrapped up in them.

Various authorities were referred to. I do not think it necessary to refer to any, except the one to which I have already referred—namely, *Lambert's case* (1)—and to one other which I shall mention in a moment,

F which is the case referred to by the judge.

I have not yet said that the finding of the special commissioners was as follows:

- G Having considered the evidence and arguments adduced before us, we held that the said unclaimed balances were not trading receipts in respect of which the firm was assessable to income tax, under the Income Tax Act, 1918, Sched. D, Case I.
- H That finding may involve a mere finding of the fact, being based on what I may call the real scope of the trade. On the other hand, it is a finding which may contain in it a finding of law. I am not prepared to assent to the view that the finding is one behind which this court is not entitled to go. It seems to me—to put it at the lowest—a mixed finding, and we are accordingly entitled to examine it in the light of the facts stated in the case. In my judgment, however, in so far as it is a finding of fact, there is ample evidence in the case to support it, and, in so far as it is a finding of law, there is no misdirection of themselves by the special commissioners on any point of law.

The judge took a different view, holding that the balances, when distributed to the partners, were trading receipts. The distribution to which I imagine he is referring is the allocation of sums to the accounts of the partners in the balance-sheet. What was distributed to the partners, however, was not an asset item, but a liability item. As I have pointed out, this liability was cut down by a certain sum. That sum was then used to feed the accounts of the partners, but it was a liability, not an asset. It is on the left-hand side of the balance-sheet, not on the right, and there was no dealing with any balance in the sense of an asset at all. It seems to me quite impossible, with the greatest deference to the judge's view, to treat that accountancy transaction *inter socios*, by which they effected the rearrangement of the liabilities side of their balance-sheet, as a distribution of trading profits. It was not. A B

The judge further treated the liability as a merely contingent liability, which could be disregarded. I have difficulty in accepting that view—at any rate in the sense in which the judge appears to have used it. This money—using a colloquial and business expression rather than a legal expression—was never the money of Messrs. Tattersall. It was the customers' money. It remains the customers' money. The customers can call for it at any moment. The fact that a demand in writing has to be made before the liability to pay accrues, so as to make the Statute of Limitation run, does not make the liability a mere contingent liability in the sense in which the judge appears to regard it. It is an existing liability which can be enforced only when the creditor has made a demand. However, treating it as a contingent liability, he says: Here is a receipt—receipt, be it observed, at the date of the alteration in the accounts, not at the date when the money was originally received, but a receipt at that date—with (tied to it, so to speak) a mere contingent liability which may never become effective, and, for income tax purposes, that contingent liability can be disregarded. C D E

I think that it sufficiently appears from the judgment which I have delivered why it is that I take a different view from that taken by the judge, but I should add one thing, which I should have added earlier, and which might conveniently be added here: Mr. Hills suggested that we could proceed on the footing that these balances—the unclaimed balances, as they are called—in fact, never would be claimed. I wish to say quite clearly and emphatically that I decline to make this assumption. There is no particle of foundation for it in the facts as found. It was a matter of fact which was proper to be found by the commissioners, if they had been minded to find it. If it had been relevant, and if they had formed that view, they would, no doubt, have stated it in their conclusions, but nowhere is any such conclusion to be found. It is, in my judgment, quite illegitimate, on a matter which Mr. Hills for the purposes of his argument treated (as, indeed, it was) as a crucial matter, for this court to assume that matter of fact in his favour, and, as I say, I must decline to do so. F G H

That leaves only one matter to which I must refer, which is the case to which the judge referred—namely, *Taxes Commissioner v. Melbourne Trust, Ltd.* (3). That was a case in which an assets realisation company had been formed to take over, nurse, develop, and realise the assets of three other companies. That was its business. Every sum which that

A company received when it sold an asset was a receipt in the matter of its trade. It was a company which was trading in those assets. The assets were its stock-in-trade, and, when it sold an asset, the sum which it received in respect of the asset was, at the moment of receipt, a trading receipt without any possibility of question. The only difficulty which

B occurred in that case was a difficulty which to a certain extent arose through the fact that the company had assets in various parts of the Commonwealth of Australia, and this arose under the taxing Act of one particular state in which some of the assets were situated. The company had sold an asset situated in that state, and the question was

C the profit in respect of which it was assessable under the state income tax law. It was impossible to say that the company had made a profit merely by selling one asset unless a valuation of the other assets was made. It is quite obvious that, in a case of that kind, to treat the proceeds of one sale as a profit, without taking into account the value of the other

D assets, would have been wrong. What the company had done, however, was that it had in point of fact decided that it could make a dividend distribution, and, by reason of the circumstance, it became possible to say, without the necessity of a valuation, that the company had, by its own actions, made it clear that, according to its judgment, it had made

E a profit, because it was distributing a profit to the shareholders. Accordingly, up to the amount of that profit, it was treated as having made a profit in that state for that year. That merely means, however, not that a receipt which in the first instance was not a trading receipt had become a trading receipt by some subsequent process, but simply that what was

F a gross trading receipt at the first had been examined by the company with reference to the rest of its trading, and the company, as a result of that examination, had decided that part of that receipt could be treated as a profit. It seems to me, with great respect, that that case affords no assistance in the present case, once the facts of that case and of this case

G are properly appreciated. The appeal must be allowed, with costs here and below, and the decision of the special commissioners restored.

SCOTT, L.J. : I agree with the whole of the judgment delivered by SIR WILFRID GREENE, M.R., and wish to emphasise only one point, namely, that the assessments in question purported to be made under

H Sched. D, Case I.

CLAUSON, L.J. : I agree.

Appeal allowed with costs in both courts.

Solicitors : *Baileys, Shaw & Gillett* (for Messrs. Tattersall) ; *Solicitor of Inland Revenue* (for the inspector of taxes).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

Re HAMMOND, HAMMOND *v.* TREHARNE.

[CHANCERY DIVISION (Simonds, J.), June 1, 1938.]

Wills—Construction—Amount of legacy—Inconsistency between words and figures.

The testator by his will gave a number of legacies to institutions, the amount of all except one being stated in both words and figures to be £500. The amount of the remaining legacy was first stated in words to be "one hundred pounds" and then in figures "£500":—

HELD: applying the maxim that in a will the second of two inconsistent provisions is to prevail, the legacy was one of £500, and not of £100.

[EDITORIAL NOTE.] In commercial documents there is no doubt a *prima facie* rule that, where words and figures conflict, the words are to prevail. In the case of wills, the later of two inconsistent clauses has always been held to prevail, upon the principle that a later testamentary disposition revokes an earlier one. In the case of deeds, it is said that the intention of the parties is to be found in the earlier of two inconsistent clauses. In the present case, the testator's intention would seem to have been to give all the legatees gifts of the same amount, but the judgment is founded upon the maxim that the later of the two inconsistent provisions prevails.

AS TO INCONSISTENT CLAUSES in A WILL, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 677, 678, para. 1292; and FOR CASES, see DIGEST, Vol. 44, pp. 606-609 Nos. 4335-4365.]

Cases referred to:

- (1) *Morrall v. Sutton* (1842), 5 Beav. 100; 44 Digest 916, 7751; 14 L.J.Ch. 266; 5 L.T.O.S. 1.
- (2) *Saunderson v. Piper* (1839), 5 Bing. N.C. 425; 6 Digest 25, 148; 8 L.J.C.P. 227.
- (3) *Garrard v. Lewis* (1882), 10 Q.B.D. 30; 6 Digest 25, 149; 47 L.T. 408.

SUMMONS to determine whether in a clause of a will, where the amount of a legacy was expressed first in words and then in figures, the words or the figures prevailed.

The clause in question read as follows:

I bequeath . . . to the Carmarthen Infirmary the sum of five hundred pounds (£500), to the Baptist Medical Mission the sum of five hundred pounds (£500), to Miss May's Mission the sum of one hundred pounds (£500), to the Baptist Sustentation Fund the sum of five hundred pounds (£500).

Gerald Upjohn for the plaintiff.

G. E. Timins for Miss May's Mission, referred to *Morrall v. Sutton* (1).

H. Lloyd-Williams for the Baptist Missionary Society.

Wilfrid M. Hunt for the residuary legatee, referred to *Saunderson v. Piper* (2) and *Garrard v. Lewis* (3).

J. W. Brunyate for the Attorney-General.

SIMONDS, J.: The question is whether the gift to Miss May's Mission is one of £100 or of £500. I think it is a case in which I should apply the maxim *cum duo inter se pugnancia reperiuntur in testamento ultimum ratum est*, which is to say that an intention is to be attributed, sometimes arbitrarily, to the testator that, where in a will there are two inconsistent provisions, the later one is to prevail. It is an arbitrary rule in the sense that one can only give effect to the intention of the testator,

but it is better to follow a general rule than to rely upon fine distinctions which can be of no substance. In this case, therefore, I shall adopt that principle. No doubt there is a *prima facie* rule that, where words and figures conflict, the words ought to prevail, but no case has been brought to my notice where that rule has been applied otherwise than in the case
A of commercial documents. The rule must, of course, give way to the context, but the context here justifies the view that the testator intended £500, and not £100.

Solicitors : *John T. Lewis & Woods*, agents for *Randell, Saunders & Randell*, Llanelly (for the plaintiff and the residuary legatee); *Boulton, Sons & Sandeman* (for Miss May's Mission); *Attenboroughs* (for the Baptist Missionary Society); *The Treasury Solicitor* (for the Attorney-General).
B

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

C KNIGHT *v.* SAMPSON.

[KING'S BENCH DIVISION (Wrotesley, J.), **June 16, 17, 1938.**]

Negligence—Breach of statutory duty—Motorist—Pedestrian crossings—Defence of contributory negligence—Availability—Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, regs. 3, 4.

D The defendant's car, proceeding at a proper speed, was approaching a pedestrian crossing and was within a foot or two of the crossing, when the plaintiff, who up to then had not shown by his demeanour that he was about to cross the road, suddenly stepped upon the crossing and was struck and injured by the defendant's car :—

E HELD : there was no negligence and no breach of the regulations respecting pedestrian crossings, and the plaintiff could not recover.
Bailey v. Geddes (1) *distinguished*.

EDITORIAL NOTE. It had been thought that, after the decision in *Bailey v. Geddes* (1), if there was a finding of fact that the car had not reached the pedestrian crossing, then no action on the part of the pedestrian could be pleaded as contributory negligence. It is here decided, however, that, if the car is within a very short distance of the crossing, proceeding at a proper speed, then it can be pleaded that the pedestrian started suddenly to cross the road, and that his actions, being quite unexpected by the motorist, were the real cause of his injury.

F AS TO PEDESTRIAN CROSSINGS, see HALSBURY, Hailsham Edn., Vol. 16, p. 492, para. 724; and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 31a, 31b.]

G Cases referred to :

(1) *Bailey v. Geddes*, [1938] 1 K.B. 156; [1937] 3 All E.R. 671; Digest Supp.; 107, L.J.K.B. 38; 157 L.T. 364.

(2) *Chisholm v. London Passenger Transport Board*, [1938] 2 All E.R. 579; Digest Supp.

H ACTION for damages for personal injuries sustained at a pedestrian crossing. The facts of the accident are fully stated in the judgment, and the case is only of importance in so far as the facts are distinguishable from those in *Bailey v. Geddes* (1).

Eric Sachs for the plaintiff.

F. G. Paterson for the defendant.

WROTTESLEY, J. : My understanding of this accident is that Captain Knight went to the edge of the pavement and was looking uphill towards Hampstead, and not presenting the appearance of a man about to cross the road at all. Nevertheless, at some time, he undoubtedly did cross the road, and, as I find, he stepped off in such a way as to meet the car on its near side, and met the near-side front wing of this motor car about 12 ins. behind the front of that wing or mudguard. A

One reading of the decision in *Bailey v. Geddes* (1) and of the case which followed it, *Chisholm v. London Passenger Transport Board* (2), might, I suppose, lead to the proposition that one never could possibly knock down a pedestrian on a pedestrian crossing without being civilly liable for any damage that resulted, if not, indeed, criminally. However, I do not think that that is what was intended in *Bailey v. Geddes* (1). I observe with interest that GREER, L.J., said this, at p. 162 (dealing with a witness who was called to assist the defendant's case) : B

So far from assisting the defendant's case, he proved the plaintiff's case up to the hilt. He did not see the actual accident, but it took place when the two men who were crossing had nearly crossed the road. One of them was fortunate enough to escape ; the other one was just too late, but would have been fully and clearly protected if effect had been given by the driver of the car to the regulations. But it was not [i.e., effect was not given to the regulations by the driver], and it is obvious that before the driver of the approaching car got to the crossing he must have had an opportunity of seeing these two men upon the crossing and an opportunity, therefore, of strictly adhering to the regulations Nos. 3 and 4. C D

I think that GREER, L.J., used that language advisedly, and I doubt very much whether he or either of the other Lords Justices who decided that case would have held that it was impossible for a pedestrian so to step on to a pedestrian crossing as in effect to be committing suicide. I think that it is possible. As a matter of fact, in this case, I do not think that this lady ever had an opportunity of seeing Captain Knight upon the pedestrian crossing. I think, indeed, that his demeanour—not, of course, purposely—deceived her into thinking, as she reasonably might, that he was not intending to cross the road at all. I think that it was very likely, although, of course, it is really impossible to say within an inch or two, that, after the car had reached the edge of the crossing, Captain Knight suddenly stepped off the pavement on to the road. His own language is : “ I turned right ”—and that very closely agrees with her recollection—“ faced the crossing, and stepped right off.” That is his own language, and I think that that really expresses what took place. What then followed is, I think, obvious from the agreed facts. The lady applied her brakes and swerved to the right. She did not succeed in avoiding Captain Knight. Captain Knight was struck by the near-side mudguard 12 ins. from the front and was thrown to the ground. That she was not travelling at anything like an excessive rate of speed appears from the fact that she was able to pull up with Captain Knight's body lying in the road opposite her car, opposite her as she sat. That is her recollection, which I think that I can trust, and that really disposes of this case. There must be judgment for the defendant. E F G H

In answer to counsel, WROTTESELEY, J., found as a fact that the wheels of the car, at the time the plaintiff stepped on to the crossing, were either on, or within a foot or two of, the crossing.

Solicitors : *Rider, Heaton, Meredith & Mills*, agents for *Harold Gee & Williams*, Bristol (for the plaintiff); *William Hurd & Son* (for the defendant).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

**Re K. T. STEPHENS AND R. H. BRANTHWAITE (TRADING AS MORESDALE FUR FARM) AND E. OTWAY.
Re HUME AND CROFT.**

[KING'S BENCH DIVISION (Branson, J.), June 14, 1938].

Work and Labour—Unemployment insurance—Insured person—Employment in agriculture—Employee on fur farm—Unemployment Insurance (Agriculture) Act, 1936 (c. 13).

The employees were engaged in the tending, cleaning, and generally in giving the necessary attention to foxes upon a fox breeding farm. The foxes were bred for the purpose of selling the pelts, which were sold in their wet, uncured state. The question raised upon the issue was whether these men were engaged in agriculture within the meaning of the Unemployment Insurance Acts, 1935 and 1936 :—

HELD : the employment was an employment in agriculture within the meaning of the above Acts.

[EDITORIAL NOTE. This appears to be the first time the question of what is "employment in agriculture" has been considered in connection with the Unemployment Insurance Acts. It will be noted that the men were employed purely in the breeding and tending of the foxes.

AS TO PERSONS INCLUDED WITHIN COMPULSORY UNEMPLOYMENT INSURANCE, see HALSBURY, 1st Edn., Vol. 28, Work and Labour, pp. 885-888, paras. 1571-1575; and FOR CASES, see DIGEST, Vol. 44, pp. 1304-1307, Nos. 83-132.]

Cases referred to :

- (1) *Peterborough Royal Foxhound Show Society v. Inland Revenue Comrs.*, [1936] 2 K.B. 497; [1936] 1 All E.R. 813; Digest Supp.; 105 L.J.K.B. 427; 155 L.T. 134; 20 Tax Cas. 249.
- (2) *Inland Revenue v. Ardross Estates Co.*, [1930] S.C. 487; Digest Supp.
- (3) *Inland Revenue Comrs. v. Melross*, [1935] S.C. 812; 19 Tax Cas. 607; Digest Supp.

ISSUE under the Unemployment Insurance Act, 1935, upon a reference by the Minister of Labour to the court for decision, as to whether or not two persons employed at silver fox breeding farms for certain stated periods were persons in insurable employment within the meaning of the Unemployment Insurance Acts, 1935 and 1936, and whether or not such employment was an employment in agriculture within the meaning of the said Acts.

The employees were solely occupied in the breeding, tending and cleaning of silver foxes and other fur-bearing animals. They also did general work in the upkeep of the farm, such as cutting hedges and drain-

age work. It was stated that employees lived the ordinary life of farm workers and generally resided in cottages upon the farms.

W. Arthian Davies for the Minister of Labour.

J. R. Bavington Jones for the Silver Fox Breeders' Association.

BRANSON, J.: The matter is one which really falls to be decided more, I think, as a matter of first impression than in any other way. The definition in the Unemployment Insurance Act, 1936, s. 16 (1), is singularly unhelpful, in that all that it does by way of a definition of the word "agriculture" is to say that that word shall include horticulture and forestry, so that one is left to put an interpretation upon the word unassisted by anything which the interpretation clause of the Act has got to say about it. The question as to whether or not a certain exercise of activities is agricultural has arisen in a variety of cases, but I cannot myself feel that I get a great deal of help out of any of them. They are not all reconcilable. For example, there is the case of *Peterborough Royal Foxhound Show Society v. Inland Revenue Comrs.* (1), where, the question being as to whether a particular society, to wit, the Peterborough Royal Foxhound Show Society, was an agricultural society within the meaning of the Finance Act, 1924, s. 23 (2), LAWRENCE, J., decided that it was an agricultural society, because, he said, it came within the words "a society established for the purpose of promoting the interests of live-stock breeding." In other words, he held that the breeding of foxhounds was the breeding of live-stock, and, in dealing with the contention of the Crown that the words should be construed as referring only to animals whose use is an integral part of agriculture, horticulture or forestry, he said, at p. 500 :

But such an interpretation would exclude many animals which are bred in the ordinary course of agriculture and shown throughout the country ; for example, town and van horses, hackneys, hunters, racehorses, most breeds of dogs, and fur-bearing animals.

If that is the correct view, it is a finding that fur-bearing animals can properly be regarded as live-stock in an Act where the distinction is being drawn between what is an agricultural society and what is not. On the other hand, there is the Scottish case, *Inland Revenue v. Ardross Estates Co.* (2), in which it was held that land and buildings devoted to the breeding and rearing of silver foxes for the sake of their pelts were not agricultural lands and heritages within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 9 (11). The ground on which that decision was arrived at would appear to be that the court came to the conclusion that it was not possible to say that land was used for agricultural purposes because it was used for the breeding of animals, unless the animals which were being bred were such as are associated with an ordinary farm—horses, cattle, sheep, goats, pigs and poultry. LORD SANDS goes on to say, at p. 490 :

Fish hatcheries are not agricultural subjects, the rearing of pheasants is not an agricultural use of the land, nor is the breeding of dogs, however wide the outrun for exercise.

He has taken exactly the opposite view to that which is taken by LAWRENCE, J., in the *Peterborough Royal Foxhound Show Society* case (1) to which I have already referred.

Then there is another Scottish case, *Inland Revenue Comrs. v. Melross* (3), where it was held that land which was used partly as a poultry farm, partly for breeding silver foxes, and mainly for the raising of the silver foxes for the sale of their fur, was land which could properly be assessed under Sched. B, and that the occupier should not be assessed upon the profits of the sale of the pelts under Sched. D. In that case, it was pointed out that—to a considerable extent, at all events—the foxes lived upon the land, in that they consumed grass, water-cress and other vegetables, some of which were grown upon the holding, and in addition, said LORD FLEMING, at p. 817 :

the cubs during the first three months are largely fed on eggs which are obtained from the poultry run on the other part of the holding.

That being so, the court came to the conclusion that the commissioners, who had found that the owner was properly assessable in respect of this adventure under Sched. B, and not under Sched. D, were right.

That being the state of the authorities, it really comes, as I have said before, rather to a question of first impression than of anything else, and, in my view, the opinion of LAWRENCE, J., is preferable to that of the Court of Session in the *Ardross* case (2), because it seems to me that, in the first place, it is right to bear in mind sect. 4 (2) of the Act of 1935, and to pay regard to the actual occupation of the people who are involved in this issue. They, it appears, are paid according to agricultural wages. They live the lives of agricultural workers. It is true that they are employed in feeding and watering and cleaning foxes, but, unless it is to be said that agriculture is stereotyped, and that no animal which has been introduced within the memory of man can properly be treated as the subject of agriculture in the sense that it is live-stock which is raised upon a farm partly by the produce of the farm and partly by having the land to walk upon, I can see no distinction to be drawn between these foxes and sheep. The latter, of course, may be grown for mutton, or for their fleece, and I suppose one might imagine that some sheep may be grown rather for the one reason than for the other. I think it is impossible to say that no animal can be the subject of agriculture when it is being raised upon the land by the produce of the land unless its flesh is used for human consumption, and that seems to me to be the only real way in which one could distinguish foxes, or mink, from other things such as pigs or cattle, which are undoubtedly live-stock in the ordinary sense of the word, and the raising, feeding, and tending of which would obviously be regarded by everybody, so long as it is done in the ordinary way upon a farm, as an agricultural pursuit. It is obvious from the passage of LAWRENCE, J., to which I have already referred, that he drew no distinction between the raising of fur-bearing animals and

the raising of town and van horses, hackneys, hunters, racehorses, and most breeds of dogs.

I do not think that any good purpose will be served by going into any further refinement of argument about this matter. My view is that, where one has, as in these cases, a plot of land in the country being used for the raising of live-stock in the shape of fur-bearing animals, and at the same time being used to some not inconsiderable extent for the production of food for those animals, persons employed in relation to the feeding of those animals and in relation to the raising of food for them are persons employed in agriculture, and therefore entitled, from the time at which the Act came into operation, to be insured at the rates provided by the statute of 1936.

Solicitors : *The Solicitor, Ministry of Labour ; A. W. Woolf & Co.* (for the Silver Fox Breeders' Association).

[*Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.*]

Re RHAGG, EASTEN v. BOYD.

[CHANCERY DIVISION (Simonds, J.), May 27, 31, June 23, 1938.]

Wills—Construction—Bequest—Business—Whether confined to goodwill or including all assets of business—Solicitor's practice.

The testator, a practising solicitor, had employed B., a qualified solicitor, as clerk since 1922. B. received a fixed salary and a proportion of the profit costs of business introduced by him. This arrangement continued until 1935, when an agreement for a partnership commencing on Apr. 1, 1935, was made. Under that agreement, B. was entitled to one-half of the net profits. In Dec., 1934, the testator made his will, leaving his practice and his office effects to "my clerk," B. It was admitted that the alteration in the circumstances did not cause an ademption of the bequest, but it was contended that after the execution of the deed of partnership it could only apply to the testator's share in the goodwill :—

HELD : the bequest could not be so limited to a half-share in the goodwill, but was a gift of a half-share of everything which the testator treated as an asset of the practice when he carried it on by himself alone.

[EDITORIAL NOTE. The bequest of a business *prima facie* includes the testator's interest in all the assets of the business, and the premises upon which the business is carried on are a part of such assets. This construction may be controlled by the context, but in the present case it is clear that the context is wholly in favour of it.

AS TO BUSINESS, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 699, 700, para. 1318 ; and FOR CASES, see DIGEST, Vol. 44, pp. 692-694, Nos. 5333-5350.]

Cases referred to :

- (1) *Blake v. Shaw* (1860), John. 732 ; 44 Digest 693, 5346 ; 2 L.T. 84.
- (2) *Re Henton, Henton v. Henton* (1882), 30 W.R. 702 ; 44 Digest 693, 5341.
- (3) *Delany v. Delany* (1885), 15 L.R.Ir. 55 ; 44 Digest 693, case f.
- (4) *Re Beard, Simpson v. Beard* (1888), 57 L.J.Ch. 887 ; 44 Digest 693, 5335 ; 58 L.T. 629.

(5) *Re Deller's Estate*, *Warman v. Greenwood*, [1888] W.N. 62; 44 Digest 693, 5337.

(6) *Re Barfield*, *Goodman v. Child* (1901), 84 L.T. 28; 44 Digest 693, 5339.

(7) *Re Hawkins*, *Hawkins v. Argent* (1913), 109 L.T. 969; 44 Digest 693, 5338.

A ADJOURNED SUMMONS by which the plaintiff raised the question whether the execution of a partnership deed in respect of the testator's practice as a solicitor prevented the legatee of his "business as a solicitor and the office furniture law books and other articles in" the office prevented such legatee from taking any interest in the business other than the testator's share in the goodwill.

B *Wilfrid M. Hunt* for the plaintiff, the sole surviving executor.

H. E. Salt for the first defendant, a specific legatee.

C. D. Myles for the second defendant, a specific devisee and legatee.

J. Neville Gray, K.C., for the residuary legatees.

C SIMONDS, J. : The testator, Adamson Rhagg, practised as a solicitor at Newcastle-upon-Tyne. From 1922 he employed as a clerk the defendant, John Henry Boyd, who is a qualified solicitor. The terms of employment were that Mr. Boyd received a fixed salary and a proportion of any profit costs arising from business introduced by him.

D This arrangement continued until some time in 1935, when, as is now conceded by the plaintiff, the legal personal representative of the testator, an agreement for partnership was made between the testator and Mr. Boyd. That agreement was that the partnership between them should be deemed to have commenced on Apr. 1, 1935, and that as from that date Boyd should be entitled to one-half of the net profits of the practice, and that for the previous year some alteration should be made in the remuneration of Boyd. The financial year of the business had at all material times been from Apr. 1 to Mar. 31, and, prior to the year ending Mar. 31, 1935, the accounts were always made up on a cash basis, nothing being brought into account in respect of bills rendered and unpaid, or for work in progress.

E On Dec. 29, 1934—that is, before any agreement for partnership had been made—the testator made his will. He appointed his friends, Farquhar Alexander Ogilvie Laing and the plaintiff, executors and F trustees thereof, and then made this bequest :

G I bequeath my business of a solicitor and the office furniture law books and other articles in my office to my clerk John Henry Boyd.

He appears to have had no family for whom he wished to provide, and he devised and bequeathed the residue of his estate upon trust for sale H and for the payment out of the proceeds of sale of substantial legacies to his housekeeper and friends or relatives, and subject thereto upon trust for three named charities in equal shares.

The question for my decision is the effect of the bequest to the defendant, Boyd, which I have stated above in full. It was conceded by counsel for the residuary legatees that the altered circumstances did

not cause an ademption of the bequest, and that some effect must be given to it, notwithstanding that the testator had not at his death, as he had at the date of his will, the business of a solicitor to dispose of, but only his share or interest in such a business. Upon the basis of this concession, I must read the bequest as a bequest by the testator of his share or interest of and in the business of solicitors carried on by him **A** in partnership with the defendant Boyd.

On behalf of the residuary legatees, it has been contended that the bequest of the business—or, as I must now read it, a share of the business—comprises nothing more than the testator's share of the goodwill, neither his capital nor undrawn profits nor interest in unpaid bills or **B** in work in progress nor the leasehold premises at which the business was carried on being included. On behalf of the defendant Boyd, it has been contended that all the items that I have enumerated are included in addition to goodwill. Further questions have arisen, as to what was the testator's capital in the business, and whether it was included in **C** the bequest.

The meaning of the word "business" in a bequest will no doubt depend to a large extent upon its context and the surrounding circumstances, but it seems to me desirable to see whether I can obtain any guidance from cases in which the question has been considered. **D**

In *Blake v. Shaw* (1), where the testator, a wholesale clothier, gave "the plant and goodwill of my business in Aldersgate Street," **SIR W. PAGE** **WOOD, V.-C.**, held that neither stock-in-trade nor furniture in the house passed under the gift of plant, but that the house, which had no intrinsic value apart from the goodwill, did pass under the gift. **SIR W. PAGE** **WOOD, V.-C.**, thought that the testator in that case, in making a gift of plant and goodwill, did not mean them to be severed from the place where the business was carried on, and that the gift, in which, as he said, each word aided the other, might properly be taken to pass the leasehold, which the testator must have known to have no value except as **F** an adjunct to the business.

With this case may be contrasted *Re Henton, Henton v. Henton* (2), where, the testator having directed his trustees to carry on his business until his son should attain the age of 21 years and then to pay the debts of the business and assign it to his son, **FRY, J.**, held that the freehold **G** shop where the business was carried on did not pass, basing his decision, according to the report, largely on what he described as the first rule of law—that the heir cannot be disinherited except by direct words—and adding that *Blake v. Shaw* (1) went to show that it was a question purely of intention. **H**

In *Delany v. Delany* (3), the testator, a corn and wool factor, directed his executors to assign and transfer to H. "my said business and the goodwill thereof with the premises in which the same shall be carried on." The question was whether the word "business" included the stock-in-trade and capital employed in the business, and the sacks,

horses and drays which were used for the purposes of the business. CHATTERTON, V.-C., held that the capital employed in the business did not pass, and, with more doubt, that the stock-in-trade did not pass, but that the sacks, horses and drays did pass, since they were used solely for the purpose of the business, and, "forming as it were part of the implements of trade, may be said to pass as part of the business." I must admit to great difficulty in seeing what is the distinction between stock-in-trade and implements of trade for this purpose, or why, if one passes as part of the business, the other does not.

In *Re Beard, Simpson v. Beard* (4), the testator, a partner in a firm of brewers, maltsters and corn dealers, gave all his personal estate, not being partnership assets, to his wife, and dealt otherwise with all his share, right and interest of and in the goodwill of the businesses carried on by him in partnership, and also all his right, share and interest of and in a certain brewery and premises, and all public-houses and other real estate forming part of the partnership property, and also all debts, chattels, money, and personal estate forming part of the assets thereof. The testator had a loan account with the partnership, and there was a large sum due to him at his death upon this account. The question was whether or not this debt formed part of the partnership assets, and it was held by NORTH J., that it did not.

In *Re Deller's Estate, Warman v. Greenwood* (5), there was a bequest of all the testator's estate and interest in the leasehold premises where he carried on business and (at p. 62):

"the business of—now carried on by me at—and all the goodwill, stock-in-trade, fixtures, and effects which at the time of my decease shall be employed by me therein charged nevertheless with and subject to the payment of my trade debts due and owing to me in connection with my said business."

It was held, according to the report, that book debts to the amount of £1,600 owing to the testator at his death did not pass under the bequest. No reasons appear in the report, and I can only suppose that the book debts were excluded by reason of the express inclusion of other items.

In *Re Barfield, Goodman v. Child* (6), the testator, who carried on the business of a solicitor in partnership with the defendant Child, by his will gave to the said defendant for his own absolute use and benefit (at p. 29):

all my share and interest in the business of solicitors carried on by me and him as co-partners by virtue of the deed of partnership, conditional on his acting as solicitor to my estate free of charge, except moneys taken by him from my said estate.

The substantial question appears to have been whether the testator's share of the goodwill only passed under this bequest or whether it included also the sum of £100, which stood to the testator's credit in the account of the firm, and a considerable sum due to him for undrawn profits. FARWELL, J., decided in favour of the latter contention. He could see no third course between, on the one hand, saying that practically nothing passed under the bequest, and, on the other hand, that both the share of capital and undrawn profits did pass. In this view he was

no doubt largely influenced by the consideration that in such a business the goodwill was practically non-existent. He said, at p. 29 :

I find it impossible to come to the conclusion that he intended to pass nothing at all except the shadowy right to goodwill.

He had to consider and give effect to words which are not to be found in the will that I have to consider, but, whatever differences there may be, his decision is a valuable authority to show what may pass under such a gift. A

In *Re Hawkins, Hawkins v. Argent* (7), a testator bequeathed his business and plant in Dyott Street, New Oxford Street, to his brother and his manager in equal parts, and his will proceeded (at p. 969) : B

I will that they shall pay to Miss Annette Argent the sum of £10 per week during her life.

The question was whether there were comprised in this bequest (a) the lease of the business premises, (b) book debts owing to the testator at his death, and (c) a balance to the credit of the testator's account at his bank at his death (presumably, though it is not so stated, in connection with his business). ASTBURY, J., held that all these items passed under the bequest. It would seem that he was influenced in coming to this decision by the fact that the legatees had to pay a weekly sum out of the assets bequeathed to them. C D

I have now reviewed all the decided cases which can throw any light upon the question before me. They leave me, I think, free to form my own judgment upon the words of this will.

I must in the first place reject the contention of the residuary legatees that nothing more than the testator's share of goodwill passed under the bequest. It appears to me an arbitrary and unjustifiable selection of a particular asset among the several assets of which a business is made up. The word "business" in such a context as this bears much the same meaning as it does when it is said that a man has sold his business. F It means the undertaking or enterprise itself, not the process of carrying it on. When, therefore, a solicitor bequeathes his business, or, as the bequest must in the present case be read, his share of the business carried on by him in partnership with another, I see no reason for saying that goodwill, rather than any other asset, passes. If anything passes which is an asset of the business, why should not everything pass which is an asset of the business ? Equally, if a share in one asset passes, why not a share in all ? There will no doubt often be room for controversy as to what are the assets of the business, and whether it be an individual business or a partnership business, but, if an asset can properly be called an asset of the business, I see no reason for its exclusion from the bequest, unless a particular context makes exclusion necessary. G H

Secondly, I must observe that somewhat different considerations may be involved where the business was that of the testator alone, and where he carried it on in partnership. In the former case, to speak of his

- “capital” in the business, or his undrawn profits, may be wholly misleading. The substance of the bequest is the assets of the business, subject to its liabilities. There may be balancing figures in the accounts of the business which are called capital and undrawn profits, but in fact those figures are represented by the assets of the business, the stock
- A in-trade, cash at the bank, and so on. It is these items which constitute the business, and which will, in my view, ordinarily pass under a bequest of the business. Where, on the other hand, the testator carries on a business in partnership, and bequeaths his share in the business, the result can only be to put the legatee in his place in relation to his partner.
- B The legatee will, subject to the partnership articles, become co-owner of the several assets of the business, but the right and the obligation to account are of the essence of the relation, and in that connection it is sensible to speak of the capital and undrawn profits of the testator. They are things which have a real meaning, as distinct from the assets
- C of the business, in the relation which exists between the partners. The distinction may be of no practical importance where the legatee is himself the sole surviving partner, but it would be vital if he were not.

- In the present case, since, as the residuary legatees concede, the bequest is not adeemed by the testator having taken a partner after the date of his
- D will, I construe it as a bequest by the testator of his share of the business carried on by him in partnership. That means that the legatee is to have all the rights of which, under the partnership agreement, or under the general law relating to partnership, the testator is able to dispose. If the legatee and the partner were different persons, it might be said
- E with sufficient accuracy that they would, subject to the partnership articles, become co-owners of the partnership assets, with the right and obligation to account which I have mentioned. The fact that they are the same person cannot, in my judgment, affect the nature of the gift. I see no reason for excluding from it anything which was in fact an
- F asset of the partnership, or for treating the right and obligation to account as in some way limited or curtailed.

- If the gift were confined to goodwill, or a share of goodwill, as the residuary legatees contend, the result would indeed be a strange one. The residuary legatees would presumably be entitled to require that
- G the other assets of the partnership should be realised in the ordinary course of winding it up. The leasehold premises upon which the business has been carried on, and which might well be of importance to its successful continuance, would have to be disposed of. The debts due to the business would have to be got in, and got in without that regard
- H for the feelings of a client which would influence a solicitor anxious to maintain the goodwill of his business. I see no justification for attributing such intention to the testator, or for giving such an arbitrary direction to his bounty.

If, then, the gift is not to be limited in the way for which the residuary legatees contend, what is included in it? I find the same difficulty that

FARWELL, J., found in *Re Barfield* (6) in excluding anything which was in fact treated by the testator as an asset of his business. While he carried on business by himself alone, he treated as such an asset certain sums which he had advanced to clients, actual or potential. These sums were, I think, to him as much the assets of his business as plant and stock would, to a manufacturer, be the assets of his business. I see A
no reason to attribute any change upon his taking Boyd into partnership. They remained assets of the partnership business, with the result that the testator is, as a matter of account between himself and his partner, to be regarded as having a sum due to him on capital account of the necessary amount. So also with "undrawn profits," including sums B
due or to become due in respect of work done or in progress at his death. These are items which are, in my view, inseparably connected with the business. Perhaps, indeed, nothing would come more quickly to one's mind as being included in a man's share of a business than the undrawn profits which were payable to him. So also with money in the till, or C
money at the bank, if it can be identified with the business.

I must finally notice a contention that, whatever conclusion I might come to, if the bequest were only of the business, I have here a context which compels me to take a narrower view, for the gift is accompanied by "office furniture law books and other articles in my office," and it D
is said that here the maxim *expressio unius exclusio alterius* must apply. There is some force in this argument, but it is diminished by the consideration that the selection of goodwill as the item which is not to be excluded remains purely arbitrary. Why should the mention of law books, etc., make it reasonable to include goodwill but unreasonable to E
include undrawn profits in the preceding gift of the business? It may be that the testator thought it desirable to enumerate certain tangible assets, leaving what was intangible to be comprised in the expression "business." This, however, is speculation. Whatever his reason may have been, I do not find in the context sufficient reason for cutting down F
the meaning that I should otherwise feel bound to give to the words "my business as a solicitor" or "my share of the business carried on in partnership with Boyd."

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Dees & Thompson*, Newcastle-upon-Tyne (for the plaintiff); *Adam Burn & Son*, agents for G
Frank Kirby & Co., Newcastle-upon-Tyne (for the first and second defendants); *Stibbard, Gibson & Co.*, agents for *Gibson, Pybus & Pybus*, Newcastle-upon-Tyne (for the residuary legatees).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.] H

SEDLEIGH-DENFIELD v. ST. JOSEPH'S SOCIETY FOR
FOREIGN MISSIONS AND HILLMAN.

[KING'S BENCH DIVISION (Branson, J.), June 17, 21, 22, 1938.]

Nuisance—Creation unknown to occupier—Right of stranger to abate—Whether occupier liable for failure to abate before notice.

A The college, the first defendant, was the owner of property adjoining the plaintiff's premises. The boundary of its property on that side had originally been a ditch and a hedge, their relative positions changing along the boundary. Where the plaintiff's garden adjoined the college property, the ditch abutted on the plaintiff's garden, the hedge being on the side of the ditch nearer to the college property. It was admitted that, applying the usual presumption, the ditch at this point belonged to the college. About 1934, when a block of flats was erected upon the western side of the plaintiff's premises, the ditch had been piped by the county council. No permission was obtained from the college, and the fact of these pipes having been put in was not at any material time brought to the notice of the college authorities. No proper guard was put at the entrance to the pipe to prevent its being blocked by *débris*. The pipe becoming blocked, the plaintiff's garden was flooded, and he claimed damages from the college, on the ground that the pipe was a nuisance. He also claimed damages from the second defendant, the lessee of the block of flats above referred to, upon the ground that she had covenanted in the lease of her property to repair, maintain and cleanse all sewers, drains, water-courses, culverts and pipes:—

D HELD: (i) it was equally open to the plaintiff and to the college to put this pipe right, and the plaintiff could not complain of the failure of the college to abate a nuisance of which they had no notice, being a nuisance which the plaintiff could have abated himself.

(ii) as the second defendant could not abate this nuisance without committing a trespass, there was no claim against her.

E [EDITORIAL NOTE. The occupier of land who is aware of a nuisance existing upon his property is under a duty to abate it, but this is not the case where he has no knowledge of the existence of the nuisance and it is not brought about by any act or default of his. There is no duty cast upon an occupier to go about his land searching for nuisances which may or may not exist, and if, as in the present case, unusual weather or any other cause by reason of some unsuspected defect produces damage to neighbouring property, the owners of such property have an equal opportunity with the innocent occupier of abating the nuisance.

F AS TO CONTINUING A NUISANCE, see HALSBURY, Hailsham Edn., Vol. 24, pp. 84, 85, para. 148; and FOR CASES, see DIGEST, Vol. 36, p. 214, Nos. 567-575.]

Cases referred to:

- G (1) *Job Edwards, Ltd. v. Birmingham Navigations*, [1924] 1 K.B. 341; 36 Digest 214, 575; 93 L.J.K.B. 261; 130 L.T. 522.
- (2) *Barker v. Herbert*, [1911] 2 K.B. 633; 36 Digest 197, 374; 80 L.J.K.B. 1329; 105 L.T. 349.
- (3) *Harrold v. Watney*, [1898] 2 Q.B. 320; 36 Digest 69, 443; 67 L.J.Q.B. 771; 78 L.T. 788.
- H (4) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, 311; 37 L.J.Ex. 161; 19 L.T. 220; *affg.* (1866), L.R. 1 Exch. 265; *revsg.* (1865), 3 H. & C. 774.

ACTION for damages for negligence and, in the alternative, for nuisance. The facts are fully stated in the judgment.

G. Granville Sharp and H. V. Lloyd-Jones for the plaintiff.

Hubert Hull and *Ifor Lloyd* for the first defendant.

T. K. Wigan for the second defendant.

BRANSON, J. : The facts of the case out of which the trouble arises are as follow. The plaintiff's house is No. 1, Victoria Road, Mill Hill, and at the upper end of the garden, that end of it which is remote from Victoria Road, there is a ditch, upon the other side of which there is land belonging to St. Joseph's College. The complaint which is made by the plaintiff arises out of the fact that in Apr., 1937, and again in Nov., 1937, a culvert which was supposed to take the water from the ditch at the end of the plaintiff's garden underneath the garden of Holcombe Court flats, which were the adjoining premises on the western side, became blocked. The ditch overflowed, and the water poured across the plaintiff's garden into the basement of his house, and did what is alleged to have been very serious damage to the foundations of the house.

The plaintiff says against the college : " This ditch, not only where it is still open, but also where it is now filled by the culvert, and by earth covering the culvert, was your ditch, and you have permitted the creation in that ditch of a nuisance, by allowing somebody to block up the ditch with a culvert, and by not properly protecting the intake end of that culvert from the possibility of being blocked by *débris* of various kinds which would in all probability be washed down the ditch in times of considerable rainfall." His case, as set out in the statement of claim, is that, by the substitution of this unguarded culvert for the open ditch, and by allowing the culvert to be blocked up by rubbish, they have created a nuisance, and by that nuisance they have caused the plaintiff damage.

The particulars of that damage, first of all, were that the pipe was inadequate in its capacity, and imposed an undue burden upon the ditch as a conduit of the surface-water effluent from the adjoining land. That, however, is now given up. The second complaint was that it was left wholly unguarded by any grid or barrier, whereby it became choked from time to time by materials brought to its entrance with the water flowing thereto. That complaint remains. The third complaint is that the ditch was befouled with leaves and other *débris* from the surrounding foliage, by which it was too much overgrown. With regard to that, there is no evidence at all, and I need not trouble any further about it.

The case against the second defendant is put in a different way. The second defendant is the lessee of the block of flats called Holcombe Court, which, as I have said, abuts upon the plaintiff's premises upon the western side, and the complaint against her is put in the following way. It is said that her predecessor in title filled up the ditch and put in this culvert, and put it in without properly guarding its entrance, and so created a nuisance. It is said that that pipe, so put in, was demised to

the second defendant, and that by her lease she undertook to maintain it and to keep it properly cleaned, and that therefore it has become her duty to maintain this culvert in such a condition as not to be a nuisance, and that, that being the position *vis-à-vis* her lessor, she is under a duty, of which the plaintiff can take advantage, to keep a free course through
 A this culvert for the water which is discharged into it by the ditch. It is said that, because the mouth of the culvert was left unguarded, and because the second defendant did nothing by way of cleansing it and keeping it free from obstructions, she has caused or permitted a nuisance, and that the plaintiff has a cause of action as against her.

B I think it will conduce to simplicity if I deal first of all with the position with regard to Mrs. Hillman. Mrs. Hillman comes upon the scene as the assignee of the lease which was granted on Dec. 21, 1934, by Joseph Hastings to Eric Richard Sumner, and the clause upon which Mr. Granville Sharp relies is cl. 2 (3) of that lease, in which it says that the tenant
 C agrees to "repair, uphold, sustain, maintain, cleanse," and so forth,

the demised premises and all . . . sewers, drains, watercourses, culverts, flagging, railings, pipes, water-pipes, pavements, fixtures and things belonging thereto and at all times during the said term to comply with all notices and requirements . . .

D The first observation to be made upon that is that this culvert is in no sense a drain, water-course or fixture or thing belonging to those premises, and that, I think, will appear plainly enough when I state how it came to be put down. The short answer, as it seems to me, to any case against Mrs. Hillman is that the culvert, so far as it exists
 E underneath or between the boundary on the east and on the west of her property, is a perfectly good culvert, and the only complaint that is made about it is that its opening is not sufficiently protected by any grid. That opening is not upon her land at all. It is in the ditch which exists at the foot of the plaintiff's garden, and over that ditch the
 F defendant Hillman has no right at all. She could not go there without being a trespasser, and it seems to me that, once one has got that position upon the facts, it is absurd to say that she can be held liable for a nuisance which she did not create, and which she was not able to abate except by the leave and licence of the adjoining owner, upon whose
 G land the nuisance existed. Assuming it to be a nuisance, it is a nuisance created, upon land over which she has no rights, by her lessor, who equally had no rights over it, and how that can bring a liability upon her I fail to see. I think that that is sufficient as an answer to the claim against Mrs. Lilian Hillman.

H With regard to the college, it is necessary to deal a little more particularly with the facts of the case. The college owns the field numbered 607 upon Middlesex Sheet 6/14 of the Ordnance Revision of 1935. At the bottom of that field there is a line of trees, and there are a hedge and a ditch. It appears that the hedge and the ditch change position from time to time in the stretch from east to west across the bottom of

field No. 607, and, at the point where the hedge and the ditch abut upon the end of the plaintiff's garden, the ditch is upon the plaintiff's side of the hedge—that is to say, upon the south side of the hedge. The first step which is taken by the plaintiff is to call attention to the ordinary presumption of ownership which arises where one has a ditch and a bank with a hedge growing on the top of it, and to say that the ditch and the hedge would, upon that presumption, belong to the owners of field No. 607. In so far as those conditions extend, the defendants, St. Joseph's College, agree that the presumption represents the facts of the case, and that, where the ditch is upon the south side of the hedge, the ditch must be taken to belong to them. As the ditch passes to the eastward, however, the relative positions of the ditch and the hedge alter. About half-way along the field No. 607, the ditch goes to the north side of the hedge, and the college, relying upon the same presumption as leads them to admit that the westerly portion of the ditch belongs to them, deny that the rest of it belongs to them. Mr. Granville Sharp made a gallant attempt to induce me to refuse to apply to the eastern half of this ditch the presumption upon which he relies for the western half, but I am afraid that I cannot assent to his argument with regard to that. I take it that the western part of this ditch, down to the point where the ditch and the hedge change places, did at one time, and does now (subject to what may be the position with regard to the part of it that has been filled up), belong to St. Joseph's College. The evidence is that that portion of it, including the portion now covered up, was regularly cleaned by servants of St. Joseph's College, upon the assumption that it belonged to the college, and it was cleaned right away through to the junction of the ditch with Lawrence Street, which includes, of course, that portion of it running behind the Holcombe Court flats which has now been covered up and put into a culvert.

This covering up came about as follows. On May 11, 1934, an agreement was entered into between Samuel Russell Stephens, the then owner of this property, whereby Mr. Stephens agreed to sell to the Middlesex County Council a patch of land at the corner of Lawrence Street and Victoria Road, and in that agreement it was provided in cl. 9 as follows :

As it has been found necessary to pipe in the ditch at the northern boundary of the vendor's land through alteration of the plans of the proposed building caused by the taking by the council of the said land, the council will immediately pipe in the ditch accordingly provided that the vendor shall provide all such soil as shall be necessary for filling in the said ditch after the pipe has been laid.

Evidence was called before me to show that the county council sent its workmen, and that they laid these pipes to make the culvert in question in this case. It is quite plain that in some way or another—perhaps because nobody thought that it mattered in the very least—the pipes not only were laid across the back of Holcombe Court but also were carried on until they projected past the boundary between Holcombe

Court and No. 1, Victoria Road, and finished by running between some rough brick walls some 2 ft. or 3 ft. into that part of the ditch which lay to the eastward of the boundary between Holcombe Court and No. 1, Victoria Road.

At that time No. 1, Victoria Road, was not owned by Stephens at all, but was owned by the witness Walter Henry Hurt, whose wife bought it in June, 1922, and who lived there from that date until Feb., 1937. Thus, no authority to go past the boundary between the two properties could have come to the Middlesex County Council from Stephens. Nobody, so far as the evidence goes, applied for or obtained any permission from the trustees or the rector of St. Joseph's College, and therefore it appears that, upon the assumption that that piece of ditch belonged to St. Joseph's College, the pipes were laid in it without their authority, and as a trespass against them. If this pipe is a nuisance, therefore, it was a nuisance created (if that part of the ditch belonged to the college) against the owners of the ditch by somebody who was a mere trespasser.

It is said that the insertion of such a culvert in such a position without a proper guard against its getting blocked by the *débris* which would be likely to be washed down the ditch was creating a nuisance. I think that it may properly be said to have been the creation of a nuisance. It is true that the matter has not been really contested, but that in itself leads me to the conclusion that it would be right to hold that it is a nuisance. It was alleged to be a nuisance, and no evidence was given from which I could properly draw a conclusion of fact that to put in such a pipe in such a position, and unguarded (as this was unguarded) by any grating, was not to create a nuisance there.

Then comes the question, however, as to who was responsible for the omission to guard the entrance to this pipe by a grating. A grating is to be found there which, if it had been properly placed, would have been a sufficient guard, but, instead of being placed so that it protected the mouth of the culvert, it was apparently propped up upon the top of it. That must have been done while the cement in which the pipe was embedded was still wet, because it has sunk into that cement, and is held by it. The actual individual who is responsible cannot be ascertained, because the men who were doing the work are not now available. One has been killed by an accident, and the other has died a natural death, and the engineer in charge of the matter apparently never saw in what position the grating was placed. So that, assuming, for the sake of argument, that the college owned both that part of the ditch which had been covered up and that part of the ditch which is at the foot of the plaintiff's garden, we have the case of a private nuisance having been created upon the defendants' land without the defendants' knowledge and without their permission.

The next matter of fact is that, when the lay brothers, who from time to time—once in February, I think, and once in November—used

to go to this ditch to keep it clean, saw the culvert being put in, they assumed, contrary to the fact, that it was authorised by their superiors, and therefore made no report to anybody in authority in the college. Thus, nobody in authority in the college was aware of the construction of this culvert at the time, and, so far as I know, none of them became aware of it until the flood took place in Apr., 1937. A

I have formed the opinion that this ditch was no doubt at one time or another dug in the ordinary course of the user of the land in order to provide for the surface drainage of that land. It is an ordinary agricultural ditch, dug along the bottom of an ordinary agricultural field, and its purpose, in the hands of St. Joseph's College, is no more than to act as a land drain to take away the surface-water. What is the position of the owners of such a ditch when it is found that somebody, without their consent or connivance, has put a structure into that ditch which, by rendering it liable to overflow, has caused a nuisance in the ditch? It seems to me that the best statement of the law upon that subject, as applicable to the present case, is to be found in *Job Edwards, Ltd. v. Birmingham Navigations* (1). The passage to which I refer is to be found in the judgment of BANKES, L.J., where, after discussing the distinction between a public and a private nuisance, he uses this language, at p. 350 : B

It is clear that in the case of a public nuisance, when once the existence of the nuisance upon his land becomes known to the occupier of the land, it is his duty to abate it, or to endeavour to abate it, even though he is entirely innocent of either causing the nuisance or of allowing it to continue : *Barker v. Herbert* (2) ; *Harrold v. Watney* (3). I can find no authority which suggests that the same standard of duty is required of the occupier of land in the case of injury resulting from a private nuisance on his land. Every consideration, apart from authority, appears to me to point in a contrary direction. In the first place the common law has given the person threatened with injury the exceptional right to enter upon the land on which the nuisance exists and to do what is necessary to abate it. This in itself, I think, points to the conclusion that this remedy was given because it was recognised that though in some cases another remedy might exist yet there were cases in which the law did not afford any other remedy. . . . I am of course confining these observations to the case where the possessor of the land on which the nuisance exists is entirely innocent of either creating, or continuing it. C

Then he proceeds to consider what will constitute a continuance of a private nuisance so as to create an actionable wrong, and says that that must depend upon the evidence in each case. He says, at p. 352 : D

A deliberate refusal to give an adjoining owner notice of the danger, or an obstruction of that owner in his endeavour to abate the nuisance, may be evidence of a continuance. There may be cases (though I am not deciding the point) in which the act necessary to abate the nuisance in the first instance was of such a trifling nature that it might amount to an act of negligence on the part of the occupier of the land on which the nuisance existed not to take that step. E

It seems to me that that is a decision that, in a case like the present, it cannot be said that the college has continued this nuisance merely by reason of the fact that some of its servants knew of it, thought that it had been authorised by the college, and therefore never communicated to those responsible for the conduct of the business of the college the existence of this culvert. F

That being the position of affairs, it seems to me that it was equally open to the plaintiff to put this culvert right as it was to these defendants. Either could have done it, and there is no right of the plaintiff to complain against these defendants that they have not abated that which, if it is a nuisance, and a nuisance which might cause injury to him, the plaintiff could have abated himself.

It is said that he did not know. That, however, is exactly what is said of the defendants, and it does not seem to me that there is any more duty cast upon the defendants to seek out and search their lands, lest there might be found to be a nuisance upon them, than there is upon the plaintiff to protect himself by going and looking into the ditch on this property of which he had recently become the purchaser, in order to see whether there was anything in its construction which might cause a danger.

For those reasons, I have come to the conclusion that neither of these defendants can be made responsible for the damage which has been sustained by the plaintiff. It is said that, however that may be with regard to the first flood in April, it surely cannot be right with regard to the second flood in November. If I am right, however, in thinking, as I do, that the common law right, to which *BANKES, L.J.*, referred in the passage which I have cited from *Job Edwards, Ltd. v. Birmingham Navigations* (1), would have given the right to the plaintiff to go and abate this nuisance himself, then the difficulty has arisen because he has failed to exercise that right, and not by reason of any obstruction or failure to give him notice on the part of the first defendants.

A good deal of argument has taken place with regard to the application of *Rylands v. Fletcher* (4) to this case. I think that all I need say about that is that it seems to me to be quite plain that, upon the facts of this case, this being a ditch cut to drain the land in the ordinary user of land, and there being no evidence that any extra accumulation of water brought upon the land by the defendants has caused this damage, the principle of *Rylands v. Fletcher* (4) can have no application at all.

Judgment for the defendants with costs.

Solicitors: *Maltz, Mitchell & Co.* (for the plaintiff); *Wilham & Co.* (for the first defendant); *F. W. Brown* (for the second defendant).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

Re BARNES.

[KING'S BENCH DIVISION (Lawrence, J.), April 11, 12, June 22, 1938.]

Estate Duty—Deduction of debts—Gifts inter vivos—Debts exceeding amount of free estate—Whether deduction allowed against gifts inter vivos.

The deceased within 3 years of his death made gifts *inter vivos* to the value of £185,000. At the time of his death he was practically penniless, and the debts owing by him amounted to just over £90,000. It was contended that his personal representative was entitled to set off the

debts and funeral expenses against the total value of the estate, which consisted, save for a very small sum, only of these gifts *inter vivos* :—

HELD : the debts could not be set off beyond the value of the assets available for their payment, and therefore could not be set off against the value of the gifts *inter vivos*, which were not so available.

[EDITORIAL NOTE.] It was argued that, since the gifts *inter vivos* had to be aggregated for the purposes of estate duty, the debts could be set off against the aggregated estate. Against the contention that such gifts were not available for payment of debts, it was argued that they might be set aside as voluntary dispositions. These contentions have been rejected, and the total value of the estate made the basis of the assessment to duty.

AS TO DEDUCTION OF DEBTS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 273-275, paras. 281, 282 ; and FOR CASES, see DIGEST, Vol. 21, pp. 25, 26, Nos. 139-145.]

APPEAL from a decision of the Inland Revenue Commissioners to the effect that, in determining the principal value for the purpose of estate duty payable on the property passing on the death of William Henry Barnes, there shall be no allowance made for the funeral expenses of the deceased or for any debts incurred by him.

The deceased, William Henry Barnes, was the governing director of a private company formed about a year before his death. The capital of the company consisted of 200,000 £1 shares, all of which had been paid for by the deceased but had been allotted, except in the case of 3 shares, to nominees. These allotments constituted gifts *inter vivos*, and at about the same time, and within 3 years of his death, the deceased had made gifts of freehold and leasehold property to the amount of £29,355. He had also made a gift of £500 in cash. At the time of his death, he owed debts amounting in the aggregate to £90,390 4s. 1d. His assets, as valued for the purposes of the inland revenue affidavit, were £10 in respect of the wearing apparel of the deceased. It was admitted, however, that the 3 shares above referred to had inadvertently been omitted from the affidavit, and it appeared, from a valuation of the gifts *inter vivos*, that these shares would have been worth rather less than their nominal value of £3.

Rt. Hon. Sir William Jowitt, K.C., and Gurney Beagley for the petitioner.

The Attorney-General (Sir Donald Somervell, K.C.) and J. H. Stamp for the Inland Revenue Commissioners.

LAWRENCE, J. : During 1930, the deceased made gifts to his family to the value of £185,000, and on Sept. 2, 1931, he died practically penniless, owing some £90,000. His executrix, whilst admitting that his gifts must be subject to estate duty, contends that his debts must be deducted therefrom, notwithstanding that they cannot be paid. Sir William Jowitt, for the executrix, submitted that, under the Finance Act, 1894, s. 2, property passing on death is deemed to include such gifts as those in question, that under sect. 4 all property passing on death, including such gifts, shall be aggregated so as to form one estate, that, under sect. 7, in determining the value of this aggregated estate, allowance shall be

made for debts, and that therefore allowance must be made in the present case for the debts in question. He further submitted that the last three lines of sect. 7 must have been inserted to meet cases where assets of the estate had been specifically charged, and in general argued that, as sect. 2 brought into the estate assets which in fact formed no part of it, there was nothing unreasonable in making allowance for debts which will never be paid, and that the position of creditors is sufficiently safeguarded by the statute of Elizabeth, and is in any event no concern of the revenue. Several cases were cited, but, as in my view they do not touch the present question, I think it unnecessary to refer further to them.

I am unable to agree with the construction of sect. 7 contended for by the appellant. I think that the words of the section contemplate liabilities of the estate which are met out of the estate, and I think that the last three lines of sect. 7 in their natural meaning are inconsistent with the appellant's case. I do not see how, in determining the value of an estate, allowance can be made for debts beyond the value of the assets out of which the debts are to be met. It is an unnatural use of words, in my view, to speak of making an allowance for a minus quantity in determining value. The appeal will therefore be dismissed with costs.

Appeal dismissed with costs. Leave to appeal.

Solicitors : *W. R. Millar & Sons* (for the petitioner) ; *Solicitor of Inland Revenue* (for the Inland Revenue Commissioners).

[*Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.*]

ATTORNEY-GENERAL v. CANTER.

[KING'S BENCH DIVISION (Lawrence, J.), **June 15, 1938.**]

Executors—Liability of representative—Survival of action—Action for penalties—Whether action in tort—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), ss. 1 (1) (3), 4 (2).

Income Tax—Penalties for inaccurate return—Liability of estate—Income Tax Act, 1918 (c. 40), s. 30 (1).

The deceased had incurred liabilities to the Inland Revenue in respect of incorrect statements made in his returns for income tax for the years ending Apr. 5, 1932, and Apr. 5, 1933. No proceedings were taken against him during his lifetime, but proceedings were commenced against his executrix on July 26, 1937. The question was whether the cause of action in such a case by virtue of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), was made to survive against the estate of the deceased, and whether such proceedings were in respect of a cause of action in tort within the meaning of sect. 1 (3) of that Act :—

HELD : (i) the cause of action survived against the estate of the deceased under sect. 1 (1) of the Act of 1934.

(ii) it was not a cause of action in tort within the meaning of sect. 1 (3) of that Act.

[EDITORIAL NOTE.] It was argued that the exclusion of Scotland and Northern Ireland from the operation of the Act of 1934 prevented it from applying to an action for penalties under the Income Tax Act, 1918, since it would lead to the

anomalous position that the position of executors in those countries would be different from that in England. Against this, it was pointed out that, so far as Scotland was concerned, the position there of executors has always been different from that in England, and the argument was rejected as being a restriction that could not be put upon the general words of the statute.

AS TO SURVIVAL OF ACTION, see HALSBURY, Hailsham Edn., Vol. 14, pp. 415-417, paras. 779-783; and FOR CASES, see DIGEST, Supp., Executors, No. 6711 *A et seq.*

Cases referred to:

- (1) *David v. Britannic Merthyr Coal Co.*, [1909] 2 K.B. 146; 34 Digest 219, 1816; 78 L.J.K.B. 659; 100 L.T. 678; *on appeal, sub nom. Britannic Merthyr Coal Co., Ltd. v. David*, [1910] A.C. 74.
- (2) *A.-G. v. Burges* (1726), Bunb. 223; 36 Digest 375, 524.
- (3) *Story v. Sheard*, [1892] 2 Q.B. 515; 24 Digest 648, 6745; 61 L.J.M.C. 178; 67 L.T. 423.

INFORMATION against the executrix of the testator, who had incurred penalties imposed in pursuance of the Income Tax Act, 1918, s. 30 (1) (b), to recover the sum of £2,843 13s. 9d. forfeited to His Majesty under that section. The Income Tax Act, 1918, s. 30 (1), provides:

A person who in making a claim for or obtaining any allowance or deduction, or in obtaining any certificate as aforesaid . . . (b) fraudulently conceals or untruly declares any income or any sum which he has charged against or deducted from, or was entitled to charge against or to deduct from another person . . . shall forfeit the sum of £20 and treble the tax chargeable in respect of all the sources of his income and as if such claim had not been allowed.

The testator made a claim for allowances and deductions for the year ending Apr. 5, 1932, and by reason of the inaccuracy thereof became liable to pay under the above section £1,652 7s. 6d. Similarly, he became liable to pay for the year ending Apr. 5, 1933, £1,191 6s. 3d. These liabilities were still subsisting at his death on July 31, 1934, but became known to the authorities only upon investigation of his estate for the purposes of duty. No proceedings, therefore, had at any time been taken against the testator during his life, and the present proceedings were commenced on July 26, 1937, by writ of *subpœna* against his executrix.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the informant.

Raymond Needham, K.C., and Terence Donovan for the defendant.

LAWRENCE, J.: The questions which are raised upon the information are (i) whether the liability to pay these penalties gives rise to such a cause or causes of action as are by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), made to survive against the estate of the testator, and (ii) whether these proceedings are in respect of a cause of action in tort within the meaning of sect. 1 (3) of the said Act. Sect. 1 (3) of the Act of 1934 provides that:

No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either (a) proceedings against him in respect of that cause of action were pending at the date of his death; or (b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.

It is conceded that proceedings were not pending at the date of the death of the testator, and the cause of action arose earlier than six months before his death, and proceedings were not taken until six months after, or, at any rate, if this is a cause of action in tort, it is conceded that the Crown cannot recover the sums claimed. The Attorney-General argued

A that an action for penalties under the Income Tax Act is not an action in tort within the meaning of sect. 1 (3) of the Act of 1934, and in support of that argument he relied upon the authority of ROBERTSON'S CIVIL PROCEEDINGS AGAINST THE CROWN, 1908 Edn., p. 170, dealing with informations, where it is said that the information is the King's action
B of debt, and that therefore this information for these penalties is a cause of action for debt, and not in tort. Secondly, he relied upon BULLEN AND LEAKE ON CONTRACTS, 3rd Edn., where actions for penalties are dealt with under the heading of "Actions for contract," and not actions for tort. Thirdly, he relied upon the definition of tort in SALMOND ON
C TORTS, 9th Edn., pp. 8, 9, para. 2, where it is said that the essential characteristic of an action in tort is that it is an action for damages. Fourthly, he referred to *David v. Britannic Merthyr Coal Co.* (1), where FLETCHER MOULTON, L.J., distinguishes an action for penalties from an action in tort, and where he says, at p. 160 :

D The civil liability arising from the breach of a statutory duty is of a wholly different nature from a penalty for such breach. The former gives no cause of action unless damage to a third party follows from it, and then it, in general, gives ground for an action for the amount of such damage at the suit of such third party. But penalties for breaches of statutory duties apply whether damage has been caused or not. Their very object is to punish the act itself and thus prevent its com-
E mission, whether damage follows or not. . .

The Attorney-General further distinguished *A.-G. v. Burges* (2), which was an information of *devenerunt* in a case in which goods had been landed without paying customs duties, and the information was apparently to recover the goods and to claim the penalty imposed by the Statute of
F 8 Anne. The court held that the penalties could be recovered from anyone of the persons concerned in landing the goods, because the cause of action was in the nature of a tort. He distinguished that case partly from the nature of the information of *devenerunt*, which is always spoken of as being of the nature of conversion, and was an information apparently
G claiming the goods themselves, and was therefore an information *in rem*, and secondly on the ground of the decision there, not that it was a cause of action in tort, but that it was a cause of action in the nature of a tort. He also referred to *Story v. Sheard* (3), where it was held that extraordinary traffic expenses, which could be recovered under the
H statute in that regard, could not be recovered, after the death of the person who caused the excessive traffic, from his executor, because they were in the nature of tort. He argued that that case was also distinguishable, partly because it was not an action for penalties, but was for such expenses as might be proved, and was therefore in that regard analogous to tort, and also because the observation of the court there-

upon was that it was not a cause of action in tort, but a cause of action in the nature of tort. He summed up his argument by saying that the cause of action and the form of the action in this case is an action for a statutory debt, a debt created by the Income Tax Act, and a form of action which is an action for debt, and it was not for unliquidated damages, which is the essential characteristic of actions in tort, but was for a liquidated sum settled by the statute itself; that it was not analogous to a tort, in that it was not an action for the protection of a right of each member of the public, but was an action given to the Crown by the statute; and, lastly, that it was a statutory remedy, and not, as in the case of what are strictly called torts, arising at common law. For these reasons, he submitted that the cause of action in this case is not a cause of action in tort, and that the answer to the second question which is put to me ought to be in the negative.

To this argument Mr. Needham replied by saying that the main burden of his argument was to be, not that this was a cause of action in tort—although he did contend that—but that it was not a cause of action within the meaning of the Act of 1934 at all, and did not fall within the words of sect. 1 of the Act of 1934. He contended that the Act of 1934 in its general terms ought not to be read as applying to taxation matters or to penalties imposed under a taxing Act, and in particular that sect. 3, which gives the court power to award interest upon any debt, or damages, was a provision which was inappropriate to a cause of action for penalties. Lastly, he said that the provisions of sect. 4 (2)—that the Act should not extend to Scotland or Northern Ireland—would produce such an extraordinary position that the words of sect. 1 ought to be read in some limited sense, so as to exclude causes of action for penalties under the Income Tax Act, 1918. He also contended that the action for penalties under the Income Tax Act is, in its nature, an action in tort, because what should be considered is the basis of the penalty—namely, the punishment for deceit, which is the subject-matter in respect of which the penalty is imposed, under sect. 30 of the Act of 1918.

The Attorney-General, in reply, contended that the position said to have been created by sect. 4 (2) of the Act of 1934, and which very likely was the position created by that section, was not an anomalous situation, and was a situation which, almost inevitably, the Act of 1934 must create. For instance, he pointed out that the liability of executors always has been different in England and Scotland, the maxim *actio personalis moritur cum persona* not applying in the same sense in Scotland as it did before the Act of 1934 in England, and that, secondly, as another instance, whereas the law of tort in Northern Ireland had been before the Act of 1934 the same as that in England, it is obvious that, unless the legislature of Northern Ireland has legislated in the same sense as the Act of 1934, it must now be different.

Although I was at first disposed to agree with the argument presented

by Mr. Needham on sect. 4, I have come to the conclusion that the words of sect. 1 cannot be limited by reason of sect. 4 of the Act of 1934, and that there is no ground for limiting those general words for any other reason such as those suggested by Mr. Needham. In my judgment, the words of sect. 1 are perfectly general, and include every cause of action
A subsisting against the person at the time of his death, and surviving against, or for the benefit of, his estate. I am further of opinion that an information for penalties under the Income Tax Act, 1918, is not a cause of action in tort within the meaning of sect. 1 (3) of the Act of 1934. Although the action is for penalties for a breach of sect. 30, and
B is based upon deceit, it is not, in my opinion, an action in tort. It is an action for a debt created by the statute, and is not a cause of action in tort within the meaning of sect. 1 (3). Judgment will be entered for the informant for the sum claimed, and for the defendant, in accordance with the agreement between parties, for costs as between
C solicitor and client.

Solicitors : *Solicitor of Inland Revenue* (for the informant) ; *Burr, Sugden & Co.* (for the defendant).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

D

THE ARANTZAZU MENDI.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **May 23, June 17, 1938.**]

E *Shipping—Foreign-owned vessel—Requisition by both de jure and de facto governments—Claim for possession—Impleading a foreign government.*

The ship *Arantzazu Mendi*, described as of the port of Bilbao, arrived at London on Aug. 11, 1937. On June 19, 1937, Bilbao had been captured by General Franco's forces, and on June 28, 1937, the ship was requisitioned by a decree of the Spanish Republican Government of that date. On Aug. 24, 1937, the owners issued a writ *in rem* for the possession of the ship, and she was arrested. On Mar. 2, 1938, the ship was requisitioned by the Nationalist Government of Spain. Notices of requisition were served on the owners on behalf of the Republican Government on Mar. 23, 1938, and on behalf of the Nationalist Government on Apr. 5, 1938. On Apr. 13, 1938, the owners declared that they freely submitted to the requisitioning of the Nationalist Government, and on the same date the Republican Government issued a writ claiming to have possession of the ship adjudged to them. The previous writ of Aug. 24, 1937, had been discontinued on Apr. 12, 1938. The Nationalist Government moved to set aside this second writ on the ground that it impleaded a foreign government. The Foreign Office stated that the *de jure* government of Spain was the Republican Government, but that the Nationalist Government was the *de facto* government of the larger
G portion of the country :—
H

HELD : the Nationalist Government was in law, for the purposes of this case, a foreign sovereign state, and could not be impleaded in an action in the English courts. The writ and warrant of arrest were set aside.

[EDITORIAL NOTE.] The question of the effect of the recognition of a *de facto* government was considered in *Banco de Bilbao v. Rey* (1). This case carries the

matter a step further, since the only connection between the ship arrested and the area controlled by the *de facto* government was her port of registry. The ship does not appear to have been within the controlled territory at any material time.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 1, p. 95, para. 121; and FOR CASES, see DIGEST, Vol. 1, pp. 109-111, Nos. 127-146.]

Cases referred to :

- (1) *Banco de Bilbao v. Rey, Bancode Bilbao v Sandia* [1938] 2 K.B. 176; A
[1938] 2 All E.R. 253; Digest Supp.
- (2) *The Gagara*, [1919] P. 95; Digest Supp.; 88 L.J.P. 101; 122 L.T. 498.
- (3) *Aksionairnoye Obschestvo A.M. Luther v. Sagor (James) & Co.*, [1921] 3 K.B.
532; 11 Digest 536, 387; 90 L.J.K.B. 1202; 125 L.T. 705.
- (4) *Compania Naviera Vascongada v. Cristina (The), The Cristina*, [1938] 1 All
E.R. 719; Digest Supp.; 107 L.J.P. 1. B

MOTION on behalf of the Nationalist Government of Spain to set aside a writ *in rem* and the subsequent arrest of the Spanish steamship Arantzazu Mendi. The facts are fully stated in the judgment.

Sir Robert Aske, K.C., J. V. Naisby and R. Valls in support of the motion. C

G. St.C. Pilcher, K.C., and Owen L. Bateson opposed the motion.

BUCKNILL, J. : On Apr. 13, 1938, the government of the Republic of Spain issued the writ against the ship which is described therein as of the port of Bilbao, now lying in the Surrey Commercial Docks. The indorsement on the writ is as follows : D

The plaintiffs claim to have possession of the said steamship Arantzazu Mendi adjudged to them.

The writ also joins Eugenio Renteria, the master of the steamship, as a defendant. The writ was framed in this unusual way to enable the plaintiffs to take the point that the Nationalist Government of Spain could not be heard to say that it was directly impleaded by the writ. The proper form of a writ of summons in an Admiralty action *in rem* is prescribed by R.S.C., Ord. 2, r. 7, and is directed to the owners and parties interested in the ship. The writ in this action is therefore not in proper form. R.S.C., Ord. 12, r. 24, however, prescribes that in an Admiralty action *in rem* any person not named in the writ may intervene and appear on filing an affidavit showing that he is interested in the *res*, and Mr. Pilcher, on behalf of the plaintiffs, agreed that the case should proceed on the assumption that the Nationalist Government of Spain had filed their affidavits and had intervened. I have dealt with the case on the footing that the defendants the Nationalist Government of Spain have entered an appearance as interveners, and are parties interested in the *res*. E F G

The history of the ship, so far as this present action is concerned, is as follows. On May 1, 1937, the ship sailed from Barry in command of Captain Eugenio Renteria, her master duly appointed by her owners, the Compania Naviera Sota y Aznar S.A. On June 19, Bilbao was captured by the forces of General Franco, and on June 28 the ship was requisitioned by the government of the Republic of Spain H

in pursuance of a decree of that date. On Aug. 11, the ship arrived at London, and on Aug. 24 the owners of the ship issued a writ *in rem* for possession of the ship, and in pursuance thereof the ship was arrested in the Surrey Commercial Docks. A conditional appearance was entered on behalf of the Bay of Biscay Co., Ltd., and also by the government of the Republic of Spain. On Sept. 8, 1937, an application by the defendants that the action be dismissed was adjourned, and an order was made that all proceedings be stayed pending the trial of another action, in which the owners were parties, which was proceeding in the Chancery Division. The action *in rem* was eventually discontinued on Apr. 12, but the arrest has not been raised. An official of the Admiralty Registry informs me that the ship was not released from arrest upon the discontinuance of the action owing to the failure of the parties to make proper provision for the payment of the charges arising out of the detention of the ship.

On Mar. 2, 1938, General Franco issued a decree and law the purport of which was (to use the words of the translation) to :

requisition the Arantzazu Mendi on behalf of the government of the nation for public services connected with national defence, or the requirements of maritime trade in its different aspects.

On Mar. 23, the Assistant Spanish Consul in London on behalf of the Republican Government of Spain served the owners of the ship with a formal notice of requisition under the decree of that government dated June 28, 1937. On Apr. 5, the accredited sub-agent of the Nationalist Government of Spain served a notice of requisition under the decree and law of Mar. 2, 1938, upon the master of the ship. On the same day, the agent indorsed a note of the requisition on the ship's papers, and notified the owners thereof.

On Apr. 13, the then manager-director of the owners of the ship made a notarial declaration in London that he freely submitted to the provisions of the decree of the Nationalist Government, and in the name of the owners gave his consent to the vessel being requisitioned at the free disposal of the Nationalist Government of Spain, to the intent that it might make use of such vessel in the manner laid down in the said decrees and as it might consider most expedient. On the same date, Apr. 13, the government of the Republic of Spain issued the writ *in rem* which the defendants are now seeking to set aside, and a further warrant of arrest was served on the ship.

On Apr. 21, the owners of the ship and the master entered an appearance to the writ. On the preceding day, the Nationalist Government of Spain entered a conditional appearance to the writ, and on May 7 filed this notice of motion to set aside the writ and arrest.

The first ground stated in the notice of motion for setting aside these proceedings is :

That the action impleads a foreign sovereign state—namely, the Nationalist Government of Spain—which is unwilling to submit to the jurisdiction of this court.

It is clear from the reported cases that the proper procedure for this court to adopt when an issue is raised as to whether or not a party is a foreign state is to make inquiry upon the subject from His Majesty's Secretary of State for Foreign Affairs. The court therefore directed the following letter to be sent to the Secretary of State for Foreign Affairs :

Sir,

1. The Arantzazu Mendi is a steamship registered at the port of Bilbao.
2. On Apr. 13, 1938, the government of the Republic of Spain issued a writ and caused the vessel to be arrested in an action for possession, brought by them against the vessel Arantzazu Mendi and Eugenio Renteria the late master of the said steamship Arantzazu Mendi.

3. On Apr. 20, the Nationalist Government of Spain entered an appearance in the action under protest and signified their intention of moving the court to set aside the writ.

4. On May 7, 1938, a notice of motion was filed by the Nationalist Government of Spain, asking that the writ and all subsequent proceedings in the action and the arrest should be set aside upon the grounds, *inter alia*, that the dispute in this action impleads a foreign sovereign state—namely, the Nationalist Government of Spain.

5. I have been asked by BUCKNILL, J., to ascertain from the Secretary of State for Foreign Affairs whether the Nationalist Government of Spain is recognised by His Majesty's Government as a foreign sovereign state.

6. I have to inform you that the above case is part heard and judgment cannot be given in it until the information asked for has been obtained. It would therefore greatly assist the court if a reply to this letter could be sent at the earliest possible moment.

The reply, dated three days later, on May 28, is as follows. It is from the Foreign Office, and is signed by Mr. Walter Roberts :

Sir, With reference to your letter of May 25, regarding the case of the Arantzazu Mendi, I am directed by Viscount Halifax to return the following answer to the question asked in para. 5 :—

(1) His Majesty's Government recognises Spain as a foreign sovereign state.

(2) His Majesty's Government recognises the government of the Spanish Republic now having its seat in Barcelona as the *de jure* government of Spain.

(3) No government other than that referred to in the preceding subparagraph is recognised by His Majesty's Government as the *de jure* government of Spain or any part thereof.

(4) The Nationalist Government of Spain is a government in conflict with the government of the Spanish Republic established at Barcelona. It claims to be the government of Spain and is seeking to overthrow the government of the Spanish Republic and to establish its authority over the whole of Spain.

(5) His Majesty's Government recognises the Nationalist Government as a government which at present exercises *de facto* administrative control over the larger portion of Spain.

(6) His Majesty's Government recognises that the Nationalist Government now exercises effective administrative control over all the Basque provinces of Spain.

(7) His Majesty's Government has not accorded any other recognition to the Nationalist Government.

(8) The Nationalist Government is not a government subordinate to any other government in Spain.

(9) The question whether the Nationalist Government is to be regarded as that of a foreign sovereign state appears to be a question of law to be answered in the light of the preceding statements and having regard to the particular issue with respect to which the question is raised.

A letter in very similar terms from the Foreign Office, dated Mar. 18, 1938, was before the Court of Appeal in *Banco de Bilbao v. Rey* (1).

The question which I have to decide is the question of law whether these facts, as proved by the letter from the Foreign Office dated May 28, constitute, according to English law, the Nationalist Government as a foreign sovereign state.

Sir Robert Aske, on behalf of the Nationalist Government, argued that the essential ingredients of a sovereign state are that it administers and governs the territory over which it has control, and that it is not subordinate to any other government. In support of this proposition Sir Robert Aske relied mainly upon *The Gagara* (2) and *Banco de Bilbao*

A *v. Rey* (1).

In *The Gagara* (2), the ship was arrested in this court in an action for possession in Jan., 1919, by a corporate body who had been the owners of the ship before its confiscation by the Bolshevik Government in 1918. Subsequently the ship proceeded to Reval, where it was captured by the

B Esthonian Government, condemned as a prize of war by a decree of the government, and registered as under the ownership of the Esthonian Republic. The Esthonian Government appeared under protest to the action *in rem* in this court, and took the same point which is taken here by the Nationalist Government of Spain—namely, that the ship

C was the property of a foreign sovereign state.

In the course of the proceedings before HILL, J., the Foreign Office and the law officers informed the court that His Majesty's Government had for the time being provisionally recognised the Esthonian National Council as a *de facto* independent body, and that it was the view of

D His Majesty's Government that the Esthonian Government was such a government as could, if it thought fit, set up a prize court. Upon this information, HILL, J., set aside the writ and arrest. He said, in the course of his judgment, that, if for the time being the Esthonian National Council was recognised as a *de facto* independent body, and the Esthonian

E Provisional Government was recognised as its executive, the courts of this country must for the time being recognise it also. Moreover, if it was recognised as an independent body, by which he understood a political body for the time being independent of every superior authority, he must recognise it as a sovereign body capable of exercising sovereign rights, including the rights of making capture *jure belli*, and entitled to have its sovereignty respected by the courts of this country. The case was taken to the Court of Appeal, who affirmed the judgment of HILL, J.

I have to consider whether the decision in *The Gagara* (2) is an authority in favour of the Nationalist Government of Spain in this case. Mr.

G Pilcher, on behalf of the Republican Government of Spain, argued that there were several important differences between *The Gagara* (2) and the present case, in that, in *The Gagara* (2), (i) there was no rival government in Esthonia, (ii) the Esthonian Government had an informal diplomatic representative in England, and (iii) the Esthonian Government had

H captured *The Gagara* and condemned her as prize, a proceeding which, if done by a prize court in Esthonia, this government would have apparently considered as valid. Moreover, in *The Gagara* (2), the government recognised the Esthonian Government as a *de facto* independent body—in other words, a body independent of every superior authority. In this case, the government merely recognises the Nationalist Government

of Spain as a government which exercises *de facto* administrative control over the larger part of Spain, and as a body which is not subordinate to any other government, but is in conflict with the government of the Spanish Republic. In *The Gagara* (2) the facts were more in favour of the recognition of the Estonian Government as a sovereign body than they are in this case. The question which I have to decide is whether the facts placed before me constitute the Nationalist Government an independent sovereign state in law. It may well be that a neutral sovereign power cannot in terms recognise the independence of any government seeking to overthrow by force the *de jure* government without in some measure departing from its own neutrality. The armed struggle mainly concerns that very question of independence, and a neutral power, by recognising the independence of the *de facto* government while the struggle continues, would anticipate that which must be finally established, if at all, by agreement or by force. It may seem a contradiction in terms that there should be two sovereign governments in Spain, where formerly there was only one such state, but I think that there may be, in the eyes of the law, two sovereigns, one *de facto* and one *de jure*, in the same country. It seems to me that the law, based on the reality of facts material to the particular case, must regard as having the essentials of sovereignty a government in effective administrative control over the territory in question, and not subordinate to any other government, because their decrees are the only legal authority which governs the area to which the subject-matter of the dispute belongs. This is the result, in my view, of the decision of the Court of Appeal in *Banco de Bilbao v. Rey* (1).

That case, so far as it is relevant to the present case, had as its cardinal issue the question as to the validity of certain decrees made by the Republican Government of Spain with reference to the constitution of the Bank of Bilbao, a corporate body having its corporate domicile in Bilbao. These decrees were made after the Nationalist Government had acquired sole administrative control over the province in which Bilbao is situated. As I have already stated, the Court of Appeal had before it a letter from the Foreign Office in terms similar, so far as the status of the Nationalist Government is concerned, to the letter which I have already read from the Foreign Office to the registrar of this court. It is important to notice the interpretation which the Court of Appeal placed upon this information from the Foreign Office. CLAUSON, L.J., on this point said, at p. 195 :

The only question open to argument arises from the fact that His Majesty's Government recognise the Spanish Republican Government with its seat in Valencia or Barcelona as the *de jure* government of the whole of Spain, but at the same time recognise the insurgent government of General Franco as the government *de facto* of the area in which Bilbao is situated.

He went on to say, at pp. 195, 196 :

... this court is bound to treat the acts of the government which His Majesty's Government recognise as the *de facto* government of the area in question as acts

which cannot be impugned as the acts of an usurping government, and conversely the court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government be recognised by His Majesty's Government as the *de jure* government of the area, as a mere nullity, and as matters which cannot be taken into account in any way in any of His Majesty's courts.

Thus, in the courts of this country no regard can be paid for the present purpose to the legislation enacted by the Republican Government which during the material period cannot be treated in this court as the government of the area in which Bilbao is situated.

A It may be argued that, although this decision of the Court of Appeal may be vital to the decision in this case, if and when this court decides the question as to which of the two rival decrees of requisition of the Arantzazu Mendi should be recognised by this court as valid, yet the
B decision does not in terms decide the question at present before the court—namely, the question whether this court ought to refuse to exercise jurisdiction at all in this case, on the ground that the Nationalist Government is a foreign sovereign government.

C In my view, the question of law which I have to decide also underlay the decision of the Court of Appeal. It is clear from the judgment of the Court of Appeal that the Court of Appeal considered that the question as to what was the government whose laws governed the constitution of the Banco de Bilbao had been settled by the principles laid down by the
D Court of Appeal in *Aksionairnoye Obschestvo A.M. Luther v. Sagor (James) & Co.* (3). In that case, the information from the Foreign Office which was before the Court of Appeal was that His Majesty's Government recognised the Soviet Government as the *de facto* government of Russia, and the Court of Appeal held that this amounted to a recognition by this government of a sovereign state into the validity of whose acts the
E court could not inquire. WARRINGTON, L.J., in that case said, at p. 551 :

there is no difference for the present purpose between a government recognised as such *de jure* and one recognised *de facto*. In the latter case, as well as in the former, the government in question acquires the right to be treated by the recognising state as an independent sovereign state, and none the less that our government does not pretend to express any opinion on the legality or otherwise of the means by
F which its powers has been obtained.

On this ground, the Court of Appeal refused to inquire into the validity of certain acts of the *de facto* government relating to the acquisition by that government of certain property which was claimed by the plaintiffs in the action before the court. The Court of Appeal in *Banco de Bilbao*
G *v. Rey* (1) treated the letter from the Foreign Office as a recognition of the Nationalist Government as the government *de facto* of the area in which Bilbao is situate, and the Court of Appeal in the case of *Luther v. Sagor* (3) treated a government *de facto* as a foreign sovereign state. It seems to me, therefore, that the decision of the Court of Appeal in
H *Banco de Bilbao v. Rey* (1) supports the argument that the Nationalist Government of Spain is, for the purposes of this case, a foreign sovereign state.

When considering the essential qualities of a foreign sovereign state for the purpose of this motion, one must consider the reason why the court refuses to exercise jurisdiction in a case where an admittedly foreign

sovereign state is impleaded, or where the action is against certain property in the possession or control of such state. The principles underlying this immunity from legal process have been recently considered in the House of Lords in *The Cristina* (4). The decision indicates that the act of the Crown, in declining through its courts to exercise the sovereign power of jurisdiction over property within its territorial limits when that property belongs to a foreign sovereign, is based on the theory of an international comity which induces a sovereign state to respect the independence of another sovereign state, and in pursuance thereof to decline to exercise by means of its courts any of its territorial jurisdiction over the public property of such other state when in the ordinary course of things it would become amenable to such jurisdiction. To make such a thing workable, it seems that the criterion of a sovereign state, for the purpose of such legal immunity, must be its absolute independence in law of any superior authority. I think that such independence arises if no judgment against that state in this court can be enforced by any process of law in any court in its own territory, and if, on the other hand, such foreign state, having sole administrative and judicial control in its own territory, is able to extend reciprocal immunity from legal process in its courts to the property of another sovereign state.

The point raised on this motion appears to me to be novel and difficult. My view is that a government which has acquired the position and power ascribed to the Nationalist Government of Spain in the letter from the Foreign Office to the court is in a position to grant to a sovereign state such immunity from legal process and such reciprocity in that respect as is the backbone of the principle of legal immunity granted to the foreign sovereign state by the law of this country.

For this reason, and for the reason that, in my judgment, the decision of the Court of Appeal in *Banco de Bilbao v. Rey* (1), which I have already discussed, supports the argument of the defendants on this motion, my judgment is that the Nationalist Government of Spain is in law, for the purposes of this case, a foreign sovereign state.

A point was also taken by Mr. Pilcher, who opposed the motion on behalf of the plaintiffs, the Republican Government of Spain, that the Nationalist Government had not got possession of the ship, and that therefore the rule laid down by the House of Lords in *The Cristina* (4) did not apply. I do not see any substantial difference between this case and *The Cristina* (4) on that point. In my view, the Nationalist Government has done all that it can legally do to obtain possession of the ship consistently with the fact that the ship was already under arrest by warrant of this court. The Nationalist Government has in fact got a limited possession through the ship's master, who, according to his affidavit, is on board the ship, and has undertaken to hold the possession of the ship for the Nationalist Government of Spain, and recognises the sole authority of the Nationalist Government. Moreover, the Nationalist Government is impleaded by this action as a party interested in the *res*,

and properly before the court under protest as a foreign sovereign state. For these reasons, I must set aside this writ, and the warrant of arrest of the ship, which was based upon the writ.

Solicitors: *H. A. Crowe & Co.* (in support of the motion); *Petch & Co.* (against the motion).

A

[Reported by REGINALD TOWNSEND, Esq., Barrister-at-Law.]

Re HODSON'S SETTLEMENT, BROOKES *v.* ATTORNEY-GENERAL.

B [CHANCERY DIVISION (Farwell, J.), March 31, May 25, 1938.]

Estate Duty—Property deemed to pass—Accumulations—Life tenant's income during settlor's life if below stated amount to be made up to that amount out of accumulations—Income of accumulations to go to life tenant upon death of settlor—Liability to duty on death of settlor—Aggregation—Finance Act, 1894 (c. 30) ss. 2 (1) (d), 4.

C

A settlor vested a trust fund in trustees upon trust that they should, if the income were sufficient, pay the clear yearly sum of £1,200 to S. during her life. During the joint lives of the settlor and S. the residue of the income was to be accumulated and form an accumulations fund. If the income of the principal trust fund was at any time insufficient to pay S. £1,000 per annum, the deficiency was to be made up out of the capital or income of the accumulations fund. After the death of the settlor, if S. survived him, the annual income of the accumulations fund was to be paid to S., and after the death of S. the trust fund and the accumulations fund were subject to a special power of appointment given to S., and in default of appointment for the children of S. By a second settlement the residue of the income during the life of S. was given to the trustee. The settlor died in the lifetime of S., and the question was as to the estate duty payable on his death:—

D

E

HELD: (i) the estate duty payable in respect of the accumulations fund was on the amount of the difference* between the values of the interests of S. in that fund immediately after and before the death of the settlor.

(ii) the above difference was to be treated as an estate in itself and not aggregated with the settlor's other property.

F

[EDITORIAL NOTE. The first part of this decision follows from the decisions in *Adamson v. A.-G.* (1) and *A.-G. v. Lloyds Bank, Ltd.* (2), but the position under those authorities was obscure owing to differences of opinion among the judges, not only upon the incidence of duty, but also upon the proper construction of the settlements. Upon the question of aggregation, the judge has held that this

G

accumulations fund is property in which the deceased never had an interest. FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 13, p. 242, para. 233; and FOR CASES, see DIGEST, Vol. 21, pp. 13, 14, Nos. 61-67.]

Cases referred to:

(1) *Adamson v. A.-G.*, [1933] A.C. 257; Digest Supp.; 102 L.J.K.B. 129; 148 L.T. 365.

H

(2) *A.-G. v. Lloyds Bank, Ltd.*, [1935] A.C. 382; Digest Supp. 104 L.J.K.B. 523; 152 L.T. 577.

(3) *Lassence v. Tierney* (1849), 1 Mac. & G. 551; 43 Digest 643, 790; 15 L.T.O.S. 557.

(4) *Hancock v. Watson*, [1902] A.C. 14; 43 Digest 644, 792; 71 L.J.Ch. 149; 85 L.T. 729; *affg.* S.C. *sub nom.* *Re Hancock, Watson v. Watson*, [1901] 1 Ch. 482,

- (5) *A.-G. v. Dickinson & Baron*, [1937] 2 K.B. 574; [1937] 2 All E.R. 485; Digest Supp.; 106 L.J.K.B. 615; 157 L.T. 550.

ADJOURNED SUMMONS to determine whether the accumulations fund, formed in accordance with the provisions of the testator's will as set out in the judgment herein, was liable to estate duty, and, if so, whether it formed an estate in itself.

Cyril Radcliffe, K.C., and *B. F. Mendel* for the plaintiff.

J. H. Stamp for the Attorney-General.

FARWELL, J.: Up to May 20, 1925, Laurence William Hodson was entitled to 20,000 £1 fully-paid ordinary shares in a company known as W. Butler & Co., Ltd. He caused those shares to be transferred into the names of himself and another as trustees, to be held by them on the trusts declared by a settlement of May 20, 1925. That settlement was made between the settlor and Thomas Cannon Brookes. It provided that the trustees should stand possessed of the 20,000 £1 fully-paid ordinary shares in W. Butler & Co., Ltd., and the investments for the time being representing the same, which were defined as "the trust fund," on the following trusts. First, out of the income of the trust fund if and so far as sufficient for the purpose the trustees were to pay such a sum in every year as after the deduction of income tax for the time being in respect thereof would leave a clear sum of £1,200, such sum to be paid to Grace Stuart therein mentioned during her life subject to forfeiture as therein mentioned. Secondly, during the joint lives of the settlor and the said Grace Stuart the residue of the income was to be accumulated by investing the same and the resulting income thereof and the trustees were to stand possessed of such investments and the investments for the time being representing the same, which were called "the accumulations fund," and the annual income thereof upon trust. Then :

If and whenever during the life of the said Grace Stuart the annual income of the trust fund shall be insufficient to provide such a sum as after the deduction of the income tax for the time being payable in respect thereof will leave a clear sum of £1,000 the trustees shall make good such deficiency out of the capital or income of the accumulations funds as they may think fit.

After the death of the settlor, if the said Grace Stuart should survive him, subject to the immediately preceding trust and forfeiture, the trustees were to pay the annual income of the accumulations fund to Grace Stuart during the rest of her life, and the will went on to provide :

After the death of the said Grace Stuart the trustees shall hold the capital and income of the trust fund and of the accumulations fund or so much thereof respectively as shall not have been paid or applied under any trust or power affecting the same in trust for all or such one or more exclusively of the others or other the issue of the said Grace Stuart whether children or remoter issue at such time and if more than one in such shares and with such gifts over and such provisions for maintenance advancement and otherwise at the discretion of any person or persons and generally in such manner for the benefit of such issue or some or one of them as the said Grace Stuart shall by deed revocable or irrevocable or by will or codicil appoint and in default of and until and subject to any such appointment in trust for all or any the children or child of the said Grace Stuart who attain the age of 21

years or being female marry under that age and if more than one as tenants in common in equal shares [subject to the provisions with regard to hotchpot therein contained].

The effect of that settlement was to dispose of the whole of the beneficial interest of the settlor in those investments with the exception of any surplus income there might be from the trust fund. By the settlement,
A Grace Stuart took the annual income of £1,200 during her life. That was a payment to be continued during the joint lives of herself and the settlor, and, after the death of the settlor, during the life of Grace Stuart. On the death of the settlor, the trust for accumulations came to an end,
B and thereupon she became entitled under the settlement to the income from the accumulations fund, but there was no disposition by this settlement of the surplus income of the trust fund itself after the annual payment had been made to Grace Stuart, and, in order to fill up that gap in the settlement, there was a supplementary settlement, dated Dec. 7,
C 1931, made between the settlor of the first part and the trustees of the second part. It provided, *inter alia*, that the trustees should stand possessed of the residue of the annual income of the trust fund during the life of the said Grace Stuart after the death of the settlor on trust to pay the annual income to the trustee, Mr. Brookes, absolutely. The effect of those two settlements combined was to take from the settlor
D the whole of the beneficial interest which he had in those investments, with the result that for all time after these settlements he ceased to have any interest except as one of the trustees and one of the legal owners of the investments.

On Mar. 3, 1933, the settlor died. At his death, the fund still consisted
E of the 20,000 ordinary shares in W. Butler & Co., Ltd., and the question which has been raised on this summons is as to the claim for estate duty. The Finance Act, 1894, s. 1, provides :

In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon
F the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called "estate duty," at the graduated rates hereinafter mentioned.

By sect. 2 (1) it is provided :

Property passing on the death of the deceased shall be deemed to include the property following, that is to say (a) property of which the deceased was at the time
G of his death competent to dispose ; (b) property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest ; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole . . . (d) any annuity or other interest purchased or provided by the deceased,
H either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

In addition to that, a question has arisen under sect. 4 with regard to the aggregation of the property forming part of the subject of the settlement. For the moment, I am only dealing with the question whether or not the property passed under sect. 2 (1) (d).

If this settlement had made no provision for the payment of any annual sums, had it been merely a settlement on trust to accumulate during the life of the settlor and then after the death of the settlor on trust for the children or issue of Grace Stuart as she should appoint and in default of appointment for the children who attained the age of 21 or being daughters married under that age, the effect, quite plainly, A would have been that the children of Grace Stuart, as and when they attained the age of 21, or, being daughters, married under that age, took vested interests in the capital of the fund, subject to being divested by a valid exercise of the power of appointment. If that had been the case, it appears to me that it would have come precisely within the B decision of the House of Lords in *Adamson v. A.-G.* (1). That was a decision of the majority of the House, and I cannot feel any doubt that, if the settlement in the present case had been the same as the settlement there, this case would have been precisely within that decision, and it would have followed that estate duty was payable under sect. 2 (1) (d). C

In this case, however, interests for life have been created. There is the interest of Grace Stuart, both in the sum of £1,200 a year and in the income of the accumulations fund, an interest which was to arise only on the death of the settlor. There is also the interest given to the trustee, Mr. Brookes, after the death of the settlor, in any surplus income there D may be of the trust fund. The question, therefore, is whether the position of those interests for life takes the case out of the decision in *Adamson v. A.-G.* (1). The question is one which, in my judgment, has been answered for me by the Court of Appeal in *A.-G. v. Lloyds Bank, Ltd.* (2). As I understand that judgment, the interposition of life interests E is not in itself sufficient to take the case out of the decision in *Adamson v. A.-G.* (1), and ROMER, L.J., stated that quite plainly in his judgment. If the matter rested there, there would be, so far as I am concerned, an end of the matter, because, in my judgment, apart from the life interests, there could be no question that *Adamson v. A.-G.* (1) applied, and, F according to the decision of the Court of Appeal, the interposition of interests for life does not take the case out of the principle of the decision in the House of Lords.

However, I have been invited, on behalf of the defendant, to say that the decision of the Court of Appeal should not be treated as binding G upon me, and that I should decide this case irrespective of that decision. That contention is based on two grounds. It is said, first, that the decision of the Court of Appeal was impliedly overruled by the House of Lords, and, secondly, that, even if it was not impliedly overruled, it was a decision on a purely hypothetical case, and, therefore, must be H treated as *obiter dicta*, and not a decision which I ought to follow. In that case, there was a settlement by which income was to be accumulated during the life of the settlor, and after the death of the settlor the property was to be held on trust for certain named persons, with a direction that the shares should be settled so that each of the named persons took

- life interests only with remainders over. The question arose with regard to the incidence of estate duty. The matter came before the Court of Appeal, who treated the true construction of the settlement as being that the named persons took life interests only with remainders over, and it became necessary for them to consider the question whether the
- A** interposition of interests for life was sufficient to take the case out of the decision of the House of Lords in *Adamson v. A.-G.* (1). They came to the conclusion that it was not sufficient, that the case was governed by *Adamson v. A.-G.* (1), and that, accordingly, estate duty was payable under sect. 2 (1) (d) of the Act.
- B** That case went to the House of Lords, and the decision of the Court of Appeal was affirmed, but the House of Lords took a different view as to the construction of the settlement. They held that the principle of *Lassence v. Tierney* (3) and *Hancock v. Watson* (4) applied, with the result that the named persons took absolute interests, and that, that being so, the
- C** decision in the House of Lords in *Adamson v. A.-G.* (1) must be applied. In the view which they took of the true construction of the settlement, it was wholly unnecessary for them to consider the question which the Court of Appeal had considered and decided as to the effect of the interposition of life interests, and they did not consider it. I cannot find,
- D** however, in the decision in the House of Lords anything which could possibly be said to amount to an express disapproval or reversal of the decision of the Court of Appeal.

- With regard to the other ground on which it was urged that I was not bound by the decision of the Court of Appeal, no doubt it is true in a sense
- E** to say that the question which the Court of Appeal had to consider and determine was a question which, in the view which the House took of the true construction of the settlement, was not a question which arose at all. In that sense, it was a hypothetical question. It seems to me, however, that it would not be proper for me, sitting here in the court of first instance,
- F** simply to disregard the decision of the Court of Appeal, and to treat it as though it were not a decision of the point at all, so as to leave it completely open to me to decide the matter as I think fit. If this decision of the Court of Appeal is to be treated as no longer a binding decision, or one to be followed in the courts, I think that it should be for the Court
- G** of Appeal itself, or, possibly, the House of Lords, to say so. So far as I am concerned, I have here a decision of the Court of Appeal which, in my view, decides the problem which I am asked to decide, and I think that it would be acting with respect to that court if I simply followed that decision without expressing any view of my own about it. In those
- H** circumstances, it seems to me that I must decide on that authority that this case is within the principle of the decision in *Adamson v. A.-G.* (1), and, accordingly, that the property as a whole passed on the death of the settlor and the estate duty is payable under sect. 2 (1) (d), and I make a declaration accordingly.

[After dealing with the first question, His Lordship adjourned the

summons for further argument on the second question, on which he gave the following judgment on May 25.]

This is, in my view, a question of some difficulty which follows on the decision which I gave in this matter a short time ago on the Finance Act, 1894, s. 2 (1) (d), which, so far as it is relevant to this matter, is as follows :

Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (d) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

It is, I think, important to notice that the property which is deemed to pass under subsect. (1) (d) is not even the annuity or other interest purchased or provided by the deceased. It is only such property to the extent of the beneficial interest accruing or arising by survivorship, and, therefore, it is not, strictly speaking, a property except in the sense that it is an interest which is beneficial or which accrues by reason of the death of the person in question.

That being so, the question which I have to determine is whether such an interest which is deemed to pass on the death is property which must be aggregated under sect. 4, which provides :

For determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof: Provided that any property so passing, in which the deceased never had an interest, or which under a disposition not made by the deceased passes immediately on the death of the deceased to some person other than the wife or husband or a lineal ancestor or lineal descendant of the deceased, shall not be aggregated with any other property but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof.

The question is whether the particular property which is deemed to pass on the death of the deceased in this case is property in which the deceased never had an interest.

I have been referred to certain authorities, but, in my judgment, this question has not been the subject-matter of a decision which binds me. So far as I can see, it was not decided by the House of Lords in *Adamson v. A.-G.* (1), and, in my judgment, the declaration which LORD WARRINGTON OF CLYFFE in his opinion stated, and which, in fact, was the declaration ultimately made, does not cover the precise point which I have to determine.

The matter is the subject-matter of a decision by LAWRENCE, J., in *A.-G. v. Dickinson & Baron* (5). In that case, it was admitted by counsel for the defendants that the property was property which passed under the Finance Act, 1894, s. 1, and LAWRENCE, J., in his judgment was careful to say, at p. 579 :

It was admitted by Mr. Fergus Morton on behalf of the defendants that these accumulations of income were property passing on the death of the deceased within the meaning of sect. 1, and I decide the case upon the footing of that admission.

It seems to me that the fact that the judge proceeded to decide the question on that footing differentiates the present case from that altogether. While that decision may well have been a perfectly correct decision on the admission, if the admission had not been made and the judge had come to the conclusion that it was not a case which came within sect. 1, but that it came, as in the present case, within sect. 2 (1) (d), a wholly different consideration would have arisen, and I should have had the benefit of the judge's view on it. I have not that benefit, because he was not considering the case from that point of view.

The other case in which the matter has been considered is *A.-G. v. Lloyds Bank, Ltd.* (2), where this particular question as to aggregation does not seem to have been referred to at all until the very end of the case. Then, after FINLAY, J., had decided that the property did not pass under sect. 1 but did pass under sect. 2 (1) (d), the question was raised whether or not it ought to be aggregated under sect. 4. I think that it is quite plain from what followed that the Attorney-General was taken by surprise, and he gave up the point. He said, [151 L.T. 268 at p. 271] :

I do not feel in a position to say that the deceased ever had an interest in the accumulations.

On that, the judge made a declaration accordingly. When the matter was before the Court of Appeal on the other point, the Crown naturally, in the face of that submission by the Attorney-General, did not take the point relating to sect. 4. It cannot be said that that was a decision actually on the point which I have to determine, but it was an order made on the submission by the Crown. I do not feel that it is a case which I should be justified in following blindly without coming to a conclusion of my own on this matter. That being so, I propose to approach this case on the footing that there is no authority binding on me.

The question is really very short, although it is, as I have said, by no means easy. It is whether this particular property was a property in which the deceased had an interest. It has been argued strenuously on behalf of the Crown that the deceased undoubtedly had an interest in this property because the property—namely, the accumulations—is the fruit of what was the deceased's own property. It is said that the deceased had immediately before the date of the settlement an interest in the income which the property he owned would produce in the future, and that he had none the less an interest because, at the time the settlement was made, the particular fruit had not appeared. The income, it was argued, was to arise in the future, but it was none the less a property in which the deceased had an interest, because it was income which was to result from the property which he did in fact own. Further, it is said that he had an interest because, if any of the trusts declared by the settlement failed for any reason at all, there would be the resulting trust for the settlor.

So far as the point with regard to the resulting trust is concerned, I do not think that it is good. A resulting trust arises where the settlor, having settled property belonging to him, has for some reason failed to dispose of the whole of the interest in that property. To the extent to which he has failed to make such a disposition, the property remains in him, but it is not, in my judgment, sufficient to entitle me to say that, merely because there might be at some time a resulting trust in property because of the failure of some trust, the settlor had an interest, not in the property itself, but in the accumulations which arose by reason of the directions to accumulate income under the settlement. A

In truth, this resulting trust is not a resulting trust in those relations, but it is a failure to dispose of the whole of the beneficial interest in the original property. No doubt the resulting trust might comprise some portion of the accumulated fund, but none the less the accumulations themselves are not the subject-matter of a resulting trust because the trust results from a failure to dispose wholly of a fund and the fruit of that fund. B
C

With regard to the fact that the settlor had an interest in the property, it is perfectly true to say that a man who makes a settlement out of his own property has an interest in the property, because he himself has owned the property before the settlement came into existence. To that extent he had an interest in the property, but the real question here is : What is the property in which the settlor had an interest ? D

To come within sect. 4 of the Act, it has to be shown that the settlor had an interest in the property so passing. What is the property so passing ? Having regard to sect. 2 (1) (d), the property so passing, in my judgment, is not the property which was settled by the settlor, nor is it the whole of the beneficial interest in the fruit of that property. What it is is an annuity or other interest provided by the settlor to the extent of the beneficial interest accruing or arising. That interest, which is deemed to be property under sect. 2 (1) (d), is an interest in which the settlor can never be said to have had an interest at all. He had an interest in the property which produced the income out of which the accumulations were to be made at the time when he made the settlement, and before he parted with it. It is perfectly true that he had such rights as settlor as he would have in respect of a resulting trust, but the interest which is the subject-matter of this subsection was not property in which he ever had an interest. E
F
G

For those reasons, I have come to the conclusion that this is property which is taken out of sect. 4, and is not, therefore, to be aggregated with the settlor's other property, but that the estate duty must be leviable on it as an estate by itself, and I so declare. H

Declaration that estate duty was payable in respect of the accumulations fund under sect. 2 (1) (d) of the Act on the amount of the difference between the value of the interest of Grace Stuart in the accumulations fund under the settlement immediately after the death of the deceased and the value

of her interest in the accumulations fund immediately before the death of the deceased. The amount of the difference ought to be treated as an estate by itself.

Solicitors: Cannon Brookes & Odgers (for the plaintiff); Solicitor of Inland Revenue (for the defendant).

A [Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

TEALL v. TEALL.

B [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P., and Henn Collins, J.), **June 14, 15, 1938.**]

Husband and Wife—Summary jurisdiction—Non-cohabitation and maintenance orders—Adultery—Limitation of time—Whether running from date of adultery or discovery thereof—Constructive desertion founded on adultery—Necessity to prove intention to persist in adultery—Matrimonial Causes Act, 1937 (c. 57), s. 11.

C (i) The time limit of six months, beyond which a complaint cannot be lodged in a court of summary jurisdiction, applies to a complaint founded on adultery under the Matrimonial Causes Act, 1937, s. 11. In such a case, time commences to run from the date of the commission of the adultery, and not from that of its discovery.

D (ii) Where a wife leaves the matrimonial home upon the discovery of her husband's adultery, this can amount to constructive desertion by the husband only if it is shown that there is an intention on the part of the husband to persist in the adultery. The discovery of a past adulterous association is insufficient.

E [EDITORIAL NOTE. The extension to adultery by the Matrimonial Causes Act, 1937, of the grounds for a justices' order gives rise to the question whether the limitation is to be reckoned from the adultery or from its discovery. It is decided that there must be evidence of adultery—which is in law the cause of action in such a case—within the six months immediately preceding the issue of the complaint.

F AS TO TIME LIMIT IN APPLICATIONS BY MARRIED WOMEN TO JUSTICES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 844, 845, para. 1347; and FOR CASES, see DIGEST, Vol. 27, pp. 560, 561, Nos. 6161-6169.]

Cases referred to:

(1) *Dutch v. Dutch* (1928), 98 L.J.P. 44; Digest Supp.; 140 L.T. 96.

(2) *Natbony v. Natbony*, [1933] P. 1; Digest Supp.; 101 L.J.P. 58; 147 L.T. 252.

G APPEAL from an order by magistrates sitting as the court of summary jurisdiction for the petty sessional division of St. Augustine, Canterbury. It was proved that the husband was seen walking with a woman not his wife on Aug. 5, 1937, and later, when questioned by the wife, stated: "I admit I have done wrong, but you have driven me to it, as you have not slept with me for 18 months." On Dec. 10, 1937, the husband showed the wife a letter from his solicitors stating that the woman in question would not accept £50, but would accept £75. If that sum were not paid, she stated that she intended to apply for an affiliation order. On Jan. 15, 1938, the wife left the husband, and in March lodged a complaint alleging desertion and adultery. The justices made an order

stating that the evidence of the wife as to the solicitors' letter was sufficient corroboration of the adultery, and that they were satisfied that the wife was forced to leave the husband on account of his adultery.

Greer Jackson for the appellant.

R. T. Barnard for the respondent.

A
B
C
D
E
F
G
H

SIR BOYD MERRIMAN, P. : Adultery is a substantial ground of complaint under the Summary Jurisdiction (Married Women) Act. It was added for the first time by the recent Matrimonial Causes Act, 1937. A question has also been raised whether, on the substantive complaint of adultery, the finding of it after six months from the time when the matter of such complaint or information arose—which is imposed by the Summary Jurisdiction Act, 1848, s. 11—applies to a complaint of adultery. If it does apply, does it apply to the dates when the adultery was committed or to the date when the committing of the adultery was discovered? I have no doubt whatever that the wording of the Matrimonial Causes Act, 1937, s. 11, necessarily involves that, in common with the other grounds of complaint accorded by the Summary Jurisdiction (Married Women) Act, the time limit of six months applies. There is in the section no sort of qualification making adultery a substantive ground of complaint, and it seems to me necessarily to follow that the time limit applies. Mr. Barnard has argued that the legislature must have intended that time limit to apply to the discovery of the act of adultery, and not to the adultery itself, because, as he points out, there would be in some cases manifest hardship if adultery committed outside six months were discovered only when it was too late to make it the ground of complaint. That may be so, but, on the other hand, it is easy to see that there are manifest objections to it, and manifest causes of hardship might arise if applicability of the time limit were made to depend upon questions of whether adultery committed a long time ago was actually known, whether there were means of finding it out, whether it was enough, for example, that some of it was known and the rest was concealed, and other questions of that sort. Speaking for myself, I am quite certain that the legislature were not contemplating introducing into this simple provision anything other than that the adultery, not the discovery of adultery, should be made one of the grounds on which the Summary Jurisdiction (Married Women) Act operated. I am not oblivious of the fact that in two cases to which we have been referred—*Dutch v. Dutch* (1) and *Natborny v. Natborny* (2)—the question has arisen whether, under the corresponding provisions for setting aside an order on the ground of adultery under sect. 7 of the Act of 1895, the time for complaint ran from the adultery or from the discovery of the adultery. Nobody has decided that discovery was the test under that section. I can see no warrant for the suggestion in the plain words of sect. 11 of the Matrimonial Causes Act that the time limit is applicable to anything but the adultery itself. It follows from that, that in order to succeed upon adultery as

a substantive ground of the charge, the burden of showing that the adulterous association continued within the six-months' period was upon the wife. The evidence on which adultery in the six-months' period could be found in any given case will be precisely the same class of evidence as that on which the issue would be disposed of in these
A courts. It is, of course, impossible to exclude from consideration an association and evidence tending to show that that association was adulterous during the period before the six months. What is required, however, is the positive evidence from which adultery may be inferred as having been committed within the six months—in other words, such
B evidence as shows that the association was adulterous, and that there was an opportunity for indulging in it on one or more specific occasions within the period of six months. That, in my opinion, was the burden which the wife was bound to discharge on the question of adultery before she could ask for a maintenance order on that ground from the
C justices. The case took rather an unfortunate course. At the end of the wife's evidence, the husband submitted that there was no case to answer, not merely on this question of adultery, but also on the question of desertion and on the question of failure to maintain. The justices overruled that submission, whereupon the husband stood upon the sub-
D mission, and called no evidence, although he was present in court. Mr. Greer Jackson, who argued this case most admirably, has asked us to set aside the finding, on the ground that on the face of it—on the face of the record of the proceedings—there is no evidence of adultery within the six months, and, correspondingly, no evidence of desertion. He tells
E us—though there is no record of this—not only that the submission dealt specifically with there being no evidence of adultery as would appear to be the submission from the face of the note, but also that the attention of the justices was directed specifically to the point that there was no evidence of adultery within the six months. The justices may
F have had their attention directed to that. I am not declining to accept that statement that Mr. Greer Jackson has made upon instructions. Nevertheless, it was quite clearly not the point which was uppermost in their minds at the time when they gave their ruling, for they decided the point on the ground that the respondent's evidence of the contents
G of a certain letter on which the appellant's solicitor was not cross-examined was sufficient corroborative evidence of the appellant's adultery. There is nothing there to show that they were directing their minds at all to the question whether there was sufficient evidence of adultery within the six months. We have examined and re-examined this
H evidence as it was recorded. Speaking for myself, I am quite satisfied that there was ample evidence on which the justices could find the husband guilty of adultery, and I agree with them more particularly now that I have seen the letter. It was only referred to before them, although it ought to have been called for and put in. I am amply satisfied that the letter referred to—namely, the letter from the husband's

solicitor to the husband, saying that he had offered the young woman with whom he was alleged to have committed adultery £50, payable by monthly instalments, in dispense of the expected birth of a child, with the alternative of affiliation proceedings—was ample corroboration of the wife's evidence that in effect the husband had confessed to adultery. None of that touches the point whether the adultery had been committed within the six months. I propose to say no more about that than that, as we are going to send this matter back to the justices, we are not going to reverse the justices, because that would not be fair, having regard to the course the case took. However, when the matter goes back to the justices, and the issue is opened afresh with this point in mind, there may be quite different evidence available on the question of the time up to which this adulterous association continued. On the face of the note as it stands, it seems to me to be impossible to affirm with certainty that any adultery was shown to have been committed within the six months before the alleged complaint. The wife herself speaks of discovering a letter which led her to go round to a certain address in Ramsgate, as a result of which she went to see a young woman in what may have been a nursing home in Ramsgate. She recognised the young woman as having been the woman she had seen with her husband in the preceding August, August itself being outside the six-months' limit. Then, a week later, she spoke to her husband. In effect, without using the words, he admitted that there was an affair, and the next day, on Dec. 10, he showed his wife the letter to which I have just referred. It seems to me to be impossible, from that evidence as it stands, to infer that the husband's confession was a confession of a consistent association of an adulterous character, for the reason—if for no other—that the very letter itself from his solicitor to him, which the wife saw, shows that he and the young woman in question were already at arm's length. I say no more, therefore, than that the date at which the adulterous association ends is left completely in the air. The whole matter must be investigated afresh, with the point clearly in mind that it is necessary for the wife, if she is to succeed on an issue of adultery, to establish that the adulterous association was persisted in within six months of the complaint.

In substance, the same point applies to the charge of desertion. In saying that, again, I am not overlooking the fact that desertion itself is a continuing offence, and that, once a state of desertion is established, and nothing has occurred to interrupt it, the mere fact that the desertion began outside the six-months' limit is neither here nor there. That does not bar the complaint. In this case, the desertion is of a kind which is always described as constructive desertion. That is to say, physically it was the wife who left the matrimonial home. She is alleging, however, that it was her husband's conduct which drove her from the matrimonial home. In substance, although there is not a definite, but rather a faint, reference to earlier misconduct, she is saying

that it was the discovery of the adultery and this adulterous association which caused the nervous breakdown and drove her from her home.

I do not propose to review all the authorities which have been examined on this point. It is sufficient for me to say that Mr. Barnard with characteristic frankness has admitted that he cannot produce any
A authority for the proposition that the mere discovery of an adulterous association, not coupled with any suggestion that it is still subsisting, or that there is an intention on the part of the husband to persist in it, is, of itself, enough to entitle the wife to leave home. I should have added the words "discovery of a past adulterous association." In
B other words, to entitle the wife to leave home, and to say that her husband had deserted her on the ground of an adulterous association, there must be some element of an intention to persist in the adulterous association, as contrasted with the mere discovery of past offences. Here, again, for the reasons I have already given, in connection with the evidence of
C adultery itself, we are left in complete doubt, a complete state of doubt, as to how the matter really stands.

Again, it is enough, as the matter is going to be re-investigated, to say that, on the face of the note, there is nothing to show that, at the time when the wife discovered this adulterous association, there was
D any intention on the part of the husband to persist in it, nor, as I have already said, was there any evidence that it was at the time a subsisting association. In those circumstances, it is impossible to allow this order to stand on the existing evidence. The matter, therefore, must be remitted to the justices to be inquired into afresh.

E

HENN COLLINS, J. : I agree, and for the same reasons. I want to add only this. For the reasons given by SIR BOYD MERRIMAN, P., the burden was upon the wife to establish adultery within the time limit. We are told that the question of the importance of the time limit was
F brought to the justices' attention. I am accepting that, but their finding makes no reference to it at all. What they have, in fact, found is that they were satisfied, on the evidence given by the respondent of the contents of a certain letter, on which the appellant's solicitor was not cross-examined, that there was sufficient corroborative evidence of the
G admission of adultery. The evidence of the appellant's adultery was an admission deposed to by the wife in these terms :

I admit I have done wrong, but you have driven me to it as you have not slept with me for 18 months.

H Taking that finding of adultery, I cannot but think that it had slipped from their minds that, to make that finding complete, they should have added, if that was their intention, evidence of the appellant's adultery within six months of the summons. I cannot think, myself, that, although it was, no doubt, mentioned to them, it was present to their minds, although Mr. Jackson has told us that they did have it in their minds.

Nor can I think that they ever, in fact, found that. For those reasons, this case must go back.

SIR BOYD MERRIMAN, P. : I ought to have added that, amongst the matters which the justices will be entitled to consider, is the issue of conduct conducing that Mr. Greer Jackson has raised. I need say **A** no more about that than that of course he is quite right in saying that under the 1937 statute the justices have to be satisfied that there was not conduct conducing. As I have said with reference to the other matters in issue on the face of the note itself, except for the one sentence to which HENN COLLINS, J., has just referred, there seems to be nothing to entitle **B** us to say that the justices were driven to the conclusion that there had been anything in the nature of conduct conducing. That matter, with the rest, will be open to them when the matter comes before them for re-hearing.

Solicitors : *Wilberforce Allen & Bryant*, agents for *Walter Hills, Shea & C* *Girling*, Margate (for the appellant) ; *Mowll & Mowll*, agents for *Mowll & Mowll*, Canterbury (for the respondent).

[*Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.*]

R. v. VALE.

[COURT OF CRIMINAL APPEAL (Branson, Hawke and Macnaghten, JJ.),
June 20, 1938.]

Criminal Law—Habitual criminal—Procedure at trial—Trial of charges by same court.

A The prisoner in this case was put up to plead, and pleaded guilty to certain charges against him. He was also charged with being a habitual criminal. On the next day, before another court, he was dealt with both on his plea of guilty and on the charge of being a habitual criminal. He appealed, alleging that these facts brought his case within the decision in *R. v. Triffitt* (1) and that his conviction as a habitual criminal should be quashed:—

B **HELD:** as the proceedings on the first day were merely putting the prisoner up to plead, there was no irregularity in them, and the conviction must stand.

R. v. Triffitt (1) explained.

C **[EDITORIAL NOTE.** It was decided in *R. v. Triffitt* (1) that the trial of the substantive offence and the charge of being a habitual criminal must be before the same court and jury; but this does not apply where the first proceedings are merely the formal putting up of the prisoner to plead to the substantive charge.

AS TO PROCEDURE AGAINST A HABITUAL CRIMINAL, see HALSBURY, Hailsham Edn., Vol. 9, p. 238, para. 336; and FOR CASES, see DIGEST, Vol. 14, pp. 481-484, Nos. 5253-5290.]

D Case referred to:

(1) *R. v. Triffitt*, [1938] 2 All E.R. 818; Digest Supp.

E APPLICATION for an extension of time in which to appeal against sentence of preventive detention, and also for leave to appeal against conviction as a habitual criminal, and for legal aid.

No counsel were instructed upon this application.

F BRANSON, J. [delivering the judgment of the court]: This appellant pleaded guilty on Feb. 9, 1938, at the Central Criminal Court to two indictments, one for blackmail and the other for stealing, forgery and false pretences, and he was found guilty of being a habitual criminal. He was sentenced by the commissioner to 5 years' penal servitude and 5 years' preventive detention. He now applies, months out of time, **G** by notice dated May 14, for an extension of time in which to appeal against the sentence of preventive detention, and also for leave to appeal against his conviction as a habitual criminal, and for legal aid. The notice of appeal takes the point that it was contrary to the statute that his pleas to the substantive offences should be taken in one court **H** and that the next day he should be tried in another court as a habitual criminal. He bases his case upon a decision delivered by this court, to which I was a party, on May 10, 1938—*R. v. Triffitt* (1). I think that it is right that I should say a word or two about that case and its application to the present one. In the opinion of the court, if the time were extended, and leave to appeal given, it would be of no use to this appellant.

R. v. Triffitt (1) was a case in which the appellant had pleaded guilty to several counts in an indictment. His antecedents were given in evidence before the court, and he was sentenced by that court to 5 years' penal servitude. On the next day he was put up for trial before a different chairman and a different jury upon the indictment charging him with being a habitual criminal. He was found guilty, and was sentenced to a period of 5 years' preventive detention. The point of that case was that it was wrong to split the indictment so that one part of it was dealt with by one tribunal and the other part of it by another tribunal. It is true that the court took the line which it did out of what was no doubt tenderness for the prisoner, no doubt feeling that he should not be tried on the charge of being a habitual criminal before a jury which had heard his previous history, for he had in fact pleaded guilty to some serious charges. This court held in that case that what was done was fatal, and that therefore the conviction of Triffitt as a habitual criminal must be quashed.

The present case is essentially different from *Triffitt's* case (1) in that in the present case all that happened in the first instance was that the prisoner, who was put up and asked to plead to the substantive counts in the indictment, pleaded guilty. The proceedings ended for that day, and he was sent to be dealt with on his plea and on the further charge of being a habitual criminal by another court.

One sentence in the judgment of HUMPHREYS, J., in delivering the judgment of the court in *R. v. Triffitt* (1) read by itself looks as if the court had decided that the trial of the charge of being a habitual criminal must always follow immediately upon the conviction or plea to the substantive offence. "Follow immediately" means dealing with the case without hearing the man's previous history and before sentencing him. In the present case the plea of guilty having been taken, [all other proceedings were adjourned, to be dealt with by another court. That seems to me and to this court a perfectly proper procedure in dealing with cases of this kind, and in this case it would be of no use extending the time. The application must be refused.

Application refused.

Solicitor: *The Registrar of the Court of Criminal Appeal.*

[Reported by REGINALD TOWNSEND, Esq., Barrister-at-Law.]

Re FOSTER, HUDSON v. FOSTER.

[CHANCERY DIVISION (Crossman, J.), June 17, 21, 22, 24, 1938.]

Insurance—Policy moneys—Policy taken out by father on life of son—Whether father's estate or son's estate entitled—Law of Property Act, 1925 (c. 20), s. 56.

A In Nov., 1908, the father took out a policy of insurance upon the life of his son, the policy moneys to be payable on the death of the son on or after his twenty-first birthday. The father died on July 25, 1925, having paid up to that time all the premiums accruing due upon the policy. The son attained 21 years of age on Sept. 26, 1916. After the death of the father, all premiums were paid either by the son or upon his behalf. Upon the death of the son, the insurance moneys became payable, and the question was whether they were payable to the personal representative of the father or to the personal representative of the son :—

HELD : (i) the father had not constituted himself a trustee for the son.

C (ii) the Law of Property Act, 1925, s. 56, did not, in the circumstances of this policy, give the son a legal right to receive the policy moneys.

(iii) the policy moneys were, therefore, payable to the legal personal representative of the father.

Re Engelbach's Estate (1) and *Re Sinclair's Life Policy* (2) followed.

D [EDITORIAL NOTE. It will be noted that in this case the policy is upon the life of the son, and not, as is now usually the case, upon the life of the father. No objection is taken upon this ground, but it is a distinction between this case and the cases which are said to be followed. This case is a further attempt to invoke the aid of the Law of Property Act, 1925, s. 56, and it was argued that the son, although he was not a party to the policy, obtained under it a right to the policy moneys. It is clear that the policy did not purport to make any agreement or covenant with the son, and, assuming, as one must, that the previous cases are correctly decided, it could not give the son any right to the policy moneys. These conclusions bring this case within the decisions in previous cases turning upon this section, which decisions the judge agrees with and applies.

F AS TO PERSONS ENTITLED TO POLICY MONEYS, see HALSBURY, Hailsham Edn., Vol. 18, p. 531, para. 842 ; and FOR CASES, see DIGEST, Vol. 29, p. 422, Nos. 3288, 3289.]

Cases referred to :

- (1) *Re Engelbach's Estate*, *Tibbetts v. Engelbach*, [1924] 2 Ch. 348 ; 29 Digest 422 3288 ; 93 L.J.Ch. 616 ; 130 L.T. 401.
- G (2) *Re Sinclair's Life Policy*, [1938] 3 All E.R. 124 ; Digest Supp.
- (3) *Worthington v. Curtis* (1875), 1 Ch. D. 419 ; 29 Digest 382, 3058 ; 45 L.J.Ch. 259 ; 33 L.T. 828.
- (4) *Re Policy No. 6402 of the Scottish Equitable Life Assurance Society*, [1902] 1 Ch. 282 ; 29 Digest 375, 3007 ; 71 L.J.Ch. 189 ; 85 L.T. 720.
- H (5) *Cleaver v. Mutual Reserve Fund Life Assn.*, [1892] 1 Q.B. 147 ; 29 Digest 369, 2969 ; 61 L.J.Q.B. 128 ; 66 L.T. 220.
- (6) *Re Ecclesiastical Comrs. for England's Conveyance*, [1936] Ch. 430 ; Digest Supp. ; 105 L.J.Ch. 168 ; 155 L.T. 281.
- (7) *White v. Bijou Mansions, Ltd.*, [1937] Ch. 610 ; [1937] 3 All E.R. 269 ; Digest Supp. ; 157 L.T. 105 ; *on appeal*, [1938] Ch. 351 ; [1938] 1 All E.R. 546.

- (8) *Re Fleetwood's Policy*, [1926] Ch. 48; Digest Supp.; 95 L.J.Ch. 195; 135 L.T. 374.
- (9) *Royal Exchange Assurance v. Hope*, [1928] Ch. 179; Digest Supp.; 97 L.J.Ch. 153; 138 L.T. 446.
- (10) *Re Collier*, [1930] 2 Ch. 37; Digest Supp.; 99 L.J.Ch. 241; 143 L.T. 329.
- (11) *Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149; 25 Digest 509, 59; A 88 L.J.Ch. 77; 120 L.T. 341.
- (12) *Berkeley v. Hardy* (1826), 5 B. & C. 355; 17 Digest 216, 283; 4 L.J.O.S.K.B. 184.
- (13) *Forster v. Elvet Colliery Co., Ltd.*, [1908] 1 K.B. 629; 77 L.J.K.B. 521; 98 L.T. 736; *affd.*, [1909] A.C. 98; 34 Digest 686, 799.
- (14) *Re Burgess's Policy* (1915), 85 L.J.Ch. 273; 27 Digest 151, 1220; *sub nom. Re Burges's Policy, Lee v. Scottish Union & National Insurance Co.*, 113 L.T. 443. B

ORIGINATING SUMMONS taken out in the matter of the estate of Robert John Foster, deceased, and in the matter of the estate of William Edward Foster, deceased, for the purpose of determining whether the money received in respect of a policy of assurance on the life of William Edward Foster, which was taken out by Robert John Foster, who was the father of William Edward Foster, belongs to the estate of William Edward Foster or to the estate of Robert John Foster. C

J. Leonard Stone for the plaintiff. D

Roger W. Turnbull for the defendants.

Stone: If this case had arisen before the Law of Property Act, 1925, had been passed, it would have been unarguable, but now, by sect. 56 of that Act, a person who is not named as a party to a deed or instrument may take the benefit of it. The contract in the present case was made for the benefit of the son, and the legal difficulty of his not being a party is got over by the section. In the present case, there is a presumption of a gift by the father to the son as an advancement. The son became 21 years of age in his father's lifetime, and after that time the father was not entitled to a return of the premiums. Up to the time when he attained 21, the son had no interest in this policy at all. In *Re Engelbach's Estate* (1), the policy did not mature before the death of the person who took it out, and that distinguishes that case. Here the father, after the son became 21, paid the premiums on the son's behalf. Applying the test laid down in *White v. Bijou Mansions, Ltd.* (7), does the son fall within the scope and benefit of this covenant? There is only one answer. He is the named beneficiary. Both *Engelbach's* case (1) and *Sinclair's* case (2) are wrong in holding that there is no trust. In *Worthington v. Curtis* (3), the Court of Appeal said that, in a transaction of this nature, the matter depended on whether the policy belonged to the father or to the son. The facts must be looked at, and the facts include the policy, the proposal form, and everything else. *Engelbach's* case (1) and *Sinclair's* case (2) cannot stand in view of *Worthington v. Curtis* (3), which case I ask the court to follow. [Counsel also referred to *Cleaver v.* E F G H

Mutual Reserve Fund Life Assocn. (5), *Re Fleetwood's Policy* (8), *Royal Exchange Assurance v. Hope* (9), *Re Collier* (10), *Re Ecclesiastical Comrs. for England's Conveyance* (6), *Re Stoneham, Stoneham v. Stoneham* (11) and *Re Policy No. 6402 of the Scottish Equitable Life Assurance Society* (4).]

- Turnbull* : Whether or not the son has any right to claim the policy
- A** moneys by reason of sect. 56 is concluded by *Re Englebach's Estate* (1). This case is also in point on the question of the existence of a legal right. *Worthington v. Curtis* (3) has no bearing upon this case. Apart from sect. 56, not only is there no declaration of trust, but there is also no right in the son to take the money. Sect. 56 was not intended to
- B** deal with personal estate at all. The definition clause, sect. 205, must be read in conjunction with it. This section says "unless the context otherwise requires." In sect. 56, the context does require otherwise, because the section is in a part of the Act which deals with real property only. It replaces and continues in plain language the Real Property
- C** Act, 1845, s. 5, which was in archaic language. Apart from earlier authority, *Re Sinclair's Life Policy* (2) is indistinguishable from the present case. The section deals with a disability that the person to whom a grant, or with whom a covenant, was made, might suffer by reason of the fact that he was not named as a party to the instrument. [Counsel
- D** referred to *Berkeley v. Hardy* (12), *Forster v. Elvet Colliery Co., Ltd.* (13), *Re Ecclesiastical Comrs. for England's Conveyance* (6), *White v. Bijou Mansions, Ltd.* (7), and *Re Burgess's Policy* (14).]

- Stone*, in reply : When *Worthington v. Curtis* (3) is analysed, it will be seen that the position is indistinguishable from the present case. In
- E** *Worthington v. Curtis* (3), the policy was taken out by the father on the life of the son and in the son's name. The same question arose for decision—namely, to whom do the policy moneys belong ? The Court of Appeal said that the facts must be considered to ascertain to whom the policy moneys really belonged. The difficulty is that *Re Englebach's Estate* (1)
- F** was decided on a different principle, and *Worthington v. Curtis* (3) was never referred to. The decision in *Worthington v. Curtis* (3) is quite irreconcilable with the decisions in *Re Englebach's Estate* (1) and *Re Sinclair's Life Policy* (2). With regard to the Law of Property Act, 1925, s. 56, it is useless to refer to sect. 5 of the old Act, as sect. 56 is in completely different language, and is not restricted to covenants. There
- G** is no covenant with the father in the present case, and the document is not *inter partes*. It states that the corporation will pay the policy moneys to the person named in the schedule. That person is the son. The clearly expressed intention of the father to make provision for his
- H** son should not be sacrificed to this modern doctrine.

CROSSMAN, J. : William Edward Foster was born on Sept. 27, 1895, and on Nov. 18, 1908, when William Edward Foster was 13 years old, Robert John Foster effected the policy in question with the North

British and Mercantile Insurance Co., having made a proposal and declaration, which, as the policy provides, form the basis of the contract, on Oct. 21, 1908. This proposal was headed :

The North British and Mercantile Insurance Co. Proposal for assurance on the life of a child.

The first paragraph is :

Full name, occupation and address of the parent or other person proposing the assurance.

Against that heading is written "Robert John Foster, Stockeld Park, Wetherby," and underneath is "Harrows Queensbury," which I think must be the name of the house. The second paragraph of the proposal is :

Full name of the person on whose life the assurance is proposed. State the relationship to the proposer.

Against that are the words "William Edward Foster, Stockeld Park, Wetherby." Then there is :

Place and date of birth of the person on whose life the assurance is proposed.

I have mentioned the date of the birth of William Edward Foster. Then there are some usual details of the medical attendant, and questions as to health, none of which is, I think, material for this purpose. There is nothing here, as there has been in some of the other cases with which I shall have to deal, referring to a policy having been taken out for or on behalf of, or for the benefit of, any person other than the person proposing the assurance. The declaration was in this form :

I, Robert John Foster [the person proposing to effect the assurance], do hereby declare that the above statement is true to the best of my knowledge and belief, and that I have not withheld any information or circumstances tending to render an assurance on the life of more than usually hazardous ; and I do hereby agree that the foregoing answers and this declaration shall be the basis of the contract with the North British & Mercantile Insurance Co., and that the company may pay commission to their agents whether acting as agents of the assured or not.

I think that to some extent it is material, in deciding in whom the rights of the policy are, to see what is the form of the proposal and declaration, by whom it is made, and how it refers to the proposal.

That being the proposal and declaration, the policy, which, as I have said, was dated Nov. 18, 1908, is in the following form :

North British and Mercantile Insurance Co.

Whereas the person named in the schedule hereto as the assured. . . .

Looking at the schedule, at once I see that the name, address, and profession or occupation of the assured, are Robert John Foster, Stockeld Park, Wetherby. Therefore the words : "Whereas the person named in the schedule hereto as the assured" mean : "Whereas Robert John Foster being desirous of effecting with the North British and Mercantile

Insurance Co. (hereinafter called the corporation) the assurance described in the said schedule on the life of the person therein and hereinafter named as the person whose life is assured has made the proposal and declaration mentioned in the said schedule and has paid the first premium for the said assurance." Again, turning to the schedule, I find :

- A** Name, address, and profession or occupation of the person whose life is assured, William Edward Foster, of the same address, son of the assured.

Then the policy witnesseth, and the first paragraph is to the effect :

- B** The said proposal and declaration [to which I have referred] shall be the basis of this contract.

Then, secondly, and this is the material part of the insurance :

- C** Provided that the premiums set forth in the said schedule shall have been duly paid, and subject to the other conditions and provisions herein and in the said schedule contained or therein referred to, the corporation will, on proof satisfactory to the directors of the corporation of (1) the happening of the event or contingency described in said schedule ; (2) the title of the person or persons claiming ; and (3) the age as stated in said proposal and declaration of the person whose life is assured, if it has not been previously admitted, pay to the person or persons to whom in terms of the said schedule the sum hereby assured is payable, the amount of the assurance mentioned in said schedule.

- D** Then there are privileges attaching to the policy which I need not go into, but in the schedule exists the " name, address, and profession or occupation of the assured, Robert John Foster," and the person whose life is assured is " William Edward Foster." I find that the sum assured is £5,000. The date of the proposal and declaration is given, as I have mentioned, as Oct. 21, 1908. Then come these words :

- E** To whom payable . . . The representatives or assigns of the person whose life is assured.

Then there is a provision as to the policy participating in profits, and then :

- F** Event or contingency on the happening of which the sum assured by this policy is to become payable . . . Death of the person whose life is assured, provided it shall happen after Sept. 26, 1916.

- G** Then the date of the birth of William Edward Foster is stated to be Sept. 27, 1895, and the yearly premium of £71 17s. 6d. is specified, payable on Sept. 26, during the whole of the currency of the policy. Then there are special provisions, one of which is :

- H** If the person whose life is assured [William Edward Foster] shall die before Sept. 27, 1916 [the day after the day on which he would attain 21] 90 per cent. of the premiums paid, with simple interest at $2\frac{1}{2}$ per cent. per annum, shall be returned to the assured or to his representatives or assigns. (2) At any time between Sept. 27, 1916, and Sept. 26, 1917, this policy may be (a) converted into an endowment assurance [on certain terms mentioned] or (b) maintained as an assurance payable at death, the premium ceasing [after certain payments have been made].

That is the effect of the policy that is executed by the director and manager on behalf of the insurance company.

Robert John Foster, who was the person who effected that policy (I do not think that, on the construction, there is any doubt that he is the assured, and the person who effected it, and made the proposal and declaration on which it was issued), paid all the premiums on this policy which became payable before his death. His death occurred on July 25, 1925. On Nov. 18, 1925, the defendant to this summons, **A** Gerald Robert Foster, proved the will and codicil of Robert John Foster. On Dec. 16, 1925, a certain Cecil Geoffrey Foster, who is now dead, obtained double probate, and the son Gerald Robert Foster is the legal personal representative of Robert John Foster. Before the death of Robert John Foster—namely, on May 11, 1925—William Edward Foster, **B** who had attained the age of 21 on Sept. 26, 1916, purported to make a settlement of the policy, and, on July 20, 1925, William Edward Foster purported to assign the policy to Cecil Geoffrey Foster, whom I have mentioned already, and the plaintiff, Walter Skelton Hudson, who were the trustees of the settlement of May 11, 1925. On Jan. 16, 1928, the **C** trustees of that settlement sold and assigned the policy, or purported so to do, to William Edward Foster, and on May 20 William Edward Foster mortgaged the policy back to the trustees of the settlement. William Edward Foster paid all the premiums on the policy which became payable after the death of Robert John Foster and before 1932. **D** In 1932, William Edward Foster became of unsound mind, and the receiver appointed for his estate paid all the premiums which became payable subsequently. Cecil Geoffrey Foster, whom I have mentioned, died on Apr. 17, 1933, and on Nov. 21, 1933, the defendant Gerald Robert Foster, was appointed a trustee of the settlement of May 11, 1925, **E** jointly with the plaintiff, Walter Skelton Hudson. On Apr. 7, 1934, the second defendant, Ronald Arthur Charteris Foster, was appointed trustee of the will and codicil of Robert John Foster together with the defendant Gerald Robert Foster, so that the position is that Gerald Robert Foster is the sole legal personal representative of Robert John **F** Foster, and Gerald Robert Foster and Ronald Arthur Charteris Foster are the trustees of the settlement made by his will. William Edward Foster died on June 2, 1936. On Mar. 15, 1937, the plaintiff, Walter Skelton Hudson, proved the will of William Edward Foster, and he is now the sole legal personal representative of William Edward Foster. **G** After the death of William Edward Foster, the North British and Mercantile Insurance Co. paid the sum of £6,760 19s. in respect of the policy in question, and they paid it on the joint receipt of the defendant Gerald Robert Foster, as the legal personal representative of Robert John Foster, and of Walter Skelton Hudson, as the legal personal representative of **H** William Edward Foster.

On Mar. 15, 1938, the plaintiff, Walter Skelton Hudson, as legal personal representative of William Edward Foster, took out this originating summons in the matters of the estates of Robert John Foster and William

Edward Foster against the defendants Gerald Robert Foster and Ronald Arthur Charteris Foster, the first defendant being the legal personal representative of Robert John Foster, and the defendants being trustees of Robert John Foster's will. They ask by the summons for the determination of certain questions, the first question being this :

A Whether the sum of £6,760 19s. being the proceeds of a policy of insurance on the life of William Edward Foster taken out by the said Robert John Foster on Nov. 18, 1908, with the North British and Mercantile Insurance Co. belongs to and is payable to the plaintiff as the legal personal representative of William Edward Foster or whether the said sum belongs to and is payable to the defendants . . .

B I have in my copy : " as legal personal representatives of the said Robert John Foster." That should be :

to the defendant Gerald Robert Foster as the legal personal representative of the said Robert John Foster.

The other question I will leave for the moment.

C Mr. J. L. Stone, in a really admirable argument for the legal personal representative of William Edward Foster, admitted—I think originally in the course of his argument—that the case is substantially, except for two points, on all fours with *Re Engelbach's Estate*, *Tibbets v. Engelbach* (1), a decision of ROMER, J., as he then was. In that case, ROMER, J., decided

D that the daughter of the assured (although the proposal form for the policy provided that the proposal was for the daughter, and the policy provided that the policy moneys were to be payable to the daughter) did not acquire any interest in the policy which was effected by the assured, who was the father of the daughter. ROMER, J., decided that

E case, as I understand it, first on the ground that the daughter could not sue on the contract effected by the policy, the contract being between her father and the insurance company, and secondly on the ground that the assured, the father, had not constituted himself a trustee of the policy for the daughter. The first point of difference which Mr. Stone

F finds between *Re Engelbach's Estate* (1) and the present case is that in *Re Engelbach's Estate* (1) the assured died before the daughter attained the age of 21, whereas in the present case William Edward Foster attained the age of 21 in the lifetime of Robert John Foster. In my judgment, the difference is not a material distinction. I find, on the authority of

G *Re Engelbach's Estate* (1), and also on that of a recent decision of FARWELL, J., in *Re Sinclair's Life Policy* (2), that in the present case no trust is created of the policy moneys in favour of William Edward Foster. That, I think, is a matter of fact arising on the documents and the evidence in the present case. There was the second ground for the decision in

H *Re Engelbach's Estate* (1), but Mr. Stone invited me not to follow *Re Engelbach's Estate* (1) and *Re Sinclair's Life Policy* (2) on this point. He argued that *Worthington v. Curtis* (3), a decision of the Court of Appeal, is inconsistent with those cases on this point. I have considered *Worthington v. Curtis* (3) very carefully, and I cannot find anything inconsistent

with the more recent cases on this point. I think that *Worthington v. Curtis* (3) did not decide any question of principle which I can follow in this case. I think that what was decided in that case was that, as the result of evidence which was produced there, the policy in fact was held in trust (I think it was by means of a trust) for the father, and that the presumption of advancement of the child, which would have arisen in the absence of any evidence to the contrary, was in fact rebutted. That seems to me to be really the decision in the case. A

A later case of JOYCE, J., *Re Policy No. 6402 of the Scottish Equitable Life Assurance Society* (4), Mr. Stone suggests was on the same lines as *Worthington v. Curtis* (3). This case was discussed in *Re Engelbach's Estate* (1), and it was pointed out that the decision in *Cleaver v. Mutual Reserve Fund Life Assn.* (5), which was what ROMER, J., based his decision upon, another decision of the Court of Appeal, was not referred to at all before JOYCE, J. *Cleaver v. Mutual Reserve Fund Life Assn.* (5) was subsequent to the date of *Worthington v. Curtis* (3), and, as far as I know, *Worthington v. Curtis* (3) was not referred to in *Cleaver's* case (5). Unfortunately, perhaps, these cases were not brought out each one in the other. Mr. Stone suggested that there was a distinction between *Re Sinclair's Life Policy* (2) and the present case, in that in *Re Sinclair's Life Policy* (2) the policy was on the life of the assured, and so any invalidity of the policy under the Life Assurance Act, 1774, was not involved. I have come to the conclusion that that Act does not affect the question as to the right to the policy moneys as between the rival claimants thereto. All it does is to affect the right of the person who can sue under the policy to sue the insurance company, and, as in fact insurance companies are not in the habit of relying upon this Act, it does not even now arise. I do not think that it can make any difference between this case and *Re Sinclair's Life Policy* (2) that in one case the result of the contention would lead to the policy not being enforceable against the insurance company while in the other case it would be. D E F

Mr. Stone contended that the first ground for the decision of *Re Engelbach's Estate* (1) is not applicable to the present case, because *Re Engelbach's Estate* (1) was decided in 1923, and he argued that the Law of Property Act, 1925, s. 56, which became law on Jan. 1, 1926, has removed the first ground for the decision in *Re Engelbach's Estate* (1). Sect. 56 is as follows : G

(1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument. H

The Law of Property Act, 1925, s. 205, is to this effect :

(1) In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say . . . (xx)

"Property" includes anything in action, and any interest in real or personal property.

So one must read sect. 56 as meaning that a person may take an immediate or other interest in land or other property—which, in the absence of any context to the contrary, means any thing in action, or any interest in

A real or personal property—although not named as a party to the deed.

Mr. Turnbull has contended that, notwithstanding that definition of sect. 56, the word "property" does not apply to personal property, and consequently could not include a thing in action, which is the case we are dealing with in this policy. I do not see how I can come to that conclusion. I think that it is too strong. I do not find anything in the context which makes it inconsistent or otherwise requires me to say that "property" is not to include personal property or a thing in action. No doubt it makes it more difficult to construe the section. I do not think

C that that is a sufficient ground. Therefore I must proceed on the basis that sect. 56 now applies to personal property as well as to real property.

Mr. Stone contended that the effect of sect. 56 is that any beneficiary under a contract can sue on the contract although he is not a party to it.

D That is substantially what his submission amounts to. In my judgment, sect. 56 does not have this effect. I think that Mr. Stone's contention really amounts to saying that an agreement by A with B to pay money to C gives C a right to sue on the contract. I think that it must go as far as that, and I am not prepared to hold that sect. 56 has created such an

E enormous change in the law of contract as would be involved in that proposition, because there could be no doubt, that apart from the section, nobody could ever have suggested that a contract by A with B to pay C a sum of money enabled C to sue A on that contract. I hold, following what I understand to have been the view that LUXMOORE, J., expressed in *Re Ecclesiastical Comrs. for England's Conveyance* (6), at p. 438, and the view that SIMONDS, J., expressed in *White v. Bijou Mansions, Ltd.* (7), at p. 625, and the view of SIR WILFRID GREENE, M.R., expressed in the same case on appeal, at p. 365, and of FARWELL, J., as expressed in *Re Sinclair's Life Policy* (2), that the Law of Property

G Act, 1925, s. 56, can be called in aid only by a person who, although not a party to the conveyance or other instrument in question, is yet a person to whom that conveyance or other instrument purports to grant something or with whom some agreement or covenant is thereby purported to be made. In my judgment, sect. 56 does not apply to the present case,

H because the representatives of William Edward Foster are not, in my opinion, and on the true construction of the document, the persons to whom the policy purported to grant the legal right to receive the policy money, or with whom a contract to pay the policy money is made by the policy. The representatives of William Edward Foster are, in my judg-

ment, only the nominees of Robert John Foster, who is the person, and the only person, to whom rights are given, and with whom a contract is made by the policy. Following, as I am bound to do, *Re Engelbach's Estate* (1) and *Re Sinclair's Life Policy* (2), I am constrained to hold that the policy moneys in the present case belong to the legal personal representative of Robert John Foster.

A

Solicitors : *Sweepstone, Stone, Barber & Ellis*, agents for *Ford & Warren*, Leeds (for the plaintiff) ; *Speechly, Mumford & Craig*, agents for *Mumford, Thompson & Bird*, Bradford (for the defendants).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

B

ATTORNEY-GENERAL (AT THE RELATION OF ESHER
URBAN DISTRICT COUNCIL) v. WILCOX.

[CHANCERY DIVISION (Farwell, J.), June 22, 1938.]

Highways—Towpath—Erection of posts—Benefit to public—Nuisance—Injunction.

A The defendant acquired certain property adjoining the towpath along the River Thames. The conveyance described the property as bounded by the towpath, and proceeded to give the defendant a right of way over the towpath. The defendant, it was alleged, had suffered annoyance from the use of the towpath by persons bringing motor cars, ice-cream barrows and other vehicles thereon. To prevent this he erected upon the towpath posts about 3 ft. apart. The conservators had erected similar posts at the other end of the path. It was contended that (a) the property in the towpath had passed to the defendant under the conveyance, and (b) the public were so benefited by the erection of the posts that they could not complain of them as a nuisance :—

C HELD : (i) upon the construction of the conveyance the towpath did not pass thereunder to the defendant, as a person cannot be granted a right of way over his own land.

(ii) the benefit to the public by the prevention of the vehicular traffic was not a sufficient justification for the obstruction, and an injunction against such obstruction ought to be granted.

D [EDITORIAL NOTE. The law has applied the maxim *de minimis non curat lex* to the question of obstruction, and an obstruction may be so temporary or so inappreciable as not to amount to a nuisance. It has, however, been said that it is no defence that, though what has been done is a nuisance, yet it is beneficial to the public or sufficient space for the use of the public is left. The judgment herein hardly supports this view of the law, but suggests that the benefit to the public must be taken into account as one of the circumstances that may make for triviality.

E AS TO OBSTRUCTION OF HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 354, 355, para. 483 ; and FOR CASES, see DIGEST, Vol. 26, pp. 413-415, Nos. 1330-1338 ; p. 440, Nos. 1569-1571.]

Case referred to :

(1) *Thames Conservators v. Kent*, [1918] 2 K.B. 272 ; 44 Digest 114, 914 ; 88 L.J.K.B. 537 ; 120 L.T. 16.

F ACTION for a declaration that certain posts which had been erected by the defendant across a certain portion of the towpath along the River Thames near Esher were an obstruction to the highway, or, alternatively, a public nuisance, and also for an injunction to restrain the defendant from further interfering with the user of the towpath. The facts are fully stated in the judgment.

G *C. Erskine W. Simes* for the plaintiff.

Harold B. Williams for the defendant.

H FARWELL, J. : The defendant in this action is the owner in fee simple of a piece of land which was known as "Lockangles," and is now known as "The Upper Deck," and which is situate immediately to the south of a towpath along the River Thames. It is near Esher, and is a triangular piece of land bounded on the north side by the towpath, which the defendant claims is his property, and on the south side by a road known

as Hurst Road. The plaintiff is seeking a declaration that certain posts which have been erected by the defendant across the portion of the towpath are an obstruction to the public highway, or, alternatively, a public nuisance, and also seeks :

An injunction to restrain the defendant his servants or his agents from erecting or causing or allowing to remain any posts or other obstructions in or about the said towpath and from in any way stopping or interfering with the user thereof by the public on foot for all purposes or with horses or other draught animals for the purposes of towing.

The facts as agreed are these :

(2) The said parcel of land is held by the defendant under a conveyance dated Mar. 23, 1936. (3) The defendant upon the said land has constructed a swimming-pool and an amusement park to which the public resort. The defendant and the public resorting to his premises have suffered annoyance and damage, particularly in the summer months of the year 1936, from the use of the said towpath by persons bringing motor cars, ice-cream barrows and other vehicles thereon. The relator council had no knowledge as to any complaints as to the user of the said towpath until after the defendant had erected the posts hereinafter referred to. (4) By an order of the Court of Appeal made in *Thames Conservators v. Kent* (1) it was declared that the public were entitled to go on and pass along the said towpath on foot for all purposes whether of profit or pleasure or with horses or other draught animals for the purposes of towing. (5) The relator council, who are the highway authority, have taken no action to prevent the use of the said towpath by persons other than those who are entitled to use it. (6) Posts have been erected across the said towpath at the point marked A in the plan printed at pp. 280, 281 of the report of *Thames Conservators v. Kent* (1) by the Conservators of the River Thames, but are not sufficiently close to prevent the use of the said towpath by persons other than those who are entitled to use it.

The posts which have been erected by the Thames Conservancy are some distance apart, and not at all even. They vary, I think, to some extent, and there is a considerable space between them.

(7) In or about Aug., 1936, the defendant, his servants or agents erected in the said towpath six wooden posts 4 ft. or thereabouts in height at distances of 3 ft. or thereabouts apart at [one point] and seven wooden posts 4 ft. or thereabouts in height at distances of 3 ft. or thereabouts apart at [another point]. The said towpath is 21 ft. wide at the western boundary of the defendant's land and 24 ft. 6 ins. wide at the eastern boundary thereof. The said posts are unlighted. Complaints were received by the relator council of the erection of the said posts. (9) On Oct. 28, 1936, the relator council by a letter from their clerk required the defendant to remove the said posts. The defendant refused so to do. (10) On or about Nov. 6, 1936, the relator council by their servants removed the said posts. (11) On or about Nov. 9, 1936, the defendant, his servants or agents re-erected the said posts in the said towpath in or about the same positions. (12) The relator council by a letter dated Jan. 5, 1937, from their clerk to the solicitor for the defendant required the defendant to remove the said posts, but the defendant, by letter dated Feb. 11, 1937, from the defendant's solicitor to the clerk of the relator council, refused so to do.

On that, this action is commenced. I must refer in a moment to the conveyance, but, before doing so, I may say that it has been suggested that there are two issues which I have to consider in this action. First, a question whether the towpath immediately to the north of the land which was purchased by the defendant is in fact the property of the defendant or whether it is that of somebody else. For myself, I cannot see that it is a very material question in this matter. Assuming that the defendant has done that which amounts to an actionable nuisance by obstructing the right of the public to use the way for the purpose for which it has

been held they have a right, then it seems to me that the plaintiff is entitled to relief against that person, whether he be in fact the owner of the soil or whether he be a mere trespasser. Of course, the only person who can sue the defendant for trespass is the owner of the property, or the person in possession of the property. However, this action is not
A strictly an action in trespass at all. It is an action in nuisance, the nuisance being the obstruction of the public highway. In my judgment, an owner who erects obstructions on a public highway, although the soil of the public highway may be in him, is none the less committing an actionable wrong to the public, and one which he can be prevented from doing at
B the suit of the Attorney-General on behalf of the public; and whether or not the soil in this particular portion of the towpath belongs to the defendant is, in the view I take of this case, not a very material consideration. It has been raised, and therefore it is quite right that I should express my view upon it.

C When I turn to the conveyance, it, I think, appears reasonably clear. It is dated Mar. 23, 1936. It is made between Charles William Kent and Edward Herbert Stenning of the first part, Reginald Flower Wells, called the purchaser, of the second part, and the defendant of the third part, hereinafter called the sub-purchaser. Then there are certain
D recitals to which I need not refer. Then the deed witnesses that, in pursuance of the agreements, and in consideration of the price, which is stated, the vendors, as trustees, convey unto the purchaser, and the purchaser conveys to the sub-purchaser (that is, the defendant in this action):

E . . . all that piece or parcel of land by the River Thames at East Molesey aforesaid bounded on the north by the towing-path on the west partly by land belonging to the vendors and partly by land belonging to the Hurst Park Club on the east by the Lock House and on the south partly by land belonging to the Hurst Park Club and partly by Hurst Road as the same is for the purposes of identification but not of limitation more particularly delineated on the plan drawn hereon and thereon coloured pink together with the garage workshops club pavilion and
F restaurant erected thereon or on some part thereof. . . .

Pausing there for one moment, the fact that the towpath itself is not described in the parcels as being part of the property which is conveyed to the purchaser does not prevent the purchaser from being entitled to the towpath if there is nothing else in the conveyance or in other
G circumstances to interfere with his right or to prevent effect from being given to that right, because, in such a case as this, as is quite plain from the decision in the *Kent* case (1), there is a presumption which would have the effect of making the conveyors of this property give to the purchaser the right in the soil over this portion of the towpath which
H immediately abuts on his property, and, *prima facie*, that is his right. Whether or not that was the intention of the parties, and whether or not effect has in fact been given to it by the conveyance, are matters which must be ascertained by a proper consideration of the circumstances, and, more particularly, by a proper consideration of the conveyance itself, because, although there is a presumption in favour of the purchaser,

it is a presumption which may be rebutted, and, if there is anything in the document itself which rebuts the presumption, then the presumption does not arise, and the soil of the towpath does not pass under the conveyance. The conveyance continues :

. . . and together with the right of user for the sub-purchaser and all persons authorised by him at such times as the same is available for traffic over the private road from Hurst Road to the towpath subject to the vendors accepting no liability for the maintenance or repair thereof or otherwise. . . . A

That private road is a road which runs out of Hurst Park almost directly north, joining the towpath to the west of the property which was sold to the defendant. Then the conveyance goes on : B

. . . and together (so far as the vendors are able to grant the same but not further or otherwise) with (i) the right of way for the sub-purchaser and all others authorised by him at all times for all purposes over the towpath on the north side of the said property . . .

Then there are mooring rights. C

. . . to hold the same unto the sub-purchaser in fee simple subject to the restrictions and stipulations (if any) affecting the same and subject also to the restrictions and stipulations contained in the first schedule hereto and subject also to and with the benefit of the lease so far as subsisting mentioned in the third schedule hereto.

There is nothing else in the conveyance to which I think I need refer.

It is a question of construction as to what is meant by the phrase "on the north side of the said property", because there is a grant of a right of way for the sub-purchaser for all purposes over the towpath on the north side of the said property. If "the said property" means the property thereinbefore described in the parcels—that is, the land which was conveyed in terms to the defendant—then the towpath immediately adjoining the property is the towpath which is marked green on the plan, and is the towpath the site of which—the presumption is in favour of the defendant—is the defendant's property, or his under the conveyance. In my judgment, it is impossible to suppose that the parties were intending to grant to the purchaser a right of way over the purchaser's property. Such a grant would, of course, be absurd. The purchaser buys the land. If the land as sold to him includes the towpath, he could, of course, buy it only subject to the rights, whatever they are, which the public have over the towpath. The property would then be his property, so far as the soil is concerned, and, as against the vendor, he, and he alone, would be the owner of the property. It is inconceivable, to my mind, that the parties can have contemplated that state of affairs, if they were in the same breath reserving or granting to the purchaser a right over the towpath which was intended to be his property. As the purest matter of construction, it seems to me that the only inference properly to be drawn from the document as a whole is that the parties did not intend by this conveyance to pass the property in the towpath to the purchaser. In other words, the presumption which would otherwise have made the purchaser entitled to the soil of the towpath is rebutted by the very instrument itself which conveys D
E
F
G
H

the property to the purchaser, because it is incredible that the vendors and the purchaser can have intended that there should be a right of way granted over property which presumably was intended to be the purchaser's own property. Therefore, so far as it is material (to my mind, it is not material in this case at all), I think that the conclusion to which I am bound to come, as a matter of construction of the conveyance, is that the defendant is not the owner of the soil in the towpath.

The effect of that is that, if the plaintiffs here were suing in trespass, the position might be a position of some difficulty. However, the true position here is that the plaintiffs are suing, not in trespass, but in nuisance. Their case is that the defendant has done that which causes an obstruction to the public footway, and that, by acts which have caused that obstruction, the defendant has been guilty of a nuisance, and that the law will restrain him from committing such a nuisance in the future, and will moreover require him to remedy that which he has done in excess of what he was entitled to do. It seems to me, therefore, that I need consider no further this question as to the title of the defendant to the soil of the towpath, because, whether or not he is the owner, if the plaintiffs are right, they are entitled to succeed.

The whole matter, therefore, comes to this: Has the defendant, by placing these posts across the towpath, done something which he is not entitled to do? I have been referred, and very properly referred, to a considerable number of authorities in which the rights of the public in public highways and public footpaths have been discussed, and those authorities have been of the greatest assistance to me in arriving at the conclusion to which I have come. I do not think it is necessary for me to travel through those various cases, because I have come to the conclusion that there is a principle which is to be extracted from those decisions, and it may be stated in this way. Where there is a public right of way—a public footpath or a public right of way of a wider nature—over a defined portion of land, the public have the right to use that piece of land for the purpose of passing and re-passing, and they are entitled, *prima facie*, to use any part of the defined portion of the land, the land as defined by a hedge or fence. The members of the public are entitled to use any part of it between the hedge or the fence, and they are as much entitled to use the grass verge or a portion of the way which is not metalled or made up as they are to use the metalled or made-up portion of the way. Their right, *prima facie*, is to use any part of the particular portion of the land for the purpose of passing and re-passing. Therefore, *prima facie*, anything which is placed in the defined area in question which obstructs in any smallest possible degree the right of the public to use the whole of the way is an obstruction. Nevertheless, it does not follow that, because there is, or may be, something which is an obstruction, in the sense that thereby a member of the public cannot put his foot on that particular portion of the highway which is now

occupied by the post or pole, but was formerly unoccupied by such post or pole, that of itself entitles the highway authority to any relief against a person who has caused that particular obstruction. As I have said, *prima facie*, it is an unlawful act to put on a public way anything which obstructs in the smallest degree the exercise by the public of their rights. On the other hand, the court will not interfere where what has been done is something which is of so trivial a nature as not really to interfere with the proper exercise by the public of their rights. That is particularly so in the case where the alleged obstruction is of a merely temporary nature. Take, for instance, the stopping of a van or a cart for the purpose of letting out passengers, and things of that sort. *Prima facie*, of course, to keep a vehicle on a public highway for an unreasonable time may be an obstruction. On the other hand, merely to stop a vehicle for the purpose of loading or unloading may not in itself, although it is a physical obstruction, be such as to entitle anyone to interfere. Therefore, it seems to me that in all these cases it must come down to a question of degree.

It has been suggested, however, that at any rate at one period the law was that, if it could be shown that, as a result of the obstruction—although one which, *prima facie*, would be an illegal act and give rise to a right in the public to object—there was some countervailing advantage to be gained from the obstruction that could be set off, as it were, against the nuisance, and, if the court came to the conclusion that on balance it was in favour of the public that there should be an obstruction, that might be a good answer to the claim for relief. I do not think, as the cases stand now, that any such right can be put, or that the position can be put, nearly so high as that. I think that the cases show that that view which was taken at one time to that effect is erroneous. None the less, I think it is clear on the authorities that it is a matter to be taken into consideration, when the court is considering the whole of the circumstances, whether or not such a comparatively trivial obstruction may not result in the way being made more convenient or commodious for the public, and, although in that way there is a technical obstruction, it may be one with which the court will not interfere because the net result of the obstruction is to enable the public to exercise their right with greater facility and more convenience. It is said here that the erection of these posts has that effect, because, prior to the erection of these posts over this particular piece of highway, people whom one frequently meets nowadays on the highroads selling ices, and other vehicular traffic, go down, or have been in the habit of going down, this bit of towpath. They are an obstruction, and may be a danger to the public, and it is said that, by taking steps to prevent that vehicular traffic generally from going down this piece of towpath, the public has been benefited and safeguarded. Further, it is said that any small obstruction which has been caused by these posts ought to be treated as entirely made up to the public by the protection that is afforded to

them by the correction of the vehicular traffic, and that, even if I come to the conclusion that there was some interference with the public rights which by itself might entitle the plaintiff to relief, when I take into consideration the fact that that which causes that obstruction is in itself a means of safeguarding the public, and therefore of making the

A use of the towpath in a sense better and more convenient and safer for the public, I ought to come to the conclusion that there has been no such serious interference with the rights of the public. It is said that in fact the public are now better able to exercise their rights, because they can exercise them without danger from vehicular traffic or inter-

B ference from vehicular traffic, than they could before, when there were no posts there. They could then walk on every portion of the soil, but at the same time they ran the risk of being interfered with by vehicular traffic which came along the towpath. I think that those are circumstances which I am bound to take into consideration, not, as I say,

C because it is a matter of balancing by way of set-off, but because the court must take into consideration, in my view, all the surrounding circumstances, and make up its mind, on the facts before the court in each case, on the net result of what has been done, and take into consideration any advantage flowing from any interference with the public.

D The court has to say whether, as a net result, there is such an interference with the right of the public over the way as to entitle the plaintiff to relief. That is the test which, in my judgment, I must apply in the present case.

Coming down to that, the position is this. Before these posts

E were erected, there were posts which had been erected by the Thames Conservancy Board, and which no doubt prevented vehicular traffic from getting on to this particular part of the towpath from the east end. From the other end, however, there was nothing physically to prevent a wheeled cart or a wheeled vehicle, so long as it was not too

F large, from using the way. On the other hand, the whole of the towpath was available to the public, not only for the purpose of passing and repassing, but also for that of towing barges and other boats on the River Thames. It has been held that the public have the right to use this way for towing purposes, and are therefore entitled to take

G along the towpath a horse or other beast of burden for the purpose of towing, which must involve the right to have the necessary ropes attached to the animal at one end and to that which is being towed at the other, and to have the rope at the correct angle along the towpath dragging that which is being towed at the end of the rope. Although it is no doubt true

H that there is no real evidence about it, the use of the towpath for towing purposes has decreased very greatly in modern times, and the more common method of propelling barges or other boats of that sort on the Thames is not now by towing, but by use of mechanical contrivances to propel the boat itself. None the less, the public have the right, if they desire so to do, to use the path for towing, properly speaking, by

horses or other beasts of burden. That is a right with which no one is entitled to interfere. In my judgment, it is impossible to say that the presence of these posts, which have been erected in these two places on this spot on the towpath, is not an interference with the right of the public to use the towpath for towing purposes. It seems to me almost impossible to suppose that, except by some means of lifting the rope across the posts, or in some other way, the use of the towpath as a towpath has not been practically prevented. It may be that there is sufficient room left between the posts to take the beast drawing the boat through, across and along the towpath, but an interference with the rope would be sufficient, in my judgment, if it is a real interference, to entitle the plaintiff to the relief which he seeks. Although, as I say, it may be possible to get over the difficulty caused by those posts by lifting the rope over them, or something of that sort, in my judgment, the public are not bound to put up with that inconvenience which is so caused to them, and, if the erection of the posts does cause them that sort of inconvenience, and puts them to the extra trouble of manipulating the rope over these posts, then there is an obstruction, in my judgment, which is sufficient to entitle the plaintiff to maintain this action. A

So far as the foot passengers alone are concerned, I think that probably there is very much less real obstruction. The members of the public cannot, of course, so long as the posts are there, use every portion of the whole of the towpath. They have to avoid the posts, so long as the posts are there, but that in itself—the small deviation which may be necessary to pass through the posts—is a comparative trifle, and one that by itself might not be sufficient to justify the court in giving the relief which is sought. It has to be borne in mind, however, that these posts are not lighted, and that any person proceeding along the towpath on a dark night might very easily fail altogether to see the obstruction, and the result of the obstruction might be that a member of the public might be seriously interfered with, and possibly hurt, by colliding with the posts, which he would not know were there, and which he could not see. Although I confess that I think that the interference with the foot passengers' use of the particular piece of towpath is only to a comparatively small extent, nevertheless, I think that, having regard to the rights of the public to use the towpath for towing, and to the fact that there is some obstruction of their right to use it as foot passengers, I am bound to come to the conclusion that the plaintiffs have made out their case, and are entitled to the relief which they seek. B C D E F G

I do not think that this is a case where I should say that any benefit which the public may derive in fact from vehicular traffic not going on to this part of the towpath by reason of the posts is sufficient to make the way itself better and more convenient for the public, so that they can exercise their rights better and more conveniently than they could exercise them before the posts were put there at all, although when the posts were not there they had the disadvantage of this particular traffic H

being on the towpath. The matter, as I have said, is, in my judgment, a question of degree, and I have to decide it on the facts as they appear from the agreed statement of facts. Giving the best consideration I can to the facts so stated, and having regard to the particular circumstances of this case and the position of the land in question, I have come to the conclusion that the plaintiffs have made out their case, that they are entitled to a declaration that the posts are an obstruction to the public highway, and that they are entitled to the injunction which they seek.

Injunction granted.

Solicitors : *Lees & Co.*, agents for *Frederick Edwards*, Esher (for the plaintiff) ; *Wilkinson, Howlett & Moorhouse* (for the defendant).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

VSESOJWZOJE OBJEDINENIJE "EXPORTLES" v.
T. W. ALLEN & SONS, LTD.

[KING'S BENCH DIVISION (Lewis, J.), June 28, 29, 1938.]

Sale of Goods—Rejection—Restrictions—Marked goods—Whether restrictions on rejection apply to unmarked goods—Claims in respect of quality and condition—Timber not properly seasoned—Faulty manufacture.

A contract for the sale of timber stated in cl. 11 thereof that no claim for quality and/or condition would be recognised by the seller upon any goods shipped under the contract unless reasonable particulars were given to the agents within 14 days, and goods in respect of which a claim was made were produced ready for inspection within 21 days, both periods to be calculated from the ship's final discharge. Reasonable particulars were defined to mean a statement as to whether the claim was for condition and/or quality and/or other defects to be named. A further clause stated that buyers should not reject the goods therein specified, but should accept or pay for them in terms of the contract against shipping documents. The buyers sent in a detailed claim on three grounds : (i) that some of the goods were not seasoned ; (ii) that some were of bad manufacture ; (iii) that part of the goods did not bear the shippers' usual mark. The sellers declined to inspect the goods on the ground that the claim was out of time :—

HELD : (i) the claim based on the ground that the goods were not properly seasoned came within cl. 11 of the contract, and was therefore out of time.

(ii) as quality and condition did not apply to faulty manufacture, cl. 11 did not apply to goods found to be faulty from the point of view of manufacture, and the sellers were therefore liable on the buyers' claim in respect of such goods.

(iii) the stipulation for a mark was a stipulation which went to the whole subject-matter of the contract, and the buyers were therefore entitled to reject goods not marked with the shippers' mark as not being goods of the contract description. Such goods were not subject to the clause restricting the right of rejection.

[EDITORIAL NOTE.] The first point in this case is the definition of the term "condition and quality," and it is held that faulty manufacture is not a question of condition and quality. The other point is that, where a contract specifies marked goods, then a delivery of unmarked goods is not a delivery within the terms of the contract, and any restrictions placed by the contract upon the right of rejection are not applicable to such unmarked goods.

AS TO REJECTION, see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, pp. 230, 231, paras. 400-404; and FOR CASES, see DIGEST, Vol. 39, pp. 586-590, Nos. 1876-1910.]

Cases referred to :

- (1) *Montague L. Meyer, Ltd. v. Kivisto* (1929), 142 L.T. 480; Digest Supp.
- (2) *White Sea Timber Trust, Ltd. v. W. W. North, Ltd.* (1932), 148 L.T. 263; Digest Supp.; 44 Ll.L.R. 390. A
- (3) *Hopkins v. Hitchcock* (1863), 14 C.B.N.S. 65; 39 Digest 419, 521; 32 L.J.C.P. 154; 8 L.T. 204.

SPECIAL CASE stated by an umpire for the opinion of the court. The dispute arose upon the proper construction of the clause in a contract for sale of timber which restricted the buyers' right of rejection. The questions asked by the umpire raised the proper construction of the clause in question. B

Gordon Alchin for the sellers.

Cyril T. Miller for the buyers. C

LEWIS, J. : This is an interesting point which arises upon an award in the form of a special case in connection with a contract for the sale of timber. The umpire has stated certain facts quite shortly in his award. The contract is first of all set out, and it is in fact attached to the award and made part of the special case. The umpire then states that the goods which are the subject-matter of the contract were shipped by two vessels, the *Ibis* and the *Bauta*, one of which was discharged on Oct. 12, 1937, and the other on Oct. 21, 1937. Objection was taken by the buyers, and the facts with regard to that are set out in paras. 3 and 3a of the award. Para. 3a is as follows : D

On Dec. 1, Brandt's informed buyers that the shippers would not recognise the claim. On Dec. 22, buyers sent Brandt's a detailed claim on three grounds, (i) that some of the goods were not seasoned, (ii) on account of bad manufacture, and (iii) on the ground that part of the goods did not bear the shippers' usual mark. Sellers declined to inspect the goods on the ground that the claim was out of time and this arbitration has resulted. E

One of the points taken was that the contract contained a clause—cl. 11, which has been referred to more than once in the course of the argument—saying : F

No complaint or claim for quality and/or condition will be recognised by sellers upon any goods shipped under this contract, unless reasonable particulars are given to agents within 14 days, and the goods in respect of which a claim is made are produced ready for inspection within 21 days, both from date of ship's final discharge. G

Then it deals with the position if there should be a delay by a dock company, and so on, and then it says : H

Reasonable particulars shall mean a statement as to whether the claim is for condition and/or quality and/or other defects which are to be named.

I ought also to add that the contract contains the familiar clause :

Buyers shall not reject the goods herein specified but shall accept or pay for them in terms of contract against shipping documents.

The umpire then goes on to set out the questions which he has been requested to leave to the court :

A (a) Whether the provision in cl. 11 that no claim will be recognised unless reasonable particulars are given within 14 days entitles sellers to reject any claim of which notice is not given within the time specified. (b) Whether the provision is conditional on the facilities for inspecting the goods. (c) Whether the buyers are entitled to give notice of claim on the grounds of faulty manufacture and that the goods did not bear the shippers' usual mark after the expiration of the 14 days. (d) Whether the buyers are entitled to reject such of the goods on the ground that they did not bear the shippers' usual mark.

He then proceeded to find certain facts :

B (a) Reasonable particulars of buyers' claims were not given to the agents within 14 days of the final discharge of the Ibis. (b) Whilst the conditions at Garston make it difficult for a buyer in Hull to inspect goods during the discharge, it is not impossible for him to inspect the goods sufficiently to enable him to give the reasonable particulars called for by cl. 11. (c) Sellers issue a schedule of marks on sawn goods according to which these goods should be marked "S.U.P." It is admitted that the goods specified in Part 3 of buyers' claim do not bear this mark. Goods in this class and size are sometimes shipped by sellers with their usual mark and sometimes unmarked. (d) The mark indicates the quality of the goods and is an essential condition of the contract.

Then the umpire goes on to say, with regard to the questions to which I have referred in para. 4 :

D Subject to the opinion of the court I award (1) that the sellers are not liable for the buyers' claim based on quality and/or condition. (2) The sellers are liable for the buyers' claim based on faulty manufacture. (3) The buyers are entitled to reject goods not marked with the shippers' mark.

E I have listened to a protracted but ingenious argument by Mr. Alchin, but I am satisfied that this court, in the circumstances in which it finds itself with regard to the special case, can answer, or can look at with a view to answering, only the actual questions submitted.

F With regard to questions (a) and (b) no question arises. The umpire decided those two questions in favour of the sellers. He said, in effect, that the claim which was based by the buyers on the ground that the goods shipped were not properly seasoned was a question which would come within the ambit of para. 11 of the contract, and was a claim for quality and/or condition, and that, as no claim or complaint was made in regard to the goods that were not seasoned within 14 days, or within the time limited by cl. 11, from the date of discharge, the claim was not a good one, and that the sellers were therefore protected by cl. 11. No question arises with regard to that.

G Questions (c) and (d) are the questions which I have to answer. Question (c) is :

H Whether the buyers are entitled to give notice of claim on the grounds of faulty manufacture and that the goods did not bear the shippers' usual mark after the expiration of the 14 days.

That, in my view, involves the question as to whether or not goods which are of faulty manufacture, or which do not bear the shippers' marks referred to in the contract, are goods which can be said to be defective in quality or condition, because, in my interpretation of cl. 11 of the contract, it is only claims in respect of condition or quality, and

for which there is a time limit for making claims, which come under cl. 11.

It is pointed out by Mr. Miller—and indeed it is not disputed, and appears from one of the documents put in before the umpire and attached to the case—that the complaint of faulty manufacture was with regard to what is called excess wain, which means that more bark than is proper is left on particular pieces of wood. It is said—and I think rightly—that that is a question of faulty manufacture. Faulty manufacture, says Mr. Miller, is something different from condition and quality, and he prays in aid the fact that in this very contract, under cl. 19, which is referred to as an amendment to printed cl. 15, dealing with arbitration, it refers to disputes as to quality, condition, measurement or manufacture of goods, thereby clearly indicating that the parties to this contract consider that quality is not the same as condition, that condition is not the same as measurement, and that measurement is not the same as manufacture, and that they are dealing with four different things.

Therefore, says Mr. Miller, I must bear that in mind when considering cl. 11, which deals with quality or condition only. I think that that is right, and that “quality or condition” does not include faulty manufacture. If it does not include faulty manufacture, cl. 11 does not apply to the goods which may be found to be faulty from the point of view of manufacture, and to contain, as is alleged in this case, excess wain.

That being so, it seems to me that the second answer given by the umpire is the right one, and that the sellers are liable for the buyers’ claim based on faulty manufacture.

He has not dealt in that particular answer with the whole of the third question, because the third question, which I have already read, deals, not only with goods of faulty manufacture, but also with goods which do not bear the shippers’ usual mark. In his second answer, he does not deal with the question of mark. I do not think, however, that that is of any importance, in view of the last question :

Whether the buyers are entitled to reject such of the goods on the ground that they did not bear the shippers’ usual mark.

To this the umpire’s answer is :

The buyers are entitled to reject goods not marked with the shippers’ mark.

That involves the question as to whether or not the mark on the goods, or the absence of mark on the goods, renders those goods not the goods specified. Mr. Alchin has argued that all I can look at in this particular contract, in order to see what the goods specified were, is the specification which appears on the front page of the contract. That specification merely says, “Severoles Production—Leningrad Bracking,” and sets out about 225 standards of one kind of wood, 162 standards of another, 15 standards of another, and 20 standards of another, giving the varying measurements :

Total : about 422 standards, as per specification attached, at the prices and on the terms of the 1937 third schedule of prices, dated Mar. 4, 1937, attached hereto.

Neither that specification nor the specification attached refers anywhere to marks on the goods.

It is true that cl. 3, which is on the back of the front page of the contract, says :

A The goods are to bear shippers' usual marks, to be properly seasoned for shipment . . .

However, Mr. Alchin says that all I can look at to see what the goods specified are to be is the specification on the front page. He has referred me to *Montague L. Meyer, Ltd. v. Kivisto* (1), and particularly to the judgment of SCRUTTON, L.J., in the Court of Appeal. There Mr. Alchin
B says that SCRUTTON, L.J., is saying that in that particular case all that can be looked at is the specification on the front of the contract.

On the other hand, I have been referred also by Mr. Alchin to a decision of MACKINNON, J. (as he then was) in *White Sea Timber Trust, Ltd. v. W. W. North, Ltd.* (2), where MACKINNON, J., states quite clearly that
C in that case he was entitled to look, not only at the specification in the sense of the printed matter on the front of the document, but also at a letter which had been written, which he says can be looked at as part of the contract in order to discover what the words "herein specified" mean. He says, at p. 263 :

D I do not think "herein specified" refers as a matter of location to that printed word "specification" in the contract form, but that it has an adequate and wider meaning. "The goods herein specified" can be described as specified not only in the specification, but also in other parts of the contract, and I think that in this case they were described in the attached letter and not upon any part of the form of contract.

E I think I am entitled to look at all the clauses of the contract in this particular case, and I am entitled to look at cl. 3, in which it is said quite clearly that the goods are to bear shippers' usual marks. The rejection clause, which is cl. 15 of the contract, entitles the buyers to reject only when the goods shipped are not the goods specified in the contract. The clause, as I have said, is a familiar one. It says :

F Buyers shall not reject the goods herein specified but shall accept or pay for them in terms of contract against shipping documents.

It has been held time and time again that, if the goods which are shipped are not goods of the contract description, then they are not the goods specified, and that clause does not apply. In this case, I am satisfied
G that the insistence of having a mark on the goods is a matter which goes to the whole subject-matter of the contract.

I have been referred to a judgment of WILLES, J., in *Hopkins v. Hitchcock* (3) where he says in the clearest possible terms, at p. 71 :

H There can be no doubt, therefore, that if a person stipulates to have an article marked or branded with a particular mark, whether it thereby acquires a real or merely a capricious value, he does not get what he bargains for if the article is without that mark.

In my view, if there is a stipulation for a mark, that is a stipulation which goes to the whole subject-matter of the contract, and, if goods which are unmarked are delivered, the goods delivered are not the

specified goods, and in those circumstances the sellers are not entitled to say to the buyers: "You are not entitled to reject, by reason of cl. 15 of the contract."

I think, therefore, that the conclusion which has been arrived at by the umpire is the right one, and that he has given the right answer to the question:

Whether the buyers are entitled to reject such of the goods on the ground that they did not bear the shippers' usual mark.

His answer was:

The buyers are entitled to reject goods not marked with the shippers' mark.

In those circumstances, my view of this case is that the umpire was right, and that the award must be upheld, with the usual consequences as to costs.

Solicitors: *Wynne-Baxter & Keeble* (for the sellers); *Pritchard, Sons, Partington & Holland*, agents for *Andrew M. Jackson & Co.*, Hull (for the buyers).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

R. v. COHEN.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Hawke and Macnaghten, JJ.), June 28, 1938.]

Criminal Law—Evidence—Prisoner giving evidence on own behalf—Cross-examination—Character—Question suggesting dishonesty—Criminal Evidence Act, 1898 (c. 36), s. 1 (f).

The prisoner was accused of conspiracy and receiving goods obtained by false pretences. In cross-examination he was asked about his bankruptcy, and, after a suggestion that he was attempting to put his discharge at a date earlier than it actually was, he was asked in successive questions whether keeping books of account would have made any difference in his bankruptcy, in his prosperity, or in his honesty. The last question was objected to as suggesting he had been guilty of dishonesty and tending to show he was of bad character:—

HELD: the question was one tending to show the prisoner was of bad character and therefore inadmissible under the Criminal Evidence Act, 1898, s. 1. The conviction should, therefore, be quashed.

[EDITORIAL NOTE. The Act of 1898 not only prevents the accused being asked as to previous convictions but also requires that no suggestion should be made to the jury by means of a question in cross-examination that the prisoner is of bad character, unless his character is in issue. The test to be applied to such a question is not what counsel intended by it, but what would be its effect upon the minds of the members of the jury. The Act gives an accused giving evidence on his own behalf certain protection, and it is essential that this protection shall not be destroyed by a side wind.

AS TO CROSS-EXAMINATION AS TO CHARACTER, see HALSBURY, Hailsham Edn., Vol. 9, pp. 215-217, para. 303; and FOR CASES, see DIGEST, Vol. 14, pp. 363-366, Nos. 3848-3874.]

Case referred to:

- (1) *R. v. Ellis*, [1910] 2 K.B. 746; 14 Digest 361, 3819; 79 L.J.K.B. 841; 102 L.T. 922; 5 Cr. App. Rep. 41.

APPEAL by leave against conviction upon a suggestion that certain questions put to the accused in cross-examination were inadmissible.

J. P. Eddy, K.C., and H. Allan for the appellant.

John Maude and J. C. Phipps for the Crown.

- A LORD HEWART, L.C.J. [delivering the judgment of the court]: This appellant, Samuel Cohen, was convicted at the Central Criminal Court of conspiracy and receiving goods obtained by means of false pretences. He was sentenced to 2 years' imprisonment and concurrently to 5 years' penal servitude, and he now appeals against conviction by leave of the court. The grounds of appeal are numerous, and cover much ground, but the only ground upon which leave to appeal was granted to the appellant was his complaint that he was improperly cross-examined about his bankruptcy, in such a way as to convey to the jury that he was a person of bad character. The way in which that ground is stated is as follows :

That part of the cross-examination administered to me was contrary to the Criminal Evidence Act, 1898, s. 1 (*f*). That is to say, I was asked questions relating to my bankruptcy in 1933 and my failure to obtain my discharge in such bankruptcy until 1937. Such questions conveyed to the jury that I had been guilty of some misconduct in, or in relation to, such bankruptcy, and was therefore of bad character.

- D The law upon this matter is as clear as it is important and rigorous. It is of the highest degree of importance, if the Criminal Evidence Act is to be of real utility, that, when defendants go into the box to give evidence, they should not be asked questions which have the effect of contravening the provisions of the statute. The Criminal Evidence Act, 1898, s. 1, provides as follows :

Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person.

- F Then there follows a series of provisos, and proviso (*f*) is in these terms :

A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character.

- G Every word of that proviso is important. It is not merely if questions are asked which show that a person has committed, or has been convicted of, or been charged with, an offence other than that wherewith he is then charged, or that he is of bad character, that the provisions of the statute are infringed. It is sufficient if the question which is asked is a question which tends to show that he has committed, or has been convicted of, or been charged with, some offence, or that he is of bad character.

It has been contended here by Mr. Eddy, on behalf of the appellant, that in the present case that provision was infringed, not merely in one way, but in two quite separate ways. Mr. Eddy puts them alternatively or cumulatively, but he contends that this cross-examination which the

appellant had to undergo had the effect of tending to show that he had committed some offence other than that wherewith he was then charged, and also that he was of bad character. In our opinion, the attempt to prove, or to contend with success, that there was here a cross-examination tending to show that the appellant had committed a bankruptcy offence has not been successful.

We have listened with interest to the argument which has been made upon two sections of the Bankruptcy Act, but that part of the argument, in our opinion, is not adequate. Other considerations apply, however, when one looks at the words: "or is of bad character." Apart altogether from the question of the committing of specific offences, the provisions of the statute are infringed if the cross-examination which was administered tended to show that the prisoner was of bad character. He had not put his character in issue. There seemed to be one passage in the argument of counsel for the Crown which appeared—for the moment, at any rate—to suggest that the appellant had put his character in issue. It therefore seemed right to put the point expressly to counsel for the prosecution, who repudiated any suggestion that the appellant had given evidence of his good character. That being so, the question is: What was the true effect of the cross-examination of which complaint was made? That is in no way the same question as the question: What was in the mind of counsel who was cross-examining? We have heard what was in his mind, and of course any statement made by counsel on that matter is conclusive. The question, however, is not what these questions were intended to convey. The question is: What was the meaning in effect conveyed to a responsible body of jurymen? It is the fact that this man had on an earlier date been made bankrupt, and in cross-examination he was asked these questions:

You went bankrupt?—Yes.

When did you get your discharge?—In 1934 or 1935.

Did you? Just think again. Do not you know when you got your discharge?—A year or two ago.

You applied in Apr., 1934?—I will accept your date if you will give it to me.

You were not discharged until 1937?—Possibly so.

Are you telling the jury on your oath that you do not remember that you got rid of your bankruptcy last year?—No, I do not. I have carried on my business as usual. I have no other business.

Having had that disagreeable experience of bankruptcy, did it not occur to you to keep books?—The bankruptcy had nothing to do with books or no books.

No use at all keeping books—it would not make the slightest difference?—In my bankruptcy it could not.

Or in your prosperity?—It would make no difference.

Or in your honesty?—It is the same thing.

The spirit of the law upon this matter is clearly set out in *R. v. Ellis* (1). In that case, the court, which consisted of no fewer than six judges, delivered judgment, and, after a reference to the Criminal Evidence Act, 1898, it is stated at p. 757:

The object of the enactment is that it should not be suggested to the minds of the jury by means of any questions put to the prisoner that he has committed another offence.

This particular passage has express reference to those words in the section which relate to the committing of another offence, and exactly the same considerations apply, exactly the same requirements are important, with regard to the other words of the statute—namely, “or is of bad character.” The judgment proceeded, at p. 757 :

- A Any question or series of questions which would reasonably lead a jury to believe that it was being imputed to the prisoner that he had committed another offence would, in our opinion, tend to show that the prisoner had committed that other offence. It does not in the least depend on the object of the counsel putting the question. The words of the Act are not “with a view to show,” they are “tending to show.” Moreover, if they do so tend, it is quite immaterial whether the evidence would be admissible or the question admissible on other grounds. As we read the statute, when a prisoner is charged with offence A, questions tending to prove offence
- B B are not to be asked unless the proof of offence B is evidence of offence A. If it were otherwise the protection of the prisoner would be liable to be destroyed by a side wind.

- Precisely the same kind of consideration applies to those words of this subsection which provide that a person charged and called as a witness in pursuance of the Act shall not be asked a question tending to show that he is a person of bad character. We have repeatedly asked ourselves in this case : What is the meaning reasonably likely to be conveyed to listening jurors who hear the questions which I have already read ? It seems to us impossible to give in that context to the words
- D “or in your honesty ” a meaning which could escape the mischief of suggesting to the jury that in the matter referred to the appellant had been guilty of dishonesty. The statement of counsel as to what was in his mind as to the purpose which he intended to fulfil is, of course, conclusive. That, however, is not the question. Here was a man, apparently under the protection, the very clear protection, of the Criminal Evidence Act, 1898, giving evidence on his own behalf. What was the effect likely to be conveyed to the minds of the jury who heard these questions asked, culminating in the question “Or in your honesty ? ”
- E

- We have reluctantly come to the conclusion that there is only one thing open to us in this case, and indeed, as has been said in this place,
- F one of the mischiefs of excessive zeal or lack of care in cross-examining prisoners in criminal cases consists precisely in the fact that the consequence of what is done may lead to the necessary quashing of a conviction on other grounds sustainable. Too great care, however, cannot be exercised. It is essential that the protection offered by this statute to a
- G prisoner who is giving evidence should be closely—not merely loyally, because no question of intention arises—and carefully observed. In our opinion, these questions offended against the clear provisions of the statute, and, in those circumstances, we have no alternative, though the difficulties of the matter are sufficiently obvious, other than to allow this
- H appeal and quash this conviction.

Appeal allowed and conviction quashed.

Solicitors : *E. C. Randall* (for the appellant) ; *City Solicitor* (for the Crown).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

HAILE SELLESSIE *v.* CABLE & WIRELESS, LTD.[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.J.J.),
June 24, 30, 1938.]*Conflict of Laws—Impleading foreign government—Possession—Mere claim to money by foreign government.*

The plaintiff, as sovereign of the Empire of Ethiopia, entered into a contract with the defendants for the institution and working of a radio telegraph service between Ethiopia and Great Britain. It was admitted that the sum of £10,613 11s. 3d. was owing by the defendants under that contract. The defendants contended that, by reason of the Italian conquest of Ethiopia and the recognition by the British Government of the King of Italy as *de facto* sovereign of Ethiopia, the right to recover this sum became vested in the King of Italy. The Italian Ambassador in London had informed the defendants that his government claimed the money:—

HELD: the action did not directly or indirectly implead the Italian government, which had no proprietary interest in the debt alleged to be due, but had merely made a claim to it, and the plaintiff was therefore entitled to have his claim adjudicated upon by the court.

[EDITORIAL NOTE.] The authorities upon the question of impleading a foreign sovereign were considered in the House of Lords in *The Cristina* (5). In that case, the vessel claimed was in the possession, or at any rate under the control, of the foreign government concerned, so that the statements of their Lordships that possession was necessary and that a mere claim was insufficient to oust the jurisdiction of the English courts were, in strictness, *obiter*. In this case, this matter falls to be decided, and the Lords Justices have unanimously decided that a mere claim to property is insufficient to oust the jurisdiction.

AS TO THE IMMUNITY OF FOREIGN GOVERNMENTS, see HALSBURY, Hailsham Edn., Vol. 6, pp. 278-280, paras. 334, 335; and FOR CASES, see DIGEST, Vol. 11, pp. 306, 307, Nos. 1-8.]

Cases referred to:

- (1) *The Parlement Belge* (1880), 5 P.D. 197; 11 Digest 537, 394; 42 L.T. 273.
- (2) *Aksionairnoye Obschestvo A.M. Luther v. Sagor (James) & Co.*, [1921] 3 K.B. 532; 11 Digest 536, 387; 90 L.J.K.B. 1202; 125 L.T. 705.
- (3) *Lariviere v. Morgan* (1872), 7 Ch. App. 550; 8 Digest 449, 237; *reversd.* (1875), L.R. 7 H.L. 423; 44 L.J.Ch. 457; 32 L.T. 41.
- (4) *Re Russian Bank for Foreign Trade*, [1933] Ch. 745; Digest Supp.; 102 L.J.Ch. 309; 149 L.T. 65.
- (5) *Compania Naviera Vascongada v. Cristina (The), The Cristina*, [1938] 1 All E.R. 719; Digest Supp.; 107 L.J.P. 1.

APPEAL by the plaintiff from an order of BENNETT, J., dated Mar. 23, 1938. It was conceded at the hearing that there was a contract between the Director-General of Posts, Telegraphs and Telephones of Ethiopia and the defendant company under which £10,613 11s. 3d. was payable by the defendants. The defendants alleged in their defence that, by a letter dated Feb. 2, 1937, the Italian Ambassador in London claimed, on behalf of the Italian government, the sum sued for in this action, and that, in response to a letter from them asking whether the Italian government was willing for the question as to what party was entitled to the money claimed to be determined by the English courts, he stated that the Italian government was not prepared to admit in any cir-

cumstances that its rights in making such a claim were in any way in doubt. BENNETT, J., held that the right of the plaintiff to recover in this action could not be determined without determining whether the claim put forward on behalf of the King of Italy was well-founded. After referring to the law as expounded in *The Parlement Belge* (1) and A *Aksionairnoye Obschestvo A. M. Luther v. Sagor (James) & Co.* (2), BENNETT, J., concluded :

If I were to give effect to the plaintiff's argument in this case, I should undoubtedly be indirectly deciding against the claim put forward on behalf of His Majesty the King of Italy to the moneys which the defendants admit that they owe under the contract sued on by the plaintiff. If I may respectfully say so, I entirely concur B with the view expressed by SCRUTTON, L.J., in the passage of his judgment to which I have referred [*Aksionairnoye Obschestvo A.M. Luther v. Sagor (James) & Co.* (2), at p. 555. I propose to base the order to be made in this action on the ground that a claim has been made to the moneys which the plaintiff seeks to recover by the Italian Ambassador on behalf of the King of Italy, and to hold that, having regard to that claim, I have no jurisdiction to decide the rights of the plaintiff.

C All further proceedings in the action were thereupon stayed. From this decision the plaintiff appealed.

Andrew E. J. Clark for the appellant, the plaintiff.

H. Wynn Parry, K.C., and *H. G. Robertson* for the respondents, the defendants.

D

SIR WILFRID GREENE, M.R. [delivering the judgment of the court] : This action arises out of a contract made between the plaintiff, as the sovereign head of the Empire of Ethiopia, through his agent the Director-General of Posts, Telegraphs and Telephones of Ethiopia, and the E defendants for the institution and working of a radio telegraphic service between Ethiopia and Great Britain. It is admitted that the contract was made, and that the sum of £10,613 11s. 3d. is owing by the defendants, in accordance with its terms. The substantial defence to the action is that, by reason of the conquest of Ethiopia by the armed forces of His F Majesty the King of Italy, coupled with the recognition by His Britannic Majesty's Government of the King of Italy as *de facto* sovereign of Ethiopia, the right to recover this sum from the defendants has become vested in the King of Italy. The defence also refers to certain correspondence which took place, subsequent to the issue of the writ, between G the defendants and the Italian Ambassador in London, in the course of which it was stated by the Ambassador that his government claimed the money, that it saw no reason to take part in the present proceedings, and that, if those proceedings resulted in the defendants being compelled to make payment to the plaintiff, it would consider itself entirely H free to claim the money in question at such time, in such manner, and in such circumstances as it might consider suitable.

The action duly came on for trial, and, after several adjournments, BENNETT, J., on Mar. 2, 1938, reserved his judgment, which he delivered on Mar. 23, 1938. In his reasons for judgment, the judge declined to express any opinion upon what we have described as the substantial

defence to the action. The ground upon which he made the order to stay proceedings was, to use his own words, that :

the right of the plaintiff to recover judgment cannot be determined without determining whether the claim put forward on behalf of His Majesty the King of Italy is well-founded.

We were informed that no argument had been addressed to him upon A
this point.

In our opinion, the decision of the judge cannot be supported. The action is one to which the Italian government is not a party, nor is it a necessary party. The question which falls to be decided in the action is whether or not the defendants are liable to the plaintiff, and, although B
the claim of the Italian government is one which, if made by a private individual in this country, could have been dealt with in interpleader proceedings, no such proceedings are possible without the consent of that government. However, the fact that His Majesty the King of Italy cannot be brought before the court cannot deprive the plaintiff of his C
right to have his claim adjudicated upon by the courts of this country in his absence, unless there be some rule of English law which precludes the courts from entertaining the claim. In our opinion, no such rule of law exists. It is unquestionably true that the courts of this country are not competent to entertain an action which directly or indirectly impleads a foreign D
sovereign state. Thus, if property locally situate in this country is shown to belong to, or to be in the possession of, an independent foreign sovereign, or his agent, the courts cannot listen to a claim which seeks to interfere with his title to that property, or to deprive him of possession of it. The rule applies in the case both of actions *in personam* and of actions E
in rem, but it has never been extended to cover the case where the proceedings do not involve either bringing the foreign sovereign before the court in his own person, or in that of his agent, or interfering with his proprietary or possessory rights in the event of judgment being obtained. Where it is either admitted or proved that property to which a claim F
is made either belongs to, or is in the possession of, a foreign sovereign, or his agent, the principle will apply ; but, where property which is not proved or admitted to belong to, or to be in the possession of, a foreign sovereign or his agent is in the possession of a third party, and the plaintiff claims it from that third party, and the issue in the action G
is whether the property belongs to the plaintiff or to the foreign sovereign, the very question to be decided is one which requires to be answered in favour of the sovereign's title before it can be asserted that that title is being questioned. It was held by BENNETT, J., however, that, where a foreign sovereign has made a claim, the proceedings in effect H
amount to impleading that sovereign. In our opinion, not only is that view incorrect in principle, but it is contrary to certain weighty expressions of judicial opinion to which we will later refer. So far as principle is concerned, the present action does not seek to bring His Majesty the King of Italy before the court, nor does it seek to interfere with any

- proved or admitted proprietary or possessory right belonging to him. The fact that His Majesty the King of Italy has put forward a claim to these moneys by asserting that the chose in action consisting of a debt owed by the defendants has become vested in him does not, in our opinion, add anything. It would be a strange result if a person claiming
- A property in the hands of, or a debt alleged to be due by, a private individual in this country were to be deprived of his right to have his claim adjudicated upon by the courts merely because a claim to the property, or the debt, had been put forward on behalf of a foreign sovereign. Such a claim can be adjudicated upon without impleading
- B the foreign sovereign either directly or indirectly. The phrase "impleading indirectly" does not, in our opinion, mean adjudicating upon such a claim as is made by the Italian government in the present case. It refers to such proceedings as Admiralty proceedings *in rem*, where the action in form is an action against the ship.
- C In his judgment, BENNETT, J., relied upon *The Parlement Belge* (1), but that was a case where the property in the vessel was admittedly vested in the Belgian government, and the claim against it involved impleading that government. He also relied upon the observations of SCRUTTON, L.J., in *Aksionairnoye Obschestvo A.M. Luther v. Sagor*
- D (*James*) & Co. (2), at p. 555. With all respect to BENNETT, J., however, he has, in our opinion, attributed to those observations a meaning which, in the context, they do not bear. SCRUTTON, L.J., was considering a case where a foreign sovereign is in possession of property, but, if his words were intended to go beyond such a case, and to apply
- E to a case where property is in the hands of a third person, and the foreign sovereign has merely made a claim to it, we respectfully dissent from the view which he expresses.

- We have mentioned the existence of certain observations which appear to us to support our view, and we will briefly refer to them. In *Larivière*
- F v. *Morgan* (3), LORD HATHERLEY, L.C., held that a trust fund, out of which the plaintiff claimed to be entitled to a payment, could be administered by the court, notwithstanding that it appeared that a foreign government was entitled to it, subject to any right that the plaintiff could establish. It is true that in that case the foreign government in
- G question had not put forward a claim, but, even if it had done so, we can find nothing in the reasoning of LORD HATHERLEY, L.C., to suggest that he would have taken a different view. That case went to the House of Lords, where the decision of LORD HATHERLEY, L.C., was reversed upon the ground that the fund in question was not a trust fund at all.
- H However, LORD CAIRNS, L.C., said, at p. 430 :

No doubt, under such circumstances, the court, having a trust fund under its control, might well proceed to administer that fund, even although a foreign government might be interested in it, and might not be before the court, or subject to the jurisdiction of the court.

In a passage preceding that relied upon by BENNETT, J., SCRUTTON, L.J., referred to the opinion expressed by LORD HATHERLEY, L.C., as being

an *obiter dictum*, but, as was pointed out by MAUGHAM, J. (as he then was), in *Re Russian Bank for Foreign Trade* (4), at p. 769, the view of LORD HATHERLEY, L.C., was a matter, not of *dictum*, but of decision, and he himself held that the circumstance that a foreign government is, or may be, interested in a trust or other like fund is no reason why the court should decline jurisdiction. In that case again—which was concerned with the winding up of a Russian company—no claim to be entitled to the surplus assets of the company had, in fact, been made by the Russian government. The question as to the effect of a claim by a foreign state, as distinct from a proprietary title, or possession proved or admitted, was, however, discussed in the House of Lords in *The Cristina* (5). In that case, LORD ATKIN said, at p. 720 :

The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted on to our domestic law which seem to me to be well-established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control.

For present purposes, we think that this can be taken as exhaustive, and it is to be observed that, in the case of property, the lack of jurisdiction is said to exist where the property belongs to, or is in possession or control of, a foreign sovereign. In the case of a debt such as that with which we are concerned, there can be no question of possession or control, and the title to it is the very thing which stands to be established or not to be established in these proceedings. In *The Cristina* (5) itself, the vessel was in the actual possession, or under the control, of the Spanish republican government, and the decision was based on that fact. LORD WRIGHT said, at p. 731 :

In the present case, the fact of possession was proved. It is unnecessary here to consider whether the court would act conclusively on a bare assertion by the government that the vessel is in its possession. I should hesitate, as at present advised, so to hold, but the respondent here has established the necessary facts by evidence.

It is to be noticed that, even in this case put by LORD WRIGHT, possession is the relevant matter, and the problem which he poses is as to whether or not a mere assertion of possession can be challenged. The fact that he expresses the view, albeit tentatively, that such an assertion would not be sufficient does, in our opinion, form ground for thinking that, where no such possession has been, or can be, asserted, no objection to the jurisdiction can arise. LORD MAUGHAM, however, expresses a clear opinion upon the subject, and, although he does so by way of *dictum* only, we respectfully agree with his view. He said, at p. 738 :

It is clear, I think, that the property in the goods and chattels would have to be established, if necessary, in our courts before the immunity could be claimed. The ambassador could not be sued in trover or detinue, but, if the property were not in his possession, and he had to bring an action to recover it, I am of opinion that he would have to prove in the usual way that the goods were his property.

Speaking for myself, I think that the position of a foreign government is the same. There is, I think, neither principle nor any authority binding this House to support the view that the mere claim by a government or an ambassador, or by one of his servants, would be sufficient to bar the jurisdiction of the court, except in such cases as ships of war or other notoriously public vessels, or other public property belonging to the state. DICEY ON CONFLICT OF LAWS, c. 4, r. 52, has been relied on in favour of another view, but his proposition, founded on existing authorities, was that "an action or proceeding against the property" of a foreign sovereign or an ambassador or his suite was for the purpose of the general rule "an action or proceeding against such person." He did not (as he showed in the notes to the rule) mean by this that an action against property *claimed* by such a person is beyond the jurisdiction of our courts. An independent sovereign sued for breach of promise of marriage in our courts can indeed claim to be outside of our jurisdiction, but there is no authority for the view that, if he wrongfully obtained possession of valuable jewellery in this country, and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner against that person to recover possession of the jewellery merely by stating that he claimed it. To come within Dicey's rule, he would, in my opinion, be bound to prove his title.

In the result, the appeal must be allowed, with costs, and the action must be remitted to the Chancery Division for hearing. With regard to the costs below, in fact the order will be to discharge the order of the judge, save in so far as it dismissed the counterclaim, and directs taxation of the costs of the plaintiff of the counterclaim, and there will be an order that the plaintiff's costs of the counterclaim will be paid by the defendants in any event, subject to a set-off against the costs, if any, which the plaintiff may hereafter be ordered to bear. The costs of the action, down to and including the order of BENNETT, J., will be reserved for the discretion of the judge who tries the action, and the action will be remitted to the Chancery Division for trial.

Solicitors: *Wordsworth, Marr Johnson & Shaw* (for the appellant, the plaintiff); *Bircham & Co.* (for the respondents, the defendants).

[*Reported by* REGINALD TOWNSEND, Esq., *Barrister-at-Law.*]

Approved. MUNRO v. MUNRO. [1950]
1 All E.R. 832.

F FASSBENDER v. FASSBENDER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.),
May 5, 1938.]

Divorce—Wife's petition for restitution of conjugal rights—No cohabitation between spouses—Husband's refusal to provide home—Prior cohabitation unnecessary to found suit.

A suit for restitution of conjugal rights will lie even although there has never been cohabitation between the spouses.

[**EDITORIAL NOTE.** It was sought here to lay down the proposition that a suit for restitution of conjugal rights cannot be maintained unless those rights have at one time been enjoyed—that is to say, unless the parties have cohabited together. The name by which these proceedings are known certainly does suggest that there has been cohabitation, but it is here held that this is not a condition precedent to the commencement of such proceedings.

AS TO RESTITUTION PROCEEDINGS, see HALSBURY, *Hailsham Edn.*, Vol. 10, pp. 645, 646, para. 946; and FOR CASES, see DIGEST, Vol. 27, p. 273, Nos. 2423-2431.]

Cases referred to :

- (1) *Buckmaster v. Buckmaster* (1869), L.R. 1 P. & D. 713 ; 27 Digest 311, 2888 ; 38 L.J.P. & M. 73 ; 21 L.T. 231.
- (2) *De Laubenque v. De Laubenque*, [1899] P. 42 ; 27 Digest 306, 2837 ; 68 L.J.P. 20 ; 79 L.T. 708.
- (3) *Brodie v. Brodie*, [1917] P. 271 ; 27 Digest 223, 1937 ; 86 L.J.P. 140 ; 117 L.T. 542.

PETITION by wife for restitution of conjugal rights. The wife alleged that the respondent had never cohabited with her, and had persistently refused to provide a home without just cause. The respondent, by his answer, denied that he had refused to provide a home without just cause, and alleged that the petition was not presented in good faith. It was conceded that the parties had never cohabited.

Serrell Watts for the petitioner.

John Latey for the respondent.

Latey : The essence of a restitution suit is withdrawal from cohabitation. As both parties agree that there never has been cohabitation, the suit is misconceived. A decree of restitution of conjugal rights orders the respondent to return to the petitioner, not merely to go to her. The remedy is a restoration of rights which the petitioner has enjoyed, but of the enjoyment of which the petitioner has been deprived. The suit is for restitution, not institution, of conjugal rights.

Watts : The remedy sought is available whether or not there has been cohabitation, provided that the respondent has refused to cohabit with the petitioner. There can be desertion although there has been no cohabitation. [Counsel referred to *Buckmaster v. Buckmaster* (1), *De Laubenque v. De Laubenque* (2), and *Brodie v. Brodie* (3).]

HENN COLLINS, J. : I do not think that the objection taken is well-founded. I think that the remedy succinctly called restitution of conjugal rights is rather more than the re-institution of something that has already been enjoyed. I think that it really means a suit to oblige one of the spouses to afford those matrimonial amenities which the marriage tie renders obligatory. I do not think that it is a test of that that they should already have been enjoyed. I think that that is the conclusion in *Buckmaster v. Buckmaster* (1), to which my attention has been called. In that case, there never had been cohabitation. There it became necessary to see whether there had been desertion. There would have been desertion, but for the fact that the wife had agreed to accept £100 not to molest the husband. The agreement there was made after marriage, and was therefore not void in law. I am therefore of opinion that a suit for restitution, framed as this one is, lies, although there has never been cohabitation between the spouses.

Solicitors : *Vivash Robinson & Co.* (for the petitioner) ; *Beachcroft, Wakeford May & Co.* (for the respondent).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

Re CARTWRIGHT, CARTWRIGHT v. SMITH.

[CHANCERY DIVISION (Bennett, J.), May 6, 11, July 1, 1938.]

*Settlements—Proceeds of sale of settled land—Whether realty or personalty—Settled Land Act, 1925 (c. 18), s. 75 (5).*A *Wills—Will made abroad—Proceeds of sale of settled land—Whether personalty—Wills Act, 1861 (c. 114), s. 1.*

The testator effected a settlement of real property on his marriage in 1908, but most of the trusts of that settlement failed by reason of there being no issue of the marriage. The only subsisting trusts at any material time were for the payment of certain annuities and rentcharges and the ultimate trust which was in favour of the right heirs of the testator. During the lifetime of the testator, the real property was sold and the proceeds invested. During the latter years of his life, the testator, without relinquishing his English domicile, resided in France, and there executed three holograph wills, which were admitted to probate in England. By the Wills Act, 1861, s. 1, these wills would be valid to pass personalty but not realty situate in England. The question was, therefore, whether the investments representing the proceeds of sale of the settled land were realty or personalty, and the Settled Land Act, 1925, s. 75 (5), was relied upon to show that they were realty:—

C **HELD:** these investments were personalty, and not realty, and were therefore capable of being disposed of by a will admitted to probate under the Wills Act, 1861, s. 1.

D **EDITORIAL NOTE.** This case concerns the short point whether investments bought with the proceeds of sale of settled land are realty or personalty, and it is held that, for the purposes of devolution, they are personalty. This decision is based upon the change made in 1925 in the law relating to devolution of property.

As to LORD KINGSDOWN'S ACT, see HALSBURY, Hailsham Edn., Vol. 6, p. 249, para. 302; and FOR CASES, see DIGEST, Vol. 11, pp. 371, 372, Nos. 506-520.]

E Cases referred to:

(1) *Re Twopeny's Settlement*, *Monro v. Twopeny*, [1924] 1 Ch. 522; 20 Digest 341, 827; 93 L.J.Ch. 323; 130 L.T. 816.

(2) *Re Grassi, Stubberfield v. Grassi*, [1905] 1 Ch. 584; 37 Digest 154, 4; 74 L.J.Ch. 341; 92 L.T. 455.

F (3) *Re Cleveland's (Duke) Settled Estates*, [1893] 3 Ch. 244; 20 Digest 372, 1096; 62 L.J.Ch. 955; 69 L.T. 735.

(4) *Chandler v. Pocock* (1881), 16 Ch.D. 648; 20 Digest 371, 1095; 50 L.J.Ch. 380; 44 L.T. 115.

(5) *Re Monckton's Settlement*, *Monckton v. Monckton*, [1913] 2 Ch. 636; 20 Digest 338, 803; 83 L.J.Ch. 34; 109 L.T. 624.

G (6) *Re Lyne's Settlement Trusts*, *Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80; 20 Digest 378, 1152; 88 L.J.Ch. 1; 120 L.T. 81.

(7) *Re Walker, Macintosh-Walker v. Walker*, [1908] 2 Ch. 705; 20 Digest 340, 826; 77 L.J.Ch. 755; 99 L.T. 469.

(8) *Re Marlborough's (Duke) Settlement*, *Marlborough (Duke) v. Marjoribanks* (1886), 32 Ch.D. 1; 40 Digest 750, 2798; 55 L.J.Ch. 339; 54 L.T. 914.

H (9) *Re Sturt, De Bunsen v. Hardinge*, [1922] 1 Ch. 416; Digest Supp.; 91 L.J.Ch. 289; 126 L.T. 460.

ADJOURNED SUMMONS asking the court to determine whether certain investments, which were in fact pure personalty, but which represented capital moneys arising from sales made by a tenant for life of settled freehold land under the powers of the Settled Land Acts, could be dis-

posed of by a holograph will made in France by a British subject domiciled in England and admitted to probate in England under the provisions of the Wills Act, 1861, s. 1 (commonly called Lord Kingsdown's Act). The facts are fully set out in the judgment.

Lionel Cohen, K.C., and *Wilfrid M. Hunt* for the plaintiff, the administratrix of the testator under letters of administration with the three French wills annexed, and also the residuary legatee under such wills, and also a person interested in any property in respect of which the testator may have died intestate. A

P. H. L. Brough for the first defendant, the sole surviving trustee of the testator's marriage settlement. B

C. E. Harman, K.C., and *C. V. Rawlence* for the second and third defendants, who claimed to be interested in the estate (if any) of the testator which devolved under a devise in cl. 3 of a will made by the testator in 1914. The third defendant also claimed to be interested in any estate of the testator as to which he died intestate. C

Cohen, K.C.: The relevant words in the Wills Act, 1861, s. 1, are: "the law of the place where the same was made." The difference is not between movables and immovables, but between real and personal estate. The question is whether or not the proceeds of sale are personal estate. The Settled Land Act, 1875, s. 75 (5), does not deal with the question of real estate as distinct from personalty, and, if the court finds property in the form of personalty, it will be treated as personalty for the purposes of Lord Kingsdown's Act, unless there is a trust converting it into realty. There is no such trust in the present case. As to whether or not sect. 75 (5) imposes a trust for conversion, the testator could have elected to take the property as personalty. [Counsel referred to *Re Grassi, Stubberfield v. Grassi* (2), *Re Cleveland's (Duke) Settled Estates* (3), *Chandler v. Pocock* (4), *Re Monckton's Settlement, Monckton v. Monckton* (5) and *Re Lyne's Settlement Trusts* (6).] D

Hunt: The onus is upon anybody who says that the property is realty to establish the fact. There is no trust in the settlement or in the Act which requires the proceeds of sale to be re-invested in freehold property. If the tenant in tail does not bar the entail, the property passes as real estate. This only applies, however, to a person who takes under a settlement. Sect. 75 (5) has no operation. The natural interpretation of this subsection would be to limit it to transmissions and devolutions under a settlement. E

Harman, K.C.: It is a novel proposition, and one which has never before been suggested, that capital money, derived from the sale of freehold land and invested under the Settled Land Act, is not to be treated as land. It has never been doubted that capital money arising from the realisation of freeholds and invested under the Settled Land Act would pass to the heir-at-law. If it devolves as land, it means that it must be treated as land for all purposes of devolution. It must be treated as land for the purposes of the settlement in the present case, F

- and therefore it will not pass under Lord Kingsdown's Act. By the Settled Land Act, 1925, s. 75 (5), the money is to be treated as land, because the section says "dispositions for all purposes." If the property had been land, it could not have been disposed of under Lord Kingsdown's Act, and it is the same in its present state. Land would include
- A leasehold land as well as freeholds, although no tenure was stated. By the Interpretation Act, 1889, s. 3, land shall include land of any tenure unless the contrary shall appear. [Counsel referred to *Re Walker, Macintosh-Walker v. Walker* (7), *Re Twopeny's Settlement, Monro v. Twopeny* (1), *Re Marlborough's (Duke) Settlement* (8), *Re Cleveland's (Duke) Settled Estates* (3), *Re Sturt, De Bunsen v. Hardinge* (9) and *Chandler v. Pocock* (4).]

- Cohen, K.C., in reply : What the court is dealing with in this case is a disposition outside the settlement, and not a devolution under a settlement. No other statute should be introduced for the purpose of
- C construing Lord Kingsdown's Act. It is necessary to find some limitation of the word "land" in sect. 75 (5), and the second part of the subsection was put in to limit the first part. So far as this subsection is concerned, it has no purpose except for devolutions, transmissions or dispositions under a settlement. In the present case, the court is concerned, with a disposition not under, but outside, the settlement. Having regard to sect. 73 of the Settled Land Act, *Sturt's case* (9) does not apply in the present case, because in that case there was an express trust for conversion. [Counsel also referred to *Re Monckton's Settlement, Monckton v. Monckton* (5).]

- E
- BENNETT, J. : The first question raised by this summons is whether certain investments, which were in fact pure personal estate, but which represent capital moneys arising from sales made by a tenant for life of settled freehold land under the powers of the Settled Land Acts, can
- F be disposed of by a will made in France by a British subject domiciled in England and admitted to probate in England under the provisions of the Wills Act, 1861, s. 1 (Lord Kingsdown's Act). That section reads as follows :

- G Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's Dominions where he had his domicile of origin.

- H The investments in question can be disposed of by such a will if, as the plaintiff contends, they are personal estate, but not if, as the defendants, Charles Henry Aubrey Cartwright and William Aubrey Cartwright, contend, they are notionally freehold land.

The facts are not in dispute, and I take them from the affidavit sworn

in support of the summons by Mr. Nelson, a partner in the firm of Messrs. Pennington & Son, the plaintiff's solicitors :

On June 25, 1906, the husband intermarried with the plaintiff. The husband died on June 13, 1936, and there was no issue of such marriage. The husband was one of the five children of Aubrey Thomas Carter Cartwright and Louisa Florence Cartwright the survivor of whom—namely, Louisa Florence Cartwright—died on Oct. 23, 1933, without having remarried. (3) The husband had three brothers (all of whom are still living) and one sister only—namely, the defendant Charles Henry Aubrey Cartwright, Victor Hamilton Aubrey Cartwright, Algernon Richard Aubrey Cartwright and Evelyn Mary Elizabeth Watson, who died on Mar. 23, 1937. The husband was the eldest son and his said brothers are named in the order of their birth. Each of the said brothers except the said Victor Hamilton Aubrey Cartwright has issue. The defendant Charles Henry Aubrey Cartwright has married and there has been issue of his marriage one child and no more—namely, the infant defendant William Aubrey Cartwright, who was born on July 30, 1930. (4) By the above-mentioned settlement dated June 25, 1906 (hereinafter called "the settlement"), made between the husband of the first part the plaintiff (then and therein described as Sophia Frances Trotter widow) of the second part and Phillip Charles Cartwright the defendant Vivian Hugh Smith Gerard Fenwick and Lambert William Middleton (hereinafter called "the original trustees") of the third part (being a settlement made in contemplation of the said marriage between the husband and the plaintiff) it was witnessed (*inter alia* and so far as material to this application) that the husband as settlor with the approbation of the plaintiff did thereby convey unto the original trustees all those the manors messuages farms lands and hereditaments of which particulars were contained in the first schedule thereto and all other the manors messuages lands and hereditaments situate or arising in the counties of Northampton and Oxford to which the husband was entitled other than and except Red Hill Farm to hold the same unto the original trustees and their heirs subject to the charges and incumbrances mentioned in the second schedule thereto to the use of the original trustees for the term of 1,000 years to commence from the solemnisation of the said then intended marriage upon the trusts and subject to the powers and provisions thereafter declared and contained concerning the same and from and after the expiration or determination of the said term and in the meantime subject thereto and to the trusts after his decease to the use of the first and every other son of the husband by the plaintiff successively in remainder one after the other according to their respective seniorities and the heirs of their respective bodies and in default of such issue to the use of the right heirs of the husband for ever and it was thereby declared that the original trustees and the survivors and survivor of them or other trustees or trustee for the time being of those presents should stand possessed of the said term of 1,000 years upon trust out of the income of the said premises to pay first an annuity of £500 commencing from the death of the husband payable to the plaintiff if surviving during her life secondly a further annuity of £200 commencing from the decease of the survivor of the husband and his mother the said Louisa Florence Cartwright payable to the plaintiff if surviving during her life or until she should marry again both such annuities to be without power of anticipation and thirdly fourthly and fifthly sums by way of portions for the children or issue of the marriage not material to be herein set forth and it was thereby agreed that the trustees should be and they were thereby appointed trustees of those presents for the purposes of the Conveyancing Act, 1881, s. 42, and for the purposes of the Settled Land Acts, 1882 to 1890, and the husband did thereby covenant with the original trustees that if he should within 12 months of the date of that settlement sell Red Hill Farm he would either apply the net proceeds of sale in or towards payment of some one or more of the principal sums charged on the said farm which were charged also on the hereditaments thereby settled or on some part thereof or would pay the same to the trustees to be applied and dealt with in the same manner as if they had been capital moneys arising under the Settled Land Acts, 1882 to 1890, from the hereditaments thereby settled and if no sale should be made within the time aforesaid he would convey the said farm to the uses upon the trusts and with and subject to the powers and provisions therein declared and contained concerning the hereditaments thereby settled.

On Jan. 6, 1935, the defendant Vivian Hugh Smith became, and now is, the sole trustee of this settlement. The affidavit continues :

(6) The first schedule to the settlement comprised certain freehold lands and property in the counties of Northampton and Oxford known as "the Edgecote

- estate" and having an acreage of 2,692 acres and 30 perches or thereabouts. The second schedule set out the incumbrances then or prior interests then affecting various portions of the said settled hereditaments (namely) (A) certain mortgages or charges for a total of £32,255 (B) a perpetual liability to repair a chancel (C) two rentcharges of £500 each in favour of the said Louisa Florence Cartwright (D) a rentcharge of £200 in favour of the unmarried sisters of the husband's father and (E) a life interest in the premises Wardington Lodge in favour of the said Louisa Florence Cartwright. (7) Between the years 1919 and 1935 the husband as tenant for life under the provisions of the Settled Land Acts for the time being in force sold from time to time parts of the freehold property settled by the settlement. The last sale was that of Wardington Lodge, which was sold in Jan., 1935, after the death of the husband's mother. As a result of such sales, by the month of Jan., 1935, the whole of such settled property had been sold. The husband also in 1921 sold Red Hill Farm aforesaid. (8) The proceeds of such sales (including the proceeds of the sale of Red Hill Farm) were applied so far as required in paying off the mortgages referred to in the second schedule to the settlement and redeeming the said liability to repair the chancel. Of the balance thereof sufficient to provide for the annuities and rentcharges subsisting under the settlement was retained and invested by the trustees and the ultimate balance was paid over to the husband. It was known by the dates on which such balance was so paid over to the husband that there was thereafter no possibility of issue of his marriage. The total sum so paid over to the husband amounted to £26,113 11s. 5d.
- C The particulars of the investments now held by the defendant Smith as trustee of the marriage settlement show that these investments are pure personal property. The annuities and charges subsisting under the settlement comprise the annuities of £500 and £200 payable to the plaintiff and a rentcharge of £192 10s. payable to a Miss Bertha Anna D Cartwright, the sole surviving unmarried sister of the testator, during the residue of her life. The affidavit continues :

- During the latter years of his life the husband resided with the plaintiff in France but he never abandoned his English domicile or his British nationality. While so resident the husband executed three holograph wills all of which were validly executed according to the law of France. Such wills are hereinafter together sometimes called "the French wills," and are respectively dated Jan. 2, 1926, Nov. 1, 1933, and Nov. 22, 1934. (11) The first of the French wills (omitting formal parts) was in the following form : "I revoke my previous will and now leave all my furniture and effects to my wife Sophia Frances Cartwright—with power of disposal as she may wish, absolutely nothing at all to my other brothers and sister." (12) By the second of the French wills the husband made certain dispositions in the event of his surviving the plaintiff which event did not happen. (13) The third of the French wills provides as follows : "I wish at my death to leave everything to my wife. Should I outlive her I leave everything to her niece Evelyn Rich" and there followed certain provisions to take place in that event which did not happen. (14) Letters of administration to the estate of the husband with the French wills annexed thereto issued on Dec. 23, 1936, out of the principal probate registry to the plaintiff. (15) The plaintiff is advised that a question arises whether upon the true construction of sect. 1 of Lord Kingsdown's Act the French wills are sufficient of themselves to pass to her the investments now standing in the name of the defendant Vivian Hugh Smith representing part of the proceeds of sale of the property comprised in the settlement subject to the subsisting charges having regard to the Settled Land Act, 1925, s. 75 (5). (16) The husband had made a will in 1914 in English form under which the plaintiff and the defendant Vivian Hugh Smith were nominated as executors and trustees, and by cl. 3 of that will the husband devised and bequeathed all and every the freehold copyhold and leasehold messuages lands tenements and hereditaments in the counties of Warwick and Northampton or elsewhere of which he was seised or possessed in possession or reversion or of which he had any power to dispose by will and whether settled or unsettled unto his trustees to the use of his wife during her life and after her death to the use that his trustees should settle the same in strict settlement upon the descendants of his father according to seniority or in such other manner and with such provisions and powers exercisable by any one or more of the beneficiaries or the trustees or otherwise as they should in their absolute discretion think fit provided nevertheless that it should not be obligatory upon his trustees to so settle the hereditaments during the lifetime of his said wife and by cl. 4 the husband

bequeathed all the specific chattels therein mentioned unto his trustees upon trust that they should permit the same to devolve and be enjoyed as heirlooms with the freehold hereditaments thereby settled but so that the same should not vest absolutely in any person who might be tenant in tail by purchase of the said hereditaments unless he or she should attain the age of 21 years but on his or her death under that age should devolve as if the same had formed part of the said hereditaments and the husband (cl. 5) bequeathed all the residue and remainder of his personal estate unto his wife for her own use and benefit absolutely. The said will was found amongst the husband's papers after his death and is now produced and shown to me marked D. (17) My said firm on the instructions of the plaintiff applied to the Probate Division of this honourable court with a view to obtaining probate of the 1914 will of the husband limited to real estate. The registrar however informed my said firm that in view of the existence of the grant of the letters of administration to the plaintiff hereinbefore mentioned in its present general form it was impossible for such application to be granted except on a motion, and in his view the proper course was to apply to the Chancery Division for a decision as to whether the French wills effectually disposed of the said investments and whether they were real estate or personalty, and that if this court held that such investments were not so disposed of but devolved as real estate there would then be no difficulty on motion in the Probate Division in persuading that court to make a grant of probate of the 1914 will to be made limited to real estate.

In those circumstances, this summons was issued, and the first question it asks is :

Whether the residuary gift in favour of the plaintiff in the latest of the said French wills of the testator includes all or any and what part of the investments representing part of the proceeds of sale of realty originally comprised in the said settlement which remained and remain in the name of the defendant Vivian Hugh Smith as the surviving trustee of the said settlement as security for the annuities payable under the settlement.

The answer to the question depends upon the true meaning and effect of the Settled Land Act, 1925, s. 75, and in particular upon the effect of subsect. (5) of that section. Sect. 75 (5) reads as follows :

Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made shall for all purposes of disposition, transmission and devolution be treated as land, and shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

It was argued on behalf of the defendants Charles Henry Aubrey Cartwright and William Aubrey Cartwright that the effect of the section was to convert the investments into freehold land, and that therefore the investments were not personal estate. The argument was based on the judgments of SIR ERNEST POLLOCK, M.R., WARRINGTON and SARGANT, L.JJ., in *Re Twopeny's Settlement, Monro v. Twopeny* (1), in the course of which all the members of the Court of Appeal expressed the opinion that the Settled Land Act, 1882, s. 22 (5), converted into land money invested in personal securities, representing capital moneys arising from the exercise by a tenant for life of the powers of sale conferred by the Settled Land Act, 1882. It was argued that, since sect. 75 (5) is framed in substantially the same terms as those of the Settled Land Act, 1882, s. 22 (5), I am bound by authority to give to the subsection in the later Act the same effect that the Court of Appeal gave to the corresponding subsection in the earlier Act.

It is true that the two subsections, although not identical in terms,

are substantially the same in their words. I do not think myself that, although some stress was laid upon it in argument, any weight is to be attached to the point that, whilst land in the earlier subsection meant real estate, in the later subsection it includes a term of years. It is also true that every member of the Court of Appeal in *Twopeny's* case (1)

A expressed the opinion that the earlier subsection did operate to convert personal securities into land. I have no doubt that, if the law relating to the devolution of real estate had been to-day the same as it was when *Twopeny's* case (1) was decided, it would have been my duty to act upon the opinion expressed by the members of the Court of Appeal in

B that case, and to hold that the effect of the Settled Land Act, 1925, s. 75 (5), was to convert investments, representing capital moneys, into real estate. However, there has been a change in the law. The devolution of real estate is now the same as that of personal estate.

It is clear, I think, that the foundation for the opinions both of

C WARRINGTON, and SARGANT, L.JJ.—that the Settled Land Act, 1882, s. 22 (5), converted investments representing capital moneys into real estate—was the provision in that subsection that such investments are to devolve as land. That provision changed the course of devolution of personal estate. In the changed state of the law, the same provision

D in the Settled Land Act, 1925, s. 75 (5), has now no such operation. It is in fact now inoperative. It seems to me, therefore, that, the basis for the opinions expressed in *Twopeny's* case (1) having disappeared, those opinions can no longer be used for the purpose for which Mr. Harman sought to use them on behalf of his clients.

E The subsection relied upon is in two parts. The first part enacts that the securities, on which an investment of capital money is made, shall, for all purposes of disposition, transmission and devolution, be treated as land. The second part enacts that such securities shall be held for and go to the same persons successively in the same manner and for and

F on the same estates, interest and trusts as the land wherefrom the money arises would, if not disposed of, have been held and gone under the settlement. Since the first part of the subsection no longer operates to change the devolution of the securities, it cannot, in my judgment, operate to convert personal estate into real estate. The purpose of the

G second part of the subsection is plain. It is to prevent beneficial interests in land limited by a settlement of land from being diverted or in any way interfered with by the exercise by a tenant for life of his statutory powers. It makes the limitation of a settlement of land attach to and operate upon the property (whatever it may be) into which a tenant for

H life has caused the land to be changed. It has no more general or extended meaning. On the law as it now stands, the provisions of the Settled Land Act, 1925, s. 75 (5), do not, in my judgment, convert into real estate the securities in which capital moneys have been invested. It follows that the securities, with which this summons is concerned, all of which are personal estate, in fact were capable of being disposed

of by a will admitted to probate under the Wills Act, 1861 (Lord Kingsdown's Act).

Declaration that the residuary gift in the last French will included all the investments in question. The second question not arising, no order.

Solicitors: *Pennington & Son* (for all parties).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

R. v. CLEGHORN.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Hawke and Macnaghten, JJ.), June 27, 1938.]

Criminal Law—Indictments—Amendment—Amendment alleging new offence—No application to quash at hearing—Appeal—Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), ss. 2 (2)(i), 3 (b).

The appellant made an application for, and obtained, in Mar., 1938, a motor trade policy, and was supplied with two certificates of insurance. Some time afterwards, that policy was cancelled, because the certificates were being used for more persons than were covered. The appellant, on being asked to return the certificates, stated that they were lost, and afterwards made a statutory declaration to that effect. On taking out these policies, the appellant had given the name of his brother, and the policies were made out in the brother's name. The appellant and his brother were then indicted upon an indictment containing four counts: (i) for conspiracy to obtain a certificate of insurance by a false statement, (ii) for conspiracy to obtain possession of a document resembling a certificate of insurance, (iii) for making a false statement in order to obtain a certificate of insurance, and (iv) for having possession of a document resembling a certificate of insurance. The original indictment had only three counts, there having been an amendment at the instance of the court by dividing the first count into two counts. The original first count charged the brothers with a conspiracy on divers dates to have in their possession with intent to deceive a document so closely resembling a certificate of insurance as to be calculated to deceive. It was contended that the amendment had the effect of preferring a new charge against the appellant, and one to which he had not been asked to plead. There had been no application at the trial that the indictment should be quashed:—

HELD: (i) the amendment was within the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2, and, if this were not so, it could not be questioned now, since no application to quash the indictment was made at the trial, as required by that section.

(ii) the document in question was properly described as one resembling a certificate of insurance, because, although at one time it had been a valid certificate, it had ceased to be so after the cancellation of the policy.

[EDITORIAL NOTE.] Until Sept. 1, 1933, when the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2, came into force, an indictment could not be amended if the effect of the amendment was to add a fresh offence which had not been before the grand jury. The position now is altered by the above section, and such an amendment can be made, provided that the offence is disclosed on the depositions and is one which can be lawfully joined in the indictment. It is further provided that an indictment which offends against this section shall not be quashed on appeal—i.e., in the Court of Criminal Appeal—unless an application was made at the trial that it should be quashed. This last provision explains the difficulty here, as no application to quash had been made at the trial.

AS TO AMENDMENT OF INDICTMENTS, see HALSBURY, Hailsham Edn., Vol. 9, p. 139, para. 182; and FOR CASES, see DIGEST, Vol. 14, pp. 234-236, Nos. 2197-2222.]

Cases referred to :

- A (1) *R. v. Benson*, [1908] 2 K.B. 270; 14 Digest 235, 2218; 77 L.J.K.B. 644; 98 L.T. 933.
- (2) *R. v. Errington* (1922), 16 Cr. App. Rep. 148; 14 Digest 234, 2201.

APPEAL against conviction and sentence, reported only in so far as it was an appeal against conviction. The original indictment before amendment charged the following offences :

- B (i) Edward Simpson Cleghorn and Ernest Simpson Cleghorn on divers dates between Mar. 27, 1937, and Nov. 19, 1937, in the city of Bradford conspired together to have in their possession with intent to deceive a document so closely resembling a certificate of insurance issued under Part II of the Road Traffic Act, 1930, as to be calculated to deceive, being an offence punishable under the Road Traffic Act, 1930, s. 112 (1) (b).
- C (ii) Ernest Simpson Cleghorn on Apr. 2, 1937, in the city of Leeds for the purpose of obtaining the issue of a certificate of insurance under Part II of the Road Traffic Act, 1930, made a false statement namely that his name was Edward Simpson Cleghorn.
- (iii) Edward Simpson Cleghorn on Nov. 18, 1937, in the city of Bradford with intent to deceive had in his possession a document so closely resembling a certificate of insurance under Part II of the Road Traffic Act, 1930, as to be calculated to deceive.

- D At the trial the first count was amended, then a second count was added, and the original second and third counts became respectively the third and fourth counts, the amended indictment charging the following offences :

- E (i) Edward Simpson Cleghorn and Ernest Simpson Cleghorn on a date on or about Mar. 27, 1937, in the city of Bradford conspired together to make a false statement for the purpose of obtaining the issue of a certificate of insurance under Part II of the Road Traffic Act, 1930.
- (ii) Edward Simpson Cleghorn and Ernest Simpson Cleghorn on a date between July 31, 1937, and Nov. 19, 1937, in the city of Bradford conspired together to have in their possession with intent to deceive a document so closely resembling a certificate of insurance issued under Part II of the Road Traffic Act, 1930, as to be calculated to deceive being an offence punishable under the Road Traffic Act, 1930, s. 112 (1) (b).
- F

Then followed the third and fourth counts in precisely the same terms as the original second and third counts.

G. H. B. Streetfeild, K.C., and *J. B. Willis* for the appellant.

- G *J. S. Snowden* for the Crown.

- LORD HEWART, L.C.J. [delivering the judgment of the court]: This appellant, Ernest Simpson Cleghorn, was charged with his brother before the recorder at Bradford upon an indictment which in its final form contained four counts: (i) for conspiracy to obtain a certificate of insurance by means of a false statement; (ii) for conspiracy to obtain possession of a document resembling a certificate of insurance; (iii) for making a false statement for the purpose of obtaining a certificate of insurance, contrary to the Road Traffic Act, 1930, s. 112 (2); and (iv) for having possession of a document resembling a certificate of

insurance contrary to sect. 112 (1) (b) of the Road Traffic Act. The appellant and his brother were found guilty on all four counts of the indictment, and in the result each of them was sentenced to a term of imprisonment. The appellant now appeals against his conviction and also against his sentence. Since the application for leave to appeal was heard, there has been delivered a voluminous document entitled A
 "Particulars of misdirection."

The facts of the case may be very shortly stated. This appellant's name is Ernest Simpson Cleghorn, and his brother's name is Edward Simpson Cleghorn. It appeared that the appellant was known to an insurance agent named Whittington. That man gave evidence that B
 the appellant was known to him under the name of Simpson, and on Mar. 27, 1938, when he was with the appellant at a garage, the appellant asked him for a quotation for a motor trade policy. An application was made and a policy was drawn up. Whittington filled in the body of the document, and, in order that he might do so, he put questions C
 to the appellant. The appellant on his part gave his name as Edward Simpson Cleghorn, that being in fact the name, not of himself, but of his brother. Whittington said to him: "I thought your name was Simpson." The appellant said: "I trade in that name." He then went on to give his address as 44, Joseph Street, Leeds Road, Bradford. D
 He also said that he had never been convicted of any offence in connection with the driving of a car. He went on to say that two or three of his employees would be driving the cars, and he signed the proposal form, which is now before the court. He was given a policy for £14 less 15 per cent. commission, and he was supplied with two certificates E
 of insurance. Some time afterwards, that policy was cancelled, because it came to the notice of the insurance company that the certificates were being used to cover a number of persons greater than the number contracted for, and the appellant was asked to produce these certificates which he had received. Instead of producing them, the appel- F
 lant said that he had lost them, and, again giving his address as 44, Joseph Street, he signed a document saying that the certificates were lost and that he recognised that the policies were brought to an end. Thereupon he was given a cheque for £7 13s., which was a refund for the cancelled policy, and for that cheque he gave a receipt. After- G
 wards the appellant went before a commissioner of oaths with Whittington, signed a declaration saying that the certificates were lost, and gave his address as 44, Joseph Street. Whittington said that it had never been his practice to allow anyone to sign a policy on behalf of anyone else. He added that the appellant later on came and saw him, saying that he H
 had been interviewed by the police and that he wanted Whittington to say that he, Whittington, knew that the policy was for his brother Edward, and that he had signed the policy on his behalf. Whittington said that up to that time he had not known that the appellant had a brother.

A point was made by Mr. Streatfeild, in the course of his very ingenious argument, that this indictment in the form in which it was finally presented to the jury was all wrong, and was all wrong because the amendment, as it was called, was made with the assistance of the recorder, and was not an amendment to remedy a defect, but was a new charge, not contained in the indictment, to which the defendants had never been asked to plead. What happened was this. The indictment originally contained three counts. The amendment which was made was an amendment which divided up that which was originally count 1 so that it became count 1 and count 2. Count 1 expressly alleged that there was a conspiracy to make a false statement for the purpose of obtaining a certificate of insurance under Part II of the Road Traffic Act, 1930. Count 2, in continuation of and in substitution for the words which had originally been in count 1, alleged that Edward Simpson Cleghorn and Ernest Simpson Cleghorn had, on a day between July 31, 1937, and Nov. 19, 1937, conspired together to have in their possession with intent to deceive a document so closely resembling a certificate of insurance issued under Part II of the Road Traffic Act, 1930, as to be calculated to deceive, being an offence punishable under the Road Traffic Act, 1930, s. 112 (1) (b). These two counts taken together were in substitution for the original count 1. The original count had indeed alleged a conspiracy. It alleged conspiracy on divers dates between Mar. 27, 1937, and Nov. 19, 1937, and it alleged that Edward and Ernest conspired together to have in their possession with intent to deceive a document so closely resembling a certificate of insurance issued under Part II of the Road Traffic Act, 1930, as to be calculated to deceive. Mr. Streatfeild has argued, and has argued very forcibly, that the added count was a count which ought not to have been permitted, inasmuch as it was essentially a new charge. He has referred the court to *R. v. Benson* (1) and *R. v. Errington* (2). The point which he has made or submitted is expressed in *R. v. Benson* (1) in the argument of Mr. Marchant, who then appeared as counsel for the prisoner. It was that the effect was to insert in the indictment a fresh count which had not been before the grand jury. LORD ALVERSTONE, C.J., in delivering the judgment of the court, said, at p. 277 :

To allow an amendment to be made substituting a fresh offence might have the effect of placing a prisoner upon his trial for an offence that had never been before the grand jury. The fact that the evidence may be the same to establish both cases is immaterial.

These words were uttered in 1908. Since then, various changes have taken place. There is no grand jury. There is now a somewhat different procedure, and, moreover, by the Administration of Justice (Miscellaneous Provisions) Act, 1933, there are specific provisions as to the circumstances in which a bill of indictment may be preferred. In the course of that statute, by sect. 2 (2) it is provided :

(i) Where the person charged has been committed for trial, the bill of indictment against him may include, either in substitution for or in addition to counts charging

the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment.

By subsect. (3) it is further provided :

If a bill of indictment preferred otherwise than in accordance with the provisions of the last foregoing subsection has been signed by the proper officer of the court, the indictment shall be liable to be quashed.

Then there follows a proviso the second part of which is in these terms :

Provided that . . . (b) where a person who has been committed for trial is convicted on any indictment or any count of an indictment, that indictment or count shall not be quashed under this subsection in any proceedings on appeal, unless application was made at the trial that it should be so quashed.

It is common ground that in this case there was no such application. The result was that this indictment in the form in which we now have it—that is to say, after the original count 1 had been divided or re-distributed into two different counts—was not challenged. The jury considered it without any exception being taken on the new ground which is now urged. In our opinion, it is too late for Mr. Streatfeild to allege that this amendment was improperly made. If it appeared to this court that there was any real injustice caused by this alteration, even at this comparatively late stage that would have been a matter well worthy of consideration. It is perfectly obvious to us, however, that there is no substance in this point.

It is said, further, that the recorder omitted sufficiently to direct the jury as to the nature of the false statement which was alleged to have been made. In our opinion, that criticism is without substance. The recorder had made it perfectly plain that the statement referred to in count 1 was a false statement with regard to the person concerned. It is said that the recorder omitted expressly to direct the jury that they ought not to convict unless they were satisfied on the evidence that there was an intent to deceive. When one looks at the whole of this summing up, and at the evidence in the case, the whole point against these defendants—the appellant and his brother—was whether the false statement had been made with intent to deceive. Finally, it is said that the second count is really misconceived, because by it the two defendants were charged with conspiracy together to have in their possession a certificate so closely resembling a certificate of insurance issued under Part II of the Road Traffic Act, 1930, as to be calculated to deceive. I am not quite sure that I follow that part of Mr. Streatfeild's ingenious argument. It seems to come to this : If a document so closely resembles a document as to be entirely mistaken for it, then these provisions under the section do not apply. It is said that this certificate of insurance was a real certificate of insurance. It was not a document which purported to be a valid document. It was in fact the certificate itself. That is an ingenious argument. What is really meant is that there was a time when it was a valid certificate of insurance, but that time had gone by, and, though it resembled a certificate of insurance,

it had ceased to be a valid certificate. For the rest, our attention has been directed to various other passages in the summing up of the recorder, but, in our opinion, this summing up fairly and fully put the real point before the jury for their consideration.

Appeal dismissed.

- A Solicitors : *Ward, Bowie & Co.*, agents for *James A. Lee & Priestley*, Bradford (for the appellant) ; *N. L. Fleming*, Town Clerk, Bradford (for the Crown).

[Reported by REGINALD TOWNSEND, Esq., Barrister-at-Law.]

B

SIMMONS & SON, LTD. v. WILTSHIRE.

[COURT OF APPEAL (Greer, Slessor, and MacKinnon, L.JJ.), July 1, 1938.]

- C *Practice—Remitted action—Costs up to remission costs in cause—Whether on High Court scale—Jurisdiction of county court judge to vary order—County Courts Act, 1934 (c. 53), s. 73.*

An action was remitted to the county court, and, in the order remitting it, it was ordered that the costs up to the time of remission should be costs in the cause :—

- D HELD : the effect of the order was that the costs up to the time of remission were to be costs on the High Court scale, and the county court judge has no jurisdiction to vary that order.

[EDITORIAL NOTE. The costs of a remitted action are in the discretion of the county court judge, but this is subject to any order made in the High Court at the time of remission. Here the costs were, at the time of remission, made costs in the cause, and this is held to mean that the costs up to the time of remission are to be taxed on the High Court scale.

- E AS TO COSTS IN REMITTED ACTIONS, see HALSBURY, Hailsham Edn., Vol. 8, pp. 357-360, paras. 758-762 ; and FOR CASES, see DIGEST, Vol. 13, pp. 490-492, Nos. 403-420. See also THE NEW COUNTY COURT PRACTICE, 1938, pp. 110-113.]

- F Cases referred to :

- (1) *Koosen v. Rose* (1897), 76 L.T. 145 ; Digest, Practice, 849, 3952.
- (2) *Ritter v. Godfrey*, [1920] 2 K.B. 47 ; Digest, Practice, 854, 4002 ; 89 L.J.K.B. 467 ; 122 L.T. 396.

- G APPEAL from a decision of His Honour JUDGE RUEGG, K.C., at the Birmingham County Court, dated Dec. 13, 1937. In this action, which was commenced in the High Court, a claim was made for the price of goods sold and delivered. The defendant counterclaimed in respect of travelling and other expenses incurred by him as a commercial traveller employed by the plaintiffs. Proceedings under R.S.C., Ord. 14, were taken, and the case was remitted to the county court, the district registrar making an order that the costs should be costs in the cause. At the trial, the county court judge dismissed the plaintiffs' claim, and gave the defendant costs on Scale B throughout. He also dismissed the counterclaim, with costs on Scale A. The parties were unable to agree as to whether that order included the costs up to remission. They therefore
- H

applied to the county court judge, who refused to deal with the matter, saying that it must be dealt with by the registrar on taxation.

C. H. Duveen for the appellant.

P. B. Morle for the respondents.

GREER, L.J. : This is a case of some importance, and one not without A difficulty, because it raises a question of the jurisdiction of a county court to deal with the costs incurred in proceedings under R.S.C., Ord. 14, and that depends partly upon the County Courts Act, 1934, s. 73, and partly upon the decision of the Court of Appeal in *Koosen v. Rose* (1). The order that was made by the district registrar in the proceedings under B R.S.C., Ord. 14, was that the costs should be costs in the cause, and, though it is suggested by Mr. Morle that that does not mean High Court costs, the registrar was making a decision as to costs that had been incurred in the High Court, and I think that it is clear that his order referred to costs on the High Court scale. What he was dealing with C were costs incurred in the High Court. It is said that the effect of the order was really to reserve these costs to the discretion of the judge who tried the case. The County Courts Act, 1934, s. 73, provides as follows :

Where an action, counterclaim or matter is ordered to be transferred (a) from the High Court to a county court ; or (b) from a county court to the High Court : or (c) from one county court to another county court ; the costs of the whole proceedings both before and after the transfer shall, subject to any order made by the court which ordered the transfer, be in the discretion of the court to which the proceedings are transferred, and that court shall have power to make orders with respect thereto and as to the scales or columns on or under which the costs of the several parts of the proceedings are to be taxed, and the costs of the whole proceedings shall be taxed in that court : D E

Provided that, as regards so much of the proceedings in any action transferred from the High Court to a county court as take place in the High Court before the transfer (i) the costs thereof shall be subject to the provisions of sect. 47 of this Act ; and (ii) the powers of the High Court or judge thereof under subsect. (3) of that section to make an order allowing costs on the High Court scale, or on or under any county court scale or column, shall, subject to any order of the High Court or the judge by whom the transfer was ordered, be exercisable by the judge of the county court. F

I think that the argument of Mr. Morle is virtually a request that we should strike out the words "subject to any order of the High Court or the judge by whom the transfer was ordered." I think it has been decided in *Koosen v. Rose* (1) that it does not mean that at all, but that G the order was a direction as to how these costs should be paid. The county court judge had no power to alter the order which the district registrar had made, and, if its meaning was not clear, he could have asked the district registrar what it meant. The county court registrar had to interpret the order subject to an appeal to the judge, and possibly H to this court.

It is clear that Mr. Duveen is right. The appeal is allowed, and the matter is remitted to the county court for these costs to be taxed in accordance with the view I have expressed as to the meaning of the order made in the High Court.

SLESSER, L.J. : I agree. In *Koosen v. Rose* (1), where DAY, J., on appeal from the master, made an order that the action should be placed in the short cause list, and that the costs of the application to the master and of the appeal should be costs in the cause, CHITTY, L.J., says, at p. 147 :

A The effect of the order of DAY, J., at chambers, made under that rule, was that the costs of the application under Ord. 14 were to abide the event, that is, were to be paid by the party who failed in the action.

This judgment was concurred in by LOPES, L.J. I think that we must now interpret such an order to the same effect—namely, that the costs must be paid by the party who failed in the action, and that they must be on the High Court scale. The district registrar might have allowed costs on some more restricted scale, but I read his order as meaning that the costs of the Ord. 14 proceedings should be costs on the High Court scale. That was an order made by the court which ordered the transfer. The matter is concluded by sect. 73, which applies to this case. If the judge were to exercise his discretion, he would be altering the order made in the High Court by the registrar, and would be acting without jurisdiction. There was no material on which the county court judge could make an order depriving a successful party of his costs.

D In *Ritter v. Godfrey* (2), there were grounds on which the judge might properly exercise his discretion to refuse to allow costs to a successful litigant. Here there were no such grounds.

I agree with GREER, L.J., that this order for costs must be interpreted as meaning costs on the High Court scale.

E
MACKINNON, L.J. : I agree.

Appeal allowed. Case remitted to the county court for the costs in question to be taxed on the High Court scale.

F Solicitors : *Michael Abrahams, Sons & Co.*, agents for *Eric Bowes*, Birmingham (for the appellant) ; *Ward, Bowie & Co.*, agents for *W. L. Highway & Sons*, Birmingham (for the respondents).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

Re INSOLE'S SETTLEMENT.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
June 30, July 1, 1938.]

Land Improvement—Structural additions to mansion house—Necessity for additions to adjoin house—Settled Land Act, 1925 (c. 18), Sched. III, Part II, para. 5. A

Upon certain land, which was settled land within the Settled Land Act, 1925, there had been erected at a distance ranging from 30 ft. to 50 ft. from the mansion house a row of glasshouses, garages, a chauffeur's flat, an engine-room, a battery-room, toolshed, boiler-house and workshop. The trustees for the purposes of the Settled Land Act asked that the expense of erecting these premises might be paid out of capital money as structural additions to buildings within the Settled Land Act, 1925, Sched. III, Part II, para. 5 :— B

HELD : the new buildings were at such a distance from the mansion house that they could fairly be regarded as part thereof. They were therefore a structural addition thereto and authorised improvements within the above paragraph. C

Decision of SIMONDS, J., ([1938] 1 All E.R. 517) reversed.

[EDITORIAL NOTE. This case deals with the meaning of the phrase "structural additions to buildings" in the Settled Land Act, 1925, Sched. III, Part II. The point decided is that an addition to a building must be something that is used for the purposes of the mansion house, and so near thereto that it can properly be regarded as part thereof, having regard to the ordinary practice in relation to domestic architecture and groups of buildings generally. D

AS TO IMPROVEMENTS UNDER PART II, see HALSBURY, Hailsham Edn., Vol. 19, pp. 386, 387, para. 791 ; and FOR CASES, see DIGEST, Vol. 30, pp. 286-288, Nos. 128-143.]

Cases referred to :

- (1) *Re Gerard's (Lord) Settled Estate*, [1893] 3 Ch. 252 ; 30 Digest 288, 145 ; E
63 L.J.Ch. 23 ; 69 L.T. 393.
- (2) *Re Blagrove's Settled Estates*, [1903] 1 Ch. 560 ; 30 Digest 287, 129 ; 72
L.J.Ch. 317 ; 88 L.T. 253.

APPEAL by the respondent Eric Raymond Insole from an order of SIMONDS, J., dated Feb. 2, 1938, and reported [1938] 1 All E.R. 517. F
G. P. Slade for the trustees.

W. P. Spens, K.C., and *Horace Freeman* for the tenant for life.

Gilbert C. Dare for the tenant for life in remainder.

Evelyn Riviere for the tenant in tail. G

SIR WILFRID GREENE, M.R. : The appellant is tenant for life under a settlement which originally comprised an estate known as the Luxborough estate in the county of Somerset. That estate has been sold, and out of the purchase price there has been purchased another estate called the Stoke Charity estate in Hampshire, and in the house standing upon that estate the present tenant for life lives. The appeal is by the tenant for life, who desires to have paid out of capital moneys the cost of certain buildings erected, or proposed to be erected, close to the dwelling-house. The buildings in question consist of a new glasshouse and a new range of buildings comprising garages, chauffeur's flat, with H

an engine-room, battery-room, boiler-house, workshop and potting-shed. These buildings form one continuous block, and they are situated close to the dwelling-house itself, just across a yard which lies to the rear of the dwelling-house. The whole group of buildings will form a group which is familiar in domestic architecture in this country. The other

A parties to the appeal are persons interested in remainder subject to the life estate of the appellant and the trustees. The remaindermen support the application, but the trustees, as in duty bound, and as representing unborn beneficiaries, have placed before the court all proper considerations to assist the court in coming to its conclusion. It is agreed on all
B sides that the buildings will form a beneficial addition to the dwelling-house, and from that point of view it is for the benefit of all interested in the settlement that they should be erected.

The particular provision of the Settled Land Act upon which the application is based is to be found in Sched. III, Part II, para. 5. That
C schedule sets out the improvements, the cost of which the trustees of the settlement, or the court, may require to be replaced by instalments. Para. 5 is in the following terms :

Structural additions to or alterations in buildings reasonably required, whether the buildings are intended to be let or not, or are already let.

D It is established that these particular works are reasonably required, and the sole question that arises is whether or not they fall within the words, "Structural additions to buildings." The judge took the view that, upon the true construction of those words, the facts of the present case did not fall within them. In considering the meaning of the phrase in
E question, it is necessary to discover what is the test which Parliament intended to lay down. I think it is clear that, in order to comply with the language of the paragraph, it must be possible to say, when the alleged additions have been made, that those additions and the buildings to which it is said they are additions should have a relationship to one
F another which makes it possible to say that they form a whole or a unit. The first test which suggests itself is that, in order to form such a whole or unit, the additions must structurally touch, or be attached to, the buildings in question. That is a test which I find it impossible to accept. It would be placing upon the words a very narrow construction and one
G which would make them completely unsuitable to the ordinary circumstances which attend matters of this kind—unsuitable in view of the common method of building, both domestic and otherwise, in this country. To say that a garage, if built next to and touching a building, so as to form a continuation or enlargement of it, would be a structural addition,
H but that, if the garage were separated by 2 ft. or 3 ft. from the structure of the house, it would not be a structural addition, appears to me to involve a construction of these words which in its consequences would be narrow and capricious. Indeed, the judge has not, as I understand his judgment, laid down any such test. The test which he lays down is of this nature. He says that it is impossible to regard as a structural

addition that which is not, according to ordinary parlance, a substantial part of the same structure. That, it is to be observed, is merely laying down what I may describe as a physical test. It does not require that the addition should be actually touching the buildings, but it is a physical test in the sense that the matter to be considered, and the only matter to be considered, is the physical nearness of the addition to the building. A That again I do not find a satisfactory test. It would lead to refinements on matters of fact, and would include, apparently, a case where the building was a few feet or a few yards away, but might exclude a building which was across a courtyard, as in the present case. That would not be in accordance with what may be described as a common B architectural lay-out of groups of buildings in this country. It seems to me that, once the purely physical test of contiguity is abandoned, some other test, not merely a purely physical test, must be adopted. The question is what that test ought to be. The answer, in my opinion, is that the whole group of buildings, when completed, must be looked upon C and considered, and regard must be had to the relationship of the buildings to one another, their use, and so forth. I am not suggesting for a moment that in that examination the question of physical farness or nearness is not a relevant consideration. It is a relevant consideration, but, in my opinion, it is not the only consideration. D

In this connection, I cannot do better than refer to some expressions of LINDLEY, L.J., in *Re Gerard's (Lord) Settled Estate* (1). LINDLEY, L.J., was dealing with the words, "The rebuilding of the principal mansion house," and he was considering the question whether or not the building of stables might fall within those words. He said, at pp. 260, 261 : E

Whether stables can or cannot be regarded as part of the principal mansion house is a question of fact in each particular case. In some cases I think they can. In some cases I am clear they cannot. All stables cannot be regarded as part of the principal mansion house—that is perfectly obvious. On the other hand, stables may be so connected with it, not merely physically, but by occupation, enjoyment and propinquity, as to fall within the expression "rebuilding the principal mansion house." F In this particular case it may be that the old stables were so used for the purposes of the mansion house and were so near to it that they could be fairly regarded as part of the principal mansion house.

That appears to me to lay down a test which is not merely consistent with the language used by Parliament but will also give to that language a reasonable effect, and one which is consistent with the ordinary practice G of this country in relation to domestic architecture and groups of buildings generally. It is true that LINDLEY, L.J., here does not deal with the particular words which are in question in this case. Nevertheless, it seems to me that the considerations which he regarded in dealing with those words before him are considerations which apply equally to those H with which we are dealing. The judge placed reliance upon a decision of this court in *Re Blagrove's Settled Estates* (2). That was a case where the relevant section was the Settled Land Act, 1890, s. 13 (ii) :

making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let.

A Apart from the word "structural" which we have in the paragraph with which we are concerned, the language there is similar to the language in the present paragraph. The word "structural" was no doubt used in order to exclude such matters as machinery and heating apparatus, and so forth. In *Re Blagrove's Settled Estates* (2) there was an engine-house and an accumulator-room erected at some distance from the dwelling-house. The exact distance does not appear in the report, but, from the expressions used, I should infer that they were a considerable distance away. However that may be, they were certainly not physically attached to the dwelling-house, and, notwithstanding that fact, B JOYCE, J., allowed the necessary sum to be paid out of capital moneys for the cost of building them. The question that came before this court related to the engine and accessories. JOYCE, J., had disallowed those, and in this court it was attempted to upset his decision. That attempt failed, but in the course of his judgment ROMER, L.J., said, at p. 564 :

C I am bound to say that I do not quite see how the learned judge in the court below came to allow the expense of the erection of the dynamo-house, seeing, as far as I am aware, that that house was some distance from the mansion house. It is difficult to see at first sight how it could be said to be an addition to, or alteration in, the mansion house, or any previously existing buildings ; but that point is, fortunately, not before us.

D It is to be observed that that particular matter was not before the court, as ROMER, L.J., points out, nor was it argued, and the present position, so far as the decision is concerned, is that the decision of JOYCE, J., stands, and the observations of ROMER, L.J., are by way of *dicta* only.

E I find myself unable to extract any real guidance from those observations, in view of the fact that the actual facts of that case in relation to that particular matter do not appear in the report. As I have said, I should have inferred from the language used that there was a physical distance, which was of such a nature as to impress the mind of ROMER, L.J. However that may be, I cannot, as I say, find guidance in those words, and I prefer myself to take the language of LINDLEY, L.J., F which I have quoted already, as a guide in this case. In the result, I think that the construction of the paragraph which I have adopted is one which gives a practical working efficacy to the paragraph. It does not involve drawing any illogical or unreasonable distinctions in deciding whether or not a building is an addition. It lays down a logical and G sensible principle, which will work in practice. It is naturally with regret that one differs from the opinion of SIMONDS, J., in such a matter as this, but I cannot help taking the view that in his construction of the paragraph he has given it too narrow a meaning. In my opinion, H the appeal must be allowed.

SCOTT, L.J. : I agree.

CLAUSON, L.J. : I agree.

SIR WILFRID GREENE, M.R. : I did not mention one matter. The summons asks for an allowance in respect of the heating of the new

glasshouses, and the meaning of that phrase is to be seen from the particulars given, I think, by the agents or surveyors. There is an item there, "Approximate cost of heating glasshouses, £130." It was agreed by Mr. Spens, on behalf of the tenant for life, that that was an item which could not come under the paragraph in question, and accordingly the order that we make is one made with the exclusion of that item. A

Appeal allowed.

Solicitors: *Collyer-Bristow & Co.* (for all parties except the tenant for life in remainder); *Hy. S. L. Polak & Co.* (for the tenant for life in remainder). B

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

BURTON v. DOBSON SHIP REPAIRING CO., LTD.

[COURT OF APPEAL (Greer, Slessor and MacKinnon, L.JJ.), June 28, 1938.] C

Workmen's Compensation—Review of compensation—Infant workman—Time within which application must be made—Meaning of "review"—Change in probable earnings at a date later than application but prior to hearing—Workmen's Compensation Act, 1925 (c. 84), s. 11 (2)—Workmen's Compensation Act, 1926 (c. 42), s. 1. D

An infant, who was apprenticed under a seven-year contract to the defendant firm of shipbuilders, was injured in an accident on Aug. 31, 1932. A declaration of liability was made by consent. Upon an application for review, heard on Oct. 8, 1937, it was proved that he was earning 30s. per week working for his mother, and, as he had therefore suffered no loss of earning capacity, no order was made. On Dec. 8, 1937, 6 days before the workman attained the age of 21 years and 6 months, his solicitor wrote notifying the defendants of his intention to apply for a further review. At that date, the applicant would still have been under his contract of apprenticeship, had he not been injured, but by Feb. 24, 1938, he would have qualified as a shipwright, and would have been earning about £3 per week. He was at that time earning 35s. per week. It was contended by the employers that the application for review must be bad on the ground that, at the time it was made, the applicant was earning as much as he would have done had he not been injured, and that therefore he had lost nothing:— E

HELD: (i) the solicitor's letter was an application for review within the meaning of sect. 11 (2). F

(ii) an application for review is not necessarily bad solely because it is one under which the workman, upon the facts proved to have been existing at the date of the application, cannot succeed. G

(iii) the date of a review is the date on which any change made at the review begins to operate, which may be any date prior to the hearing of the application, and therefore a date subsequent to the date of the application itself, so long as it is prior to the hearing.

(iv) the infant was entitled to compensation as from Feb. 24, 1938, on the footing that he would then probably have been earning £3 per week. H

[EDITORIAL NOTE.] The time from which a change in the amount of compensation may be made to operate is the date of the review. This date is not necessarily the date of the application for review, nor the date of the hearing of the application by the county court. It obviously cannot be a date later than the hearing, but it may be a date before the application, and equally it may be a date

between the application and the hearing. In the present case, at the date of the application, the applicant would have been, but for the accident, still subject to his deed of apprenticeship, which restricted his earnings to 30s. per week. He was in fact at the date of the application earning 35s. per week, so that there was no case for a review at that time. Between the date of the application and that of the hearing, the seven-years' term of the apprenticeship deed would have expired, and, as from such expiry, the applicant, had he served the full term of the deed, would have been able to earn as a journeyman something in the nature of £3 per week. The applicant, in the present case, is held not to be barred from a review of his compensation by reason of the fact that there was no case for such a review at the date of the application. It is further held that the facts show that he would be entitled to a review under the provisions of sect. 11 (2) of the Act (dealing with injured infants) at the time of the expiration of the term of the apprenticeship deed, such expiration having taken place before the application was heard by the court.

AS TO REVIEW IN CASE OF INFANTS, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 236, 237, para. 559; and FOR CASES, see DIGEST, Vol. 34, pp. 458-460, Nos. 3752-3768. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 339-344,]

C Cases referred to :

- (1) *Vickers-Armstrong, Ltd. v. Regan*, [1933] 1 K.B. 232; Digest Supp.; 101 L.J.K.B. 657; 147 L.T. 298; 25 B.W.C.C. 211.
- (2) *Briggs v. Dryden (T.) & Sons, Talbot v. Vickers, Ltd.*, [1925] 2 K.B. 667; 34 Digest 458, 3752; 95 L.J.K.B. 275; 133 L.T. 409; 18 B.W.C.C. 163.

D APPEAL from a decision of His Honour JUDGE LANGMAN given at the Great Grimsby County Court and dated May 19, 1938. An infant was apprenticed in 1931 to the defendant firm of shipbuilders, the term of the apprenticeship being one of 7 years, ending on Feb. 23, 1938. On Aug. 31, 1932, the infant was injured in an accident, and a declaration of liability was made by consent. On June 14, 1937, the applicant attained the age of 21. An application by the workman for a review, which was heard on Oct. 8, 1937, was dismissed, without prejudice to any further application, upon the ground that he had an earning capacity of 30s. per week, and, had he remained uninjured, he would still have been earning a like sum under his contract of apprenticeship, which did not expire until Feb. 23, 1938. In view of the provisions of sect. 11 (2) of the Act, further application for review was made on Dec. 8, 1937, being 6 days before the apprentice would have attained the age of 21 years and 6 months. At that time he was earning 35s. per week.

G The application was heard on May 19, 1938, when the county court judge assessed the compensation upon the footing that, as from Feb. 23, 1938, the date of the expiration of the term of the apprenticeship deed, the apprentice would have become a fully-qualified journeyman shipwright, and would probably have been earning £3 per week.

H *J. Alun Pugh* for the appellants.

W. K. Carter for the respondent.

Pugh: There was here no application for a review within the proper time. The date of the review can only be the date when some change was made—that is, Feb. 24, 1938. That should be within the statutory period of 21 years and 6 months. There was no loss of earning capacity

in respect of which the applicant's solicitor could make an application for review. [Counsel referred to *Vickers-Armstrong, Ltd. v. Regan* (1).] An applicant cannot take a step under sect. 11 (2) until he has acquired some right. No right could accrue here until Feb. 23, 1938, when the period of apprenticeship would have come to an end. By that time, however, the statutory period of 21 years and 6 months had elapsed, A and it was too late.

Carter was not called on.

GREER, L.J. : This is an appeal in a workman's compensation case from an order made by the judge under the provisions of the Workmen's Compensation Act, 1925, s. 11 (2). That provision, as was stated by LORD HANWORTH, M.R., and SLESSER, L.J., in *Vickers-Armstrong, Ltd. v. Regan* (1), was an amendment of the existing law, and it was obviously an amendment which enabled an application to be made which could not have been made under the earlier statutes. Sect. 11 (1) provides C as follows :

Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum hereinbefore in sect. 9 provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act. D

That means that either the workman or the employer may ask for a review, if it is not too late to ask for that review. Then it is provided by sect. 11 (2), as amended by the Workmen's Compensation Act, 1926, s. 1, as follows :

Where the workman was, at the date of the accident, under 21 years of age, and the review takes place more than 6 months after the accident, and the application for the review so made before or within 6 months after the workman attains the age of 21 years, the amount of the weekly payment may be increased to such an amount as would have been awarded if the workman had at the time of the accident been earning weekly the sum which he would probably have been earning at the date of the review, if he had remained uninjured. E

I need not recite the facts of the case. They were not really in dispute, F and they are set out in the very careful judgment of the judge. It is beyond question that, if the decision in *Vickers-Armstrong, Ltd. v. Regan* (1) is right, as we must assume it to be, the application for a review means the application to the employer, and does not mean the application to the court. In this case, that was made before the expiration of 6 months which is referred to in the section. That is to say, G it was made within 6 months after the workman attained the age of 21. If the application is made within that time, within the meaning of the section, then, when the case comes on for review, the judge has power to increase it to such an amount as would have been awarded if the H workman had, at the time of the accident, been earning the weekly sum which he probably would have been earning at the date of review if he had remained uninjured. The judge has decided that, if he had remained uninjured, at the date of the review he would have been earning about £3 per week, the applicant, at the time the review came on, being in a

position to say that he would then have been, not an apprentice, but a journeyman. I see no reason to differ from the view which the judge took of the meaning of this subsection, and I think that he made no mistake in law. There is no reason for disputing, reviewing or altering the amount he awarded as an amount which the man would probably have been earning at the date of the review, if he had remained uninjured. For these reasons, I think that the appeal must be dismissed with costs.

SLESSER, L.J. : I agree. In my opinion, the language of the Workmen's Compensation Act, 1925, s. 11 (2), is clear and unambiguous, and I therefore do not think it necessary, as an aid to its construction, to have recourse to the consideration of the earlier legislation, or of the mischief to which the section was directed.

There are two matters here to be considered. The first is whether, under the language of the section, the application for review must be made before or within 6 months after the workman attains the age of 21 years. On Dec. 8, 1937, which was within a few days of the workman having attained the age of 21 years and 6 months, a Mr. Walter West, stating that he had been instructed by the person who had been injured, wrote to the employers as follows :

I have been instructed by Mr. Frank Burton, of 106, Weelsby Street, Grimsby, formerly in your employ, as apprentice-shipwright, and in respect of whose accidental injuries sustained on Aug. 31, 1932, an award of the Grimsby County Court was made in the form of a declaration of liability on Nov. 7, 1933. My client applies for a review, and asks for a weekly payment in respect of his partial incapacity at 18s. a week.

I have no doubt in my mind that that letter did constitute an application within the meaning of sect. 11 (2). It was laid down by this court in *Vickers-Armstrong, Ltd. v. Regan* (1) that an application by the workman may be an application to the employer. It need not be in any technical form, but it is sufficient if it enables the employer to know that a claim which may result in arbitration will thereafter be made upon him. Mr. Pugh wishes to reserve the argument that *Vickers-Armstrong, Ltd. v. Regan* (1) was wrongly decided in this court. Of course, he is fully entitled to reserve all his rights, but, so far as we are concerned, we are bound by that decision, which, as I understand it, establishes clearly, to my mind, that this was a sufficient application within the meaning of the subsection.

Next, it is said that the application must be bad because, at the time when it was made, on Dec. 8, 1937, this infant being still within the seven-years' apprenticeship, or the agreement under which he was receiving no more than 30s. per week, the application, as on a previous occasion, must have failed. In other words, the judge must have found of necessity, as I understand the argument, that the applicant could not probably have been earning, at the date of the review following on that application, more than he would have earned if he had remained uninjured—namely, 30s. per week. That argument seems to me ill-founded.

Whether or not the claim will be successful is a matter to be decided at the arbitration. Apart from the question of whether the seven-years' obligation does at one end limit the workman to receiving 30s., there was always open for consideration before the judge the argument that the man at the time was actually earning less than 30s. How that will be determined at the time of the claim it is impossible to say, but in any event I can find no restriction in law to the provision that the application must be made within 6 months after the workman attains the age of 21 years, limiting it to cases in which the workman must necessarily succeed in the application. The application, by its very nature, might result in an arbitration, in which ultimately the employer might win equally with the workman. I think, therefore, that the argument fails.

The application being well-founded, the only other questions which remain are as to the date of the review and the powers of the judge as at that date. To my mind, were there no authority on the matter, what is meant by the date of review would be made clear by a consideration of the whole of sect. 11. The date of review, as is, I think, stated in sect. 11 (1), is the date when the weekly payment may be ended, diminished or increased. It is not necessarily the date when the case is heard, or when the award is signed. It is the date whence the alteration operates. That matter has in fact already been decided by this court. In *Talbot v. Vickers, Ltd.* (2), WARRINGTON, L.J., quoting from the old cl. 16 of the first schedule of the Act of 1906, which contains the same words, "which the workman would probably have been earning at the date of the review," says, at p. 193 :

I think there is very little difficulty in understanding what is meant by the words 'the review takes place' and the expression "at the date of the review," in the latter part of the proviso. Under cl. 16 it is settled that the review may be retrospective, and once you grasp that, then, I think, those expressions in the proviso mean not either when the workman applies for the review or when the county court judge sits to hear that application, but it means the date at which, under cl. 16, read retrospectively, the weekly payment is reviewed, that is to say, either increased or diminished.

The county court judge in this case, on hearing this application for review, came to the conclusion that the workman had failed to make a case before Feb. 23, 1938, because he held that up to that time the workman was able to earn in his employment, while suffering from his incapacity, 35s. per week. Under the agreement for seven years, which was necessary in order that he might qualify as a journeyman, the man would probably have been earning only 30s. per week, and would therefore, if anything, be rather worse off than better off. However, he also came to the conclusion that, as and from Feb. 24, 1938, the seven years having elapsed, he would then be earning probably something in the nature of £3 per week as a fully-qualified journeyman, had he not been injured. He made the necessary computation by taking half the difference, as required by the Act, and no complaint could be made on that head.

It seems to me, therefore, that, in reviewing the whole matter, the

county court judge rightly directed himself in taking as his terminus the point when the workman would, if he had not been injured, presumably have served his seven years' apprenticeship, and would have been fully qualified, and would have been earning something in the nature of £3 per week. The judge made his calculations upon that assumption, and I do not think that his award can be impeached.

MACKINNON, L.J. : I agree. Sect. 11 (2) appears to me to be drafted with unusual clarity. Applying it to the facts of this case, it seems to me that the judge was abundantly justified in making the award he did, which was, having regard to the terms of the section, to this effect. As the workman was, on Aug. 31, 1932, when the accident occurred, under 21 years old, and as the review took place on Feb. 24, 1938, which is more than 6 months after Aug. 31, 1932, and as the application for review was made on Dec. 8, 1937, which was 6 days before the workman attained 21 years and 6 months of age, the amount may be increased to such an amount as he probably would have been earning on Feb. 24, 1938, if he had remained uninjured. That is merely applying the dates involved in this case to the language of the section. That is what the county court judge has done, and it seems to me that his award was perfectly right.

Appeal dismissed with costs. Leave to appeal on the term that appellants pay respondent's costs in any event.

Solicitors : *Carpenters*, agents for *F. G. & H. E. Smith*, Bradford (for the appellants); *Smith & Hudson*, agents for *Walter West*, Grimsby (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

Dictum of SIR BOYD MERRIMAN, P., at p. 418, approved. DEMETRIOU v. DEMETRIOU. [1950] 2 All E.R. 49.

H——— v. H———.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.), June 23, 24, 1938.]

Divorce—Cruelty—Compromise of judicial separation suit—Deed of separation—All charges withdrawn—Petition for divorce based on same charges—Absolute release—Frustration—Matrimonial Causes Act, 1937 (c. 57), s. 2.

In Jan., 1929, a suit for judicial separation in which the wife as petitioner alleged cruelty was compromised upon terms, *inter alia*, that all charges of cruelty were withdrawn and that the cause should be placed in the reserve list until a deed of separation was executed by the parties. The deed was executed on Mar. 20, 1929, and it was thereby provided, *inter alia*, that neither of the parties would take proceedings against the other for judicial separation or restitution of conjugal rights, and that the wife thereby withdrew all the charges of cruelty alleged by her in the petition and particulars. The petition was not dismissed, but remained in the reserve list. On Jan. 1, 1938, the wife filed a petition for divorce charging the same cruelty as that alleged in the former petition. It was contended that the second petition was barred by the deed of separation :—

HELD : (i) the petition was barred by the deed, since, although the deed only provided that neither party should not bring proceedings for

separation or restitution of conjugal rights, the charges of cruelty had been irrevocably withdrawn, so that they could never again be the foundation of any matrimonial proceedings.

(ii) the doctrine of frustration was not applicable to the deed of separation, and it was not avoided by the change in the law of divorce brought about by the Matrimonial Causes Act, 1937.

(iii) the proper order, in the circumstances, was that both petitions be dismissed.

[EDITORIAL NOTE.] The main contention here is that the doctrine of frustration extended to the deed of separation here in question. This involved the proposition that a deed is avoided by a considerable alteration in the law. Such a proposition cannot be confined to deeds of separation, but must apply to contracts generally, and the result would be that all contracts must be subject to an implied term that they will be *ipso facto* void if the law be radically changed. So stated, the proposition seems an impossible one, and it is here rejected.

AS TO AGREEMENTS NOT TO INSTITUTE PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 671-673, para. 993; and FOR CASES, see DIGEST, Vol. 27, p. 325, Nos. 3036-3040, pp. 362-364, Nos. 3468-3489.]

Cases referred to :

- (1) *Rose v. Rose* (1883), 8 P.D. 98; 27 Digest 362, 3470; 52 L.J.P. 25; 48 L.T. 378.
- (2) *L. v. L.*, [1931] P. 63; Digest Supp.; 100 L.J.P. 76; 144 L.T. 723.
- (3) *Rowley v. Rowley* (1866), L.R. 1 Sc. & Div. 63; 27 Digest 325, 3039; 35 L.J.P. & M. 110; *affg.* (1864), 3 Sw. & Tr. 338.
- (4) *Stanes v. Stanes* (1877), 3 P.D. 42; 27 Digest 325, 3040; 47 L.J.P. 19; 39 L.T. 46.
- (5) *Hyman v. Hyman*, [1929] A.C. 601; Digest Supp.; 98 L.J.P. 81; 141 L.T. 329.
- (6) *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 12 Digest 612, 5056; 85 L.J.K.B. 1389; 115 L.T. 315.
- (7) *Goslin v. Clark* (1862), 12 C.B.N.S. 681; 27 Digest 232, 2038; 31 L.J.C.P. 330; 6 L.T. 824.

SUMMONS FOR DIRECTIONS to determine the question whether a petition for divorce on the ground of alleged cruelty could be filed, having regard to a subsisting deed between the parties compromising a previous petition for judicial separation based on identical charges and withdrawing all charges in the petition and particulars, by reason of the change in the law effected by the Matrimonial Causes Act, 1937, which provided for the first time that cruelty might be a ground for dissolution.

Marquess of Reading, K.C., and *Walter Frampton* for the petitioner. *G. S. E. Karminski* for the respondent.

SIR BOYD MERRIMAN, P. : It is necessary to state the facts relating to the earlier petition somewhat fully, although I am absolved from the necessity of going in any detail into the charges of cruelty by reason of Lord Reading's categorical statement that there is no difference whatever between the charges now sought to be raised and those raised in the earlier petition. There is no question here, for example, of any acts of cruelty having occurred during the period of separation which preceded the withdrawal of the charges in the original petition. It is

unnecessary, therefore, even to refer to the details of the charges. It is, however, important to know that that petition was defended, and not merely defended as a matter of form. The husband came to court with leading counsel prepared to substantiate the denial which he had put upon the file that these charges were untrue. When the matter came on in open court on Jan. 23, 1929, after considerable discussion between the parties—and, I gather, very largely with the assistance of the judge—the petition was disposed of upon the terms which were filed and made a rule of court, and which, in terms, involved the subsequent execution of a deed of separation. The first of these terms is in these words:

B “All charges of cruelty withdrawn.” The second term provided that the case should go into the reserve list pending the execution of a deed containing the usual clauses, with provision as to how any question of doubt was to be resolved. The third term provided for that which the wife particularly desired—that is, for custody of the children being given to the wife, with very limited and restricted access being allowed to the husband. Again, I do not propose to deal with all the details, but that was, as an affidavit shows, the thing above all others about which she was anxious. By cl. 5 the parties were to pay their own costs, and by cl. 6 the terms were to be filed and made a rule of court. It is necessary

D to say only that the absence of any provision in these terms for maintenance is explained in this way. The wife herself, if the case had proceeded to a finding and judgment in her favour, could not, it is conceded, have obtained any order on a petition for permanent alimony, for the reason that her fortune was very nearly the equal of the husband's.

E If anything approaching the usual practice were followed, she would have no case for permanent alimony from the husband so long as that state was subsisting. On the other hand, of course, the husband was liable to maintain the children, and it is true that in this deed it was to the disadvantage of the wife that there was no provision for maintenance of the children. In other words, in effect, she made herself responsible for the maintenance of the children. As I have said, she had got the point on which she had laid the greatest stress—that the children should be confined to her custody with very little access allowed to the husband—established in her favour. At any rate, for reasons

G which seemed sufficient at the time, there is no question that she gave her full assent to these terms. Nobody has suggested that there was any question of pressure or anything of that sort. She was represented by leading counsel and junior counsel of unquestioned experience, and there is not the slightest suggestion that her full assent did not go to

H the terms as they were put forward at the time. It follows, therefore, that she herself assented to the court making an order—that is the result of terms being made a rule of court—which included the two provisions that all charges of cruelty were withdrawn and that the deed of separation should be entered into. The result of making the terms a rule of court was that, if either party had refused to execute the deed

after it had been drawn up and made to conform with the terms by having any disputed points settled by the counsel who was designated in the terms as being the party to decide controversial points of draftsmanship, the court itself would have appointed some person, presumably the senior registrar, to sign the deed which had been drawn up, on behalf of the person who had refused to sign. I mention that only to show A what the force of making these terms a rule of court is. There is no such question of that here, because the parties promptly agreed on the deed themselves, and signed it. The only thing that has not been dealt with is that the petition, having gone into the reserve list, ought to have been disposed of. Where it is a provision that the cause should go into B the reserve list pending the execution of the deed, it implies that, as soon as the deed has been executed, the petition shall be dismissed. However, nobody paid any attention to this point. It was of no practical importance whatever until this present petition was filed. In fact, the old petition was still on the file when this new petition was filed on C Jan. 1, and, in accordance with what is acknowledged to be the established practice of the court, dating, it is said, back to the days of the old ecclesiastical courts—at any rate, established by authority and practice for fifty years—it is impossible to have two petitions on the file in respect of the same marriage at the same time, and *a fortiori* when the two D petitions both deal with the same subject-matter. Nothing really turns on that except what would be the best way in which and the best time at which to get rid of the old petition. It is quite certain that, if it becomes necessary to dismiss it in the present summons, the dismissal will take place by virtue of the terms which were filed on the former E hearing. I do not think that it is necessary, and nor has counsel thought it necessary, to spend any time on this particular point, which is merely one of machinery, and does not touch the substance of the matter. I therefore come back to the carrying out of the terms by the execution of the deed. F

It is a deed containing some 14 clauses, but it is not really necessary to refer to more than one or two of them. By the first clause, it is agreed that the parties will henceforth live separate and apart from each other, and that neither of them will take proceedings against the other for judicial separation or restitution of conjugal rights, or molest or G annoy or interfere with the other or any member of his or her family or household in any way whatsoever. In passing, before leaving that clause, it is quite plain that the clause is of itself a much less extensive clause than that which is sometimes put into deeds of separation, and known as the *Rose v. Rose* (1) clause, to which I shall have to make H reference in a moment. Lord Reading does not seek to evade the conclusion that, if it had been sought to base another claim for judicial separation, not merely upon these charges of cruelty, but upon any ground open to the wife, she would in any case be precluded by this clause; but, as he truly points out, this clause does not prevent her

from bringing any petition for dissolution. I think that I agree with Lord Reading—and Mr. Karminski has not argued to the contrary—that cl. 1 does not carry the matter any further. It does not prevent proceedings for divorce based on any matrimonial offence. It only prevents the wife from taking proceedings for judicial separation or for restitution of conjugal rights. The real point, as far as this deed is concerned, as distinct from cl. 1 of the terms which were made a rule of court, is that by cl. 7 the wife hereby withdraws all the charges of cruelty alleged by her in the said petition and particulars against the husband. That sets out in full what was obviously intended to be the meaning of the shorter form: "All charges of cruelty withdrawn." It was intended to mean that. It is common ground that what was intended to be dealt with were the charges of cruelty which had been made in the petition, the withdrawal of which had led to the signing of this deed. Then, without going further into the details of the terms, it is worth noticing that, in addition to the provisions with regard to the custody, which were set out in full in accordance with the wishes of the wife, the husband was by cl. 8 excluded from any participation in his wife's estate after her death, whether on an intestacy or otherwise, or from having anything to do with the administration of his wife's estate. That clause was a very important one, and might, in certain circumstances, have been an extremely important monetary provision. Clause 12 provided that, in the event not merely of reconciliation and a return to cohabitation, but in the event of the dissolution of the marriage, the provisions of the deed should become void, but without prejudice to anything which had been done up to then. Finally, in para. 14, there is the provision for the costs. The position therefore is that, not merely by the filing of the terms and making them a rule of court, but by the terms of the deed entered into, there is the plainest agreement in the most categorical terms that the charges made in the petition were all withdrawn. It was upon those terms that the court disposed of the case.

I have to consider the effect of that settlement—the order taken by itself, and in conjunction with the deed of separation drawn up under it. It is common ground that no authority exactly on all fours can be found. I say advisedly "exactly on all fours," because in none of the cases have we got a combination of the withdrawal of the charges and an attempt to resuscitate them in a subsequent petition. Equally Lord Reading has not been able to suggest—and says so quite frankly—that the fact that this case differs from somewhat similar cases in that particular respect really makes any difference in principle. I think that it is right, and a compliment to the very clear arguments which everybody has put forward (and that it is necessary that the grounds of my judgment may appear here), that I should here refer quite shortly to the three principal cases to which reference has been made. It will be convenient to take them out of chronological order, and to begin with *Rose v. Rose* (1). *Rose v. Rose* (1) is the case, as everyone knows, which

has given the name to the most comprehensive form of withdrawal of charges which has hitherto been arrived at. The clause in *Rose v. Rose* (1) had come into existence because of the execution of a deed of separation unconnected with any divorce proceedings, but it was in the widest possible terms. It provided (7 P.D., at p. 225) :

No proceedings shall be commenced or prosecuted by or on behalf of either party against the other in respect of any cause of complaint which now exists or has arisen before the date of these presents, [irrespective of whether the offence is or is not known to the other party] and every offence (if any) which has been committed or permitted by either party against the other shall be considered as hereby forgiven and condoned, and in case hereafter either shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise, no offence or misconduct which has been committed or permitted before the execution of these presents, and no act, deed, neglect, or default of either party in relation to any such offence or misconduct shall be pleaded or alleged by either party or be admissible in evidence.

The question arose in connection with a petition for dissolution on the grounds of cruelty and adultery by the husband. The wife alleged that the husband had been guilty of cruelty before the deed of separation and after the deed of separation. Nothing turned for this purpose upon the allegation of adultery. The husband denied all the cruelty after the deed of separation, and was found in effect to be innocent of any cruelty after the deed of separation. In order, therefore, to rely upon the combination of cruelty and adultery to entitle her to the relief of dissolution, the wife was driven to rely on cruelty antecedent to the deed. Therefore, when all the extraneous matters had been got out of the way, it raised the clear-cut issue whether cruelty antecedent to the deed could be alleged, in conjunction with subsequent offences, in face of the very clear provision in this clause. It is unnecessary to consider whether in this clause—which has now become common form, and which was approved as recently as 1931 in a very full and useful judgment of LORD MERRIVALE, P., in *L. v. L.* (2)—where the parties are by the terms of the deed agreeing that the marriage relationship to its full extent, at any rate, shall be foregone, and there shall be nothing in the nature of a restitution of conjugal rights, but exactly the opposite, the words “ Shall be considered as hereby forgiven and condoned ” are really very apt words. It is unnecessary to consider that for the reason that, in the Court of Appeal in *Rose v. Rose* (1), SIR GEORGE JESSEL, M.R., in saying that in his opinion this was a perfectly binding agreement, said, at p. 99 :

It appears to me to be perfectly consistent with public policy to hold that there may be what, for want of a better term, I will call final condonation. . . . The lady here made a final bargain that she would not take any proceedings against her husband in respect of past offences, nor plead any past offences in any proceedings as to subsequent offences.

In the last sentence of his judgment, LINDLEY, L.J., said, at p. 100 :

This is not a case of mere condonation ; it is a matter of express bargain.

If it had been “ mere condonation,” the clause would have been a contradiction to the terms, because condonation imports that the offence condoned may be revived by a subsequent offence. The clause in *Rose v.*

Rose (1) says exactly the opposite. It says that, even if there was a subsequent offence, offences antecedent to the clause could not be revived for the purposes of being linked up with any new offences. The Court of Appeal held that that was a valid and binding agreement, that it had a higher effect than mere condonation, inasmuch as it effected what

A SIR GEORGE JESSEL, M.R., called "final condonation," meaning that in no circumstances whatever could the particular charge be revived. From that it follows that the wife, in seeking to link the antecedent charges of cruelty with subsequent adultery, was breaking the agreement, and for that reason was not allowed to proceed with the petition. That

B was a case in which the matter depends entirely upon the consent of the parties, and not on any order of the court. The decisions in *Rose v. Rose* (1) and the decision of LORD MERRIVALE, P., in *L. v. L.* (2), to which I have referred, were founded upon *Rowley v. Rowley* (3), and I think that it is very important that I should examine that case in a little

C detail. It resembles this case inasmuch as it was there attempted to revive in a second petition charges which had been condoned in an earlier petition. It differs from this case inasmuch as in this case the charges in the earlier petition were merely withdrawn. The phrase used was merely that the charges were withdrawn. In *Rowley v. Rowley* (3),

D the terms on which the earlier petition was brought to an end contained an undertaking by the petitioner not to institute other proceedings in the Divorce Court. To get the point out of the way immediately, let me say that it was accepted in the court of first instance before SIR CRESWELL CRESWELL, and also in the House of Lords, that those words

E were not intended to have the widest interpretation not to institute proceedings on any fact, but that they were limited to prohibition or an undertaking against instituting proceedings in respect of the facts alleged in the petition. Again, as a matter of history, there was a trial before the full court as to whether the wife had assented to the terms,

F and that was decided against her. Eventually the matter came on before SIR JAMES WILDE as Judge Ordinary. It is not, I think, necessary to go through the whole history of the facts. The point was that, coupled with acts of adultery (which had occurred before the petition, which was withdrawn on Mar. 12, 1861, and some of which were said

G to have been unknown to the petitioner at the time) and with acts of cruelty since that date, there were acts of cruelty which it was conceded had occurred before the cohabitation of the parties had come to an end in 1854. In other words, in this case, as eventually proved to be the case in *Rose v. Rose* (1), the cruelty which it was sought to ally with

H the adultery had all occurred before the date on which this first petition was filed, and, of course, before it was withdrawn. SIR JAMES WILDE, after reviewing the facts, said, at p. 345 :

The late Judge Ordinary, when applied to for directions as to the mode of trial, perceived [the fact to which I have just alluded], and refused to make any order [as to how the case should be tried] till these old charges were struck out.

He then proceeds to discuss what is the real effect of the agreement made in face of the court when the juror was withdrawn in respect of the old petition—what was the effect of this undertaking not to institute other proceedings.

He says, at p. 346 :

Now, what is the effect of that agreement, and to what extent is the course which Mrs. Rowley has taken consistent with good faith, and an honest adherence to that arrangement ? I cannot construe the agreement to mean anything else but that, in respect to her husband's past conduct at any rate, Mrs. Rowley consented to surrender, and that irrevocably, any legal right she might have to relief in this court. I say any right she might have, for her case remained to be proved, and she might perchance have been as little successful on that occasion as she was in the previous suit. It is, therefore, in gross breach of good faith, and in violation of express agreement, that Mrs. Rowley has filed her present petition. The foundation of her prayer for divorce is the cruelty she alleges to have been committed by her husband during the cohabitation antecedent to the suit which resulted in that agreement. It is not in the nature of cruelty not to be within the knowledge of the party aggrieved. She has not even, therefore, the excuse that she did not then know the full extent of her then existing grievances.

Then there is one sentence which is really to the same effect as the passage I have quoted from *Rose v. Rose* (1). He said, at p. 346 :

It has been ingeniously argued, that the adultery charged to have been committed in 1862, revived the previous cruelty, as it would do in an ordinary case of condonation. Now, condonation is that species of forgiveness or reconciliation which, in furtherance of the marriage bond, the court has erected into a bar to legal proceedings for a separation ; but which, in the interest of justice, the law has also declared to be only conditional on future good conduct. This has nothing in common with a direct and positive bargain not to resort to the powers of this court, made between the husband and wife, and reduced into writing.

I lay particular stress on this sentence, at p. 347 :

The conditions, if any, to which such an agreement is subject, must be found expressed or collected as implied in the language itself.

That judgment was upheld in the House of Lords, and it is unnecessary to do more than read a sentence or two, after saying that it was not contended that the undertaking was never to institute any other proceedings, but only to prevent future proceedings in respect of matters forming the ground of the petition for divorce which was presented prior to the agreement. LORD CHELMSFORD, L.C., holding that the agreement was perfectly good and that the undertaking must be enforced, added, at p. 68 :

The learned Judge Ordinary very properly rejected the supposed analogy between this case and a case of condonation. In the latter case there is a conditional forgiveness ; here there was an absolute release.

In my opinion, whether it was LORD CHELMSFORD, L.C., using the phrase : " absolute release " in respect of an undertaking given in face of the court, or SIR GEORGE JESSEL, M.R., using the words " final condonation " in respect of a clause in a deed of separation which had not been the subject of any proceedings, or SIR JAMES WILDE using the words " consented to surrender, and that irrevocably," all the judges who were concerned with the decisions of those two cases meant the same thing. When once those charges had been abandoned, and abandoned

in face of the court, they could not be revived for the purpose of another petition. To do so was not, to use the strong language of SIR JAMES WILDE, at p. 346 :

. consistent with good faith, and an honest adherence to that arrangement.

A The only other case to which it is necessary to refer in this connection is this. I have already indicated that Lord Reading is unable to draw any real distinction between the words “ shall not institute proceedings in the Divorce Court ” and “ withdrawal of the charges.” On principle, I think, that must be right, and to some extent, although again the case is not exactly on all fours, that seems to me to be substantiated by a case to which Mr. Karminski referred me, *Stanes v. Stanes* (4). That case again differs from the present case in this particular, although the first term of the settlement provided, as stated at p. 43 :

C [The] suit to be stayed, and [subject to a later clause] petition and counter-prayer dismissed . . . charges in petition and answer being withdrawn.

D It was not, like this case, an attempt to revive the charges in a subsequent petition, but was an attempt to proceed with the current petition notwithstanding the words which I have just read. SIR JAMES HANNEN, P., was concerned mainly to find out what the truth of the matter was, because the wife, who had agreed to those terms, and whose agreement to those terms was the basis of the settlement, disputed that she had agreed. That was the subject matter of the decision of SIR JAMES HANNEN, P. He found that she had, in fact, agreed to the terms, and, as soon as he found that, it disposed of the matter. He said, at p. 47 :

E . . . and, therefore, I shall not allow the case to be set down for hearing.

F It is true, as I have said, that it was the very petition in which the terms had been arrived at, and not a subsequent petition based upon the very charges which had been withdrawn. In my opinion, there is really no difference in principle between the one set of words and the other. The substance of the matter is that, when once terms of this sort have been arrived at and made a rule of court, and the party has refrained from going on with the charges, and the other party has refrained from establishing his denial in face of the charges, then, in the absence of fraud or anything of that sort, or of some repudiation of the contract by one or other, it is impossible for the court to allow those charges, which are identical in substance, to be revived for the purpose of further proceedings. I ought to add that it is not suggested or hinted that in this case there has been anything in the nature of repudiation of the compromise arrived at in the face of the court on the part of the husband. On the contrary, it is conceded that all the terms to which he has agreed have been concisely and punctually observed. Although, in my opinion, the question of the date at which it is sought to set aside and ignore an arrangement of this sort arrived at in face of the court is immaterial, as a matter of logic, on the facts of this case, the incon-

venience of allowing the whole matter to be raked up again ten years after the husband had dispersed the witnesses with which he was prepared to refute the charges is so obvious as not to require comment. I do not decide this matter on the question of convenience. It seems to me to be a matter of principle, independent of any convenience of that sort.

That is my view of the meaning of the terms, and, if that is so, and there is no way out of the arrangement containing those terms, that decides the matter. It is here that Lord Reading's other submission must be dealt with. He says: "Assume all that; assume that there is no way out of this contract, taken by itself. Nevertheless, it must be taken with the implied term that, when the law was changed by the Matrimonial Causes Act, 1937, and the wife was enabled, for the first time, to sue for dissolution of marriage on the ground of cruelty, the agreement should not survive so important a change in law." I am bound to say that it seems to me to be a proposition the consequences of which it would be difficult to envisage to say that a contract of any sort—and in particular a contract of this kind solemnly entered into before the court—contains the inherent imputation that, if at any future time, notwithstanding that the contract has been faithfully executed in the meantime, the law on the subject matter is changed in a material respect, the contract *ipso facto* comes to an end. It is not that the contract is voidable. This doctrine assumes that it was an implied term of the contract that, if the law was materially changed in this respect, the contract should become void, and not that the parties might elect to avoid it. I am bound to say that I think that this contention would go a great deal further than any tribunal has yet gone in expounding the law of frustration of contract, and it must be for some other court to say that that position was inherent in this particular contract. Lord Reading really founds his argument on a passage in the opinion of LORD BUCKMASTER in *Hyman v. Hyman* (5). Before reading the material sentence, it is essential to know what was the context in which the sentence was used. It was a case in which the wife had covenanted in a deed of separation not to take proceedings against her husband for alimony or maintenance beyond the provision made for her in the deed. After the deed of separation, however, circumstances had arisen which enabled her to take advantage of the then new Act, which is now consolidated in the Supreme Court of Judicature (Consolidation) Act, 1925, for dissolution of marriage on the ground of her husband's adultery, which was then for the first time by itself a ground for dissolution at the instance of the wife. There was nothing in the deed of separation which touched her right to petition for anything—certainly, at any rate, as far as dissolution. There is no agreement barring her from the right to petition for dissolution, but what was said was that the existence of this covenant not to sue for alimony or maintenance barred her from what for convenience we now call the ancillary relief of petitioning for maintenance in divorce proceedings.

The main ground of the decision against the husband was that, once the court had got properly constituted divorce proceedings, the statute gave the court the power, and imposed a duty, of making provision for the wife, and, as was pointed out, that is a statutory provision which is not only in the interests of the wife but may also be in the interests of strangers to the suit, who are nevertheless interested in seeing that the wife obtains from her husband the maintenance which it is his obligation to give her. The court held—and this was the real ground—that no agreement between the parties could prevent the court from exercising the function imposed upon it by statute. That really is now a commonplace in connection with this subject matter. LORD BUCKMASTER, however, indicated that, in addition to this ground for deciding the case, the judgment of the Court of Appeal could also be supported on the grounds that the covenant in the deed did not apply to any rights she might have of bringing divorce proceedings. In that connection, he said, at p. 623 :

At the date of the deed, after the separation of the parties, previous cruelty not being suggested, divorce was at the wife's instance impossible, except upon grounds which, apart from bigamy, are so revolting and fortunately so rare that it may be safely assumed they were outside the consideration of the parties. At the date of the deed, therefore, so far as the wife's position was concerned, the only contemplated dissolution of the marriage was by death. It would, therefore, be indeed an astonishing thing if the wife's covenant were to be construed as relating to a set of circumstances that no one thought would arise.

Lord Reading makes that sentence the test on which he bases the wife's right to bring this petition. He says that, at the time when this compromise before the court was entered into, and at the time when the deed of separation was executed as a result of it, whereby she withdrew these charges of cruelty, these charges of cruelty, taking them at their full value, and assuming them to be established, could result only in the judicial separation for which she was suing, and could not result in a divorce. It would therefore be said to be an astonishing thing if her consent were to be construed as applicable to a set of circumstances in which, by change of the law, that very cruelty could be made the basis of a petition for dissolution. On the facts of this case—and I wish not to lay undue stress on it—it is, in fact, impossible to say that this particular petitioner did not consider the possibility that the law might be changed, for she raised the matter when the deed was being discussed. She raised first of all the question whether she would be precluded from bringing any divorce proceedings, which, of course, she obviously would not, provided that some grounds for divorce subsequently arose. She also raised the question of a change of law, and whether or not the matter was discussed between counsel does not appear. I assume that it was not. At any rate, she was, according to her own affidavit, advised that any question of the alteration of the law was so vague that it was impossible to advise upon it. I should have thought myself that it was very difficult for any party to a divorce suit entering into terms of compromise, or indeed for any litigant compromising any sort of suit, or even, I

would add, any citizen entering into any sort of contract, to be taken to have disregarded altogether the possibility that the law on the sort of subject-matter that was being dealt with might be altered by Parliament at some subsequent date. It seems to me to be a very difficult conception that anybody must be taken to have excluded such a possibility. However that may be, in this case, as I say, some small consideration, at any rate, was actually given to the matter, and it was put upon one side on advice. Apart from that, it is one thing to say that, at a time when all that was being dealt with was a provision for alimony or maintenance, as the case might be, a party must not be taken to have shut his or herself out of her statutory right in that connection which would arise if and when, at some future time, proceedings were taken for dissolution of the marriage. It is quite another thing, it seems to me, to suggest that, when a party agrees to abandon the very charges which it is suggested can be used as the foundation of a plea for relief, that change in law as to the nature of the relief entitles a party to revive the charges. The two things do not seem to me to be in the same atmosphere. LORD ATKIN, at any rate, in his opinion, gave no countenance to the suggestion that the frustration of the contract applied to the matter at all. He says, at pp. 627 and 628 :

If on the other hand the frustration is confined to this particular case and the unforeseen event of the passing of the Act of 1923, I cannot think that this alteration of the law can have the destructive effect on the contract which is suggested. All that the Act did was to enable the wife to obtain a dissolution for simple adultery, which before she could only obtain for adultery together with some additional fact. But before the Act and during the separation deed the existing law provided grounds for divorce which might have resulted had the facts been so in a dissolution of this marriage [His Lordship sets out the various grounds]. It seems to me unreasonable to think that the separation deed remained operative if effect was given to the existing law, but that the basis of the contract fell away if divorce became easier, some of the grounds still remaining the same. The change in the law did not make the performance of the contract either impossible or more difficult. Indeed it did not necessarily affect it at all. In view of the effect of the doctrine of frustration in the automatic destruction of contracts in spite of the will of the parties, and of the caution which is required before applying still more before extending the doctrine, I should be reluctant to decide this case against the respondent on this ground, though as we have not heard the respondent I do not express a final opinion upon it.

In my opinion, there is no real reason here for the application of that doctrine. I think that, without any elaborate examination of the authorities, it is sufficient to refer to two passages in *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (6), decided by the House of Lords in 1916. The subject-matter of that case was entirely different from the present, but the principles were laid down in quite general terms in the passages to which I propose to refer. EARL LOREBURN says, at p. 403 :

When a lawful contract has been made and there is no default, a court of law has no power to discharge either party from the performance of it unless either the rights of some one else or some Act of Parliament give the necessary jurisdiction. But a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must

have done so, then a term to that effect will be implied, though it be not expressed in the contract.

Later, he says, at p. 404 :

- Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said "if that happens, of course, it is all over between us" ? What, in fact, was the true meaning of the contract ? Since the parties have not provided for the contingency, ought a court to say it is obvious they would have treated the thing as at an end ?
- A I have already said that I think that it is very difficult in this case to deal with this matter on the basis that it is left in doubt whether the parties—at any rate, this party—had thought of the particular contingency.
- B I find it impossible to say that there is any implied term in this contract that, if the law ten, twenty or thirty years later is changed in the sense in which it was changed in 1937, the whole contract was to be at an end, without any further decision on the part of the parties, but by some term implied in the contract itself. It is quite plain that a decision to
- C that effect would, apart from much wider imputations, have an effect on all deeds of separation entered into at any time where anything resembling this set of circumstances applied, for the alteration in the divorce law has been drastic, and the same argument could be raised with regard to innumerable settlements entered into on the faith of the
- D old law. One other passage only I think I need refer to in this case, and that is in the opinion of LORD PARKER OF WADDINGTON, at p. 423, where he emphasises the point that it is much more difficult to violate a condition of the clauses when a contract has been at least in part executed than to imply frustration before ever the deed has carried into execution.
- E Those observations apply with full force, for this contract has been faithfully observed for ten years.

- The only other case which I think it is necessary to review at all is *Goslin v. Clark* (7), to which my attention was called by Mr. Karminski, and which he says supports the view for which he contends. I had asked
- F for any authority in connection with the still graver change in the law in 1857, the law which enabled parties to come to a court for the first time and get a decree of dissolution of marriage instead of invoking the jurisdiction of Parliament, in order to see whether that drastic change had been held to change any agreement that had been entered into before the
- G Act. Mr. Karminski's industry has given me the case of *Goslin v. Clark* (7). It does not raise exactly the point with which I have to deal. In a sense, it is the converse of it. In that case, there had been a deed of separation in which it was admitted as a foundation that the wife admitted adultery and that the withdrawal from *consortium* was based
- H upon that fact, and the husband agreed to make specified provision for her. There was nothing in that case in the nature of an agreement of any sort or kind to surrender the husband's rights to take proceedings in respect of the adultery which had been admitted. The deed, it is necessary to state, was made before the Act of 1857, which gave the relief of dissolution for a wife's adultery as distinct from the old divorce

a mensa et thoro, and had at all times been acted upon. Then, when the Act was passed, upon the very adultery which had been admitted, but in respect of which he had not, by virtue of the deed, surrendered any of his rights at all, the husband prayed for, and obtained, dissolution of the marriage. Then the wife sought to enforce the deed. The husband said, in effect : "That is all changed, because at that time there A
was no such thing as divorce for adultery. I have now got a divorce against you under the new law in 1857, and that avoided the deed." The court said that it did nothing of the sort and WILLES, J., said, at p. 693 :

It is now sought, by virtue of an Act of Parliament passed five years after the date of the deed, and by the grantor's own act, to which the grantee is not a consenting party, to deprive her of the benefit of the covenant. To hold that the Divorce Act can have the effect contended for by the defendant, would be giving it an *ex post facto* operation of the worst sort. B

Although the analogy between the two cases is not complete, I do not think that I can do better than to adopt the words of WILLES, J., words which dispose of Lord Reading's contention that the passing of the Act of 1937 obliterates the compromise and the order of this court of Jan. 23, 1929. In my opinion, the proper order in this case is that, having regard to the terms of Jan. 23, 1929, the old petition should now be formally dismissed, and this petition must be struck out. C D

Solicitors : *Theodore Goddard & Co.* (for the petitioner) ; *Evans, Barraclough & Co.* (for the respondent).

[Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.]

WILENSKO SLASKI TOWARZYSTWO DREWNO v.
FENWICK & CO. (WEST HARTLEPOOL), LTD.

[KING'S BENCH DIVISION (Lewis, J.), June 22, 23, July 1, 1938.]

A *Sale of Goods—Rejection—Restrictions on rejection—Variation from specification greater than that permitted by contract—Restriction on rejection of “the goods herein named nor any part of them.”*

B In a c.i.f. contract for the sale of 1,500 standards of pit-props of stated lengths and top sizes, with liberty to ship up to 10 per cent. more or less than the quantity specified, with “about 1,000 standards 4/10 ft. lengths, fair proportion of lengths, of which the 4/6 ft. to be 4/5½ ins. tops with maximum 10 per cent. 2½/3½ ins. tops, the 6½/10 ft. to be 2½/5½ ins. tops of which about 50 per cent. 2½/3½ ins. tops, 5 per cent. 2 ins. tops to be allowed. Fair proportion of tops within each stipulated range and over remainders. Inches in tops not to exceed feet in length.” The contract provided that, upon any dispute, the buyer should “not reject the goods herein named nor any part of them,” but such dispute, if not otherwise arranged, should be referred to arbitration. The timber was shipped in two ships, and separate shipping documents (bills of lading, invoice and policy) were tendered in respect of each consignment. In the case of the first consignment, the documents were first rejected because the specification did not comply with the contract. The specification was thereupon amended and the documents re-tendered, but, upon unloading both consignments, the out-turn specifications showed that there were substantially more than 10 per cent. of 2½/3½ ins. tops in the 4/6 ft. lengths. The umpire found as a fact that, after amendment as above stated, the shipping documents were in order, but that both consignments were in fact substantially different from the goods described in the contract, whether the consignments were considered separately or together. It was contended that, as the quantity of the goods not in compliance with the contract was under 1 per cent. of the whole, the maxim *de minimis non curat lex* should be applied, and that the clause restricting the right of rejection had purposely been altered from its usual form, and operated to bar rejection in this case:—

F HELD: (i) although the number of goods not in compliance with the contract description was relatively small, it was sufficient to entitle the buyers to refuse to take up the documents, especially in view of the fact that the umpire had found that both consignments were substantially different from the goods described in the contract, whether the consignments were considered separately or together.

G (ii) the change in the wording of the rejection clause from “not reject the goods herein specified” to “not reject the goods herein named nor any part of them” had not the effect of preventing the buyer from rejecting the goods, since the goods delivered were not the goods specified.

H [EDITORIAL NOTE. It will be noted, upon the first point in this case, that, although the proportion of the goods not in accordance with the specification was relatively small, the contract itself fixed a definite limit of variation. Upon the second point, it was sought to show that the wording of the rejection clause had been altered in reliance upon a *dictum* of ROMER, L.J., in *Green v. Arcos, Ltd.* (4), but it was held that the alteration in the words had no effect upon the operation of the rejection clause.

AS TO REJECTION, see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, pp. 230, 231, paras. 400-404; and FOR CASES, see DIGEST, Vol. 39, pp. 586-590, Nos. 1876-1910.]

Cases referred to :

- (1) *Shipton, Anderson & Co. v. Weil Brothers & Co.*, [1912] 1 K.B. 574 ; 39 Digest 564, 1703 ; 81 L.J.K.B. 910 ; 106 L.T. 372.
- (2) *Tamvaco v. Lucas* (1862), 3 B. & S. 89 ; 39 Digest 577, 1808 ; 31 L.J.Q.B. 296 ; 6 L.T. 697.
- (3) *Montague L. Meyer, Ltd. v. Osakeyhtio Carelia Timber Co., Ltd.* (1930), 36 Com. Cas. 17 ; Digest Supp. A
- (4) *Green v. Arcos, Ltd.* (1931), 30 Ll.L.R. 229 ; Digest Supp.
- (5) *Montague L. Meyer, Ltd. v. Kivisto* (1929), 142 L.T. 480 ; Digest Supp.
- (6) *Vigers Brothers v. Sanderson Brothers*, [1901] 1 K.B. 608 ; 39 Digest 466, 919 ; 70 L.J.K.B. 383 ; 84 L.T. 464.
- (7) *Millar's Karri & Jarrah Co. (1902) v. Weddel, Turner & Co.* (1908), 100 L.T. 128 ; 39 Digest 572, 1769. B
- (8) *Biddell Brothers v. Clemens (E.) Horst Co.*, [1911] 1 K.B. 934 ; *reversd.*, [1912] A.C. 18 ; 39 Digest 575, 1801 ; 81 L.J.K.B. 42 ; 105 L.T. 563.
- (9) *Maple Flock Co., Ltd. v. Universal Furniture Products (Wembley), Ltd.*, [1934] 1 K.B. 148 ; Digest Supp. ; 103 L.J.K.B. 513 ; 150 L.T. 69. C
- (10) *Montague L. Meyer, Ltd. v. Travaru A/B H. Cornelius, of Gamleby* (1930), 46 T.L.R. 553 ; Digest Supp.
- (11) *Gabriel, Wade & English, Ltd. v. Arcos, Ltd.* (1929), 73 Sol.Jo. 483 ; Digest Supp.
- (12) *Finlay (James) & Co. v. N. V. Kwik Hoo Tong H.M.*, [1929] 1 K.B. 400 ; Digest Supp. ; 98 L.J.K.B. 251 ; 140 L.T. 389. D

SPECIAL CASE stated by an umpire in an arbitration arising out of a contract for the sale of timber. The points at issue were whether the goods were within the specification in the contract and whether the right to reject them, if they were not within that specification, was barred by the restrictions on rejection which were included as a term of the contract. The facts and the terms of the contract and award fully appear in the judgment. E

L. B. Schapiro, for the claimants, referred to *Biddell Brothers v. Clemens (E.) Horst Co.* (8), *Maple Flock Co., Ltd. v. Universal Furniture Products (Wembley), Ltd.* (9), *Montague L. Meyer, Ltd. v. Travaru A/B H. Cornelius, of Gamleby* (10), *Green v. Arcos, Ltd.* (4), *Montague L. Meyer, Ltd. v. Osakeyhtio Carelia Timber Co., Ltd.* (3) and *Millar's Karri & Jarrah Co. (1902) v. Weddel, Turner & Co.* (7). F

The following extract from the judgment of ROMER, L.J., in *Green v. Arcos, Ltd.* (4) at p. 232 was relied on : G

In the present case, after applying the rule *de minimis non curat lex*, or bearing it in mind, it is impossible to say that the goods tendered are the goods specified. I do not think it would be possible to give effect to Mr. van den Berg's contention unless we introduce some words into the clause which are not there. It would be right if the clause were : "The buyer shall not reject the goods herein specified or any portion thereof." But I see no justification for introducing those words, H and I accordingly agree that the appeal must be dismissed.

J. V. Naisby, for the respondents, referred to *Shipton, Anderson & Co. v. Weil Brothers & Co.* (1), *Gabriel, Wade & English, Ltd. v. Arcos, Ltd.* (11), *Finlay (James) & Co. v. N. V. Kwik Hoo Tong H.M.* (12), *Green v. Arcos, Ltd.* (4) and *Tamvaco v. Lucas* (2).

LEWIS, J. : In this case, by a contract dated Aug. 12, 1937, Messrs. Fenwick & Co. (West Hartlepool), Ltd., bought from Messrs. Wilensko Slaski Towarzystwo Drewno a cargo of certain wood goods :

Red and/or white wood to be of good, sound, merchantable quality well-barked and as usually shipped at port of loading.

- A The terms of the contract were as follow. The shipment was to be made in Jan., 1938, and the price was to be 150s. per Gothenburg scale standard, c.i.f. West Hartlepool in a full and complete cargo. The buyers were to : pay freight as per charterparty and bills of lading and balance by cash (but subject to cl. 12) less $2\frac{1}{2}$ per cent. discount on f.o.b. amount payable upon presentation and in exchange for shipping documents, including approved insurance policy on English
- B Lloyds terms, excluding 3 per cent. franchise to cover both maritime and mine risks for gross amount of invoice less freight (unless prepaid) plus 10 per cent. imaginary profit. Deck load to be separately valued and insured against jettison and washing overboard. In case of lump sum freight a *pro rata* clause of payment of the freight to be provided for against goods washed overboard or jettisoned.

Clause 12, which appears on the back of the contract, reads as follows :

- C Sellers to draw on Hessler & Co., Ltd., for 90 per cent. of the invoice amount of the cargo, any balance pro or con to be settled immediately upon receipt of and in accordance with measurement certificate.

Those words are typewritten on the back of the contract. Then the printed document goes on :

- D In case of complaint as regards quality, notice thereof to be given to seller without loss of time, and such portion of the goods, alleged to be defective, to be laid aside for inspection by seller on final discharge. No complaint in respect of quality and condition to be recognised unless notified within 7 clear days of ship's final discharge at port of destination.

Then :

- E Any margin to be in sellers' option and, failing a margin being stipulated, sellers to have the liberty to ship up to 10 per cent. more or less than the quantity specified. About 1,000 standards 4/10 ft. lengths, fair proportion of lengths, of which the 4/6 ft. to be $4/5\frac{1}{2}$ ins. tops with maximum 10 per cent. $2\frac{1}{2}/3\frac{1}{2}$ ins. tops, the $6\frac{1}{2}/10$ ft. to be $2\frac{1}{2}/5\frac{1}{2}$ ins. tops of which about 50 per cent. $2\frac{1}{2}/3\frac{1}{2}$ ins. tops, 5 per cent. 2 ins. tops to be allowed. Fair proportion of tops within each stipulated range and over remainders. Inches in tops not to exceed feet in length.

- F Then at the bottom there is cl. 10 :

Should any dispute or claim arise out of this contract the buyers shall not reject the goods herein named nor any part of them, nor refuse acceptance or payment for same in terms of contract, but such dispute or claim if it cannot be otherwise arranged, shall be referred to the decision of a third party in Great Britain to be jointly agreed upon . . .

- G A dispute arose with regard to the wood goods, and the matter went to arbitration and was arbitrated upon by Mr. Charles Wemyss Muir, the umpire, who was appointed by two arbitrators who had been appointed in accordance with the contract. The umpire made his award in the form of a special case, which states :

- H 1. After hearing oral evidence and considering the documents laid before me my findings are as follows : (a) By the said contract . . . the claimants sold to the respondents a quantity of about 1,000 standards of pit-props (according to a specification set out in cl. 6 of the said contract) of sound and merchantable quality as usually shipped at the port of loading (in this case Danzig) c.i.f. West Hartlepool . . . Clauses 4 and 12 of the contract provide for certain payments against shipping documents. The figure of 90 per cent. in cl. 12 was by agreement reduced to 80 per cent. (b) By correspondence passing between the parties it was agreed that the

contract goods might be shipped in two ships together with other goods (which are not the subject of these arbitration proceedings) and in fact the goods shipped by the claimants in respect of this contract were shipped in the steamships Ulea and Onto and separate shipping documents were tendered in respect of each consignment. (c) On Jan. 11, 1938, shipping documents in respect of the Ulea consignment were tendered on behalf of the claimants to the respondents. The shipping documents included (in addition to an invoice) a specification of the lengths and top sizes shipped. The specification was by reference incorporated in the invoice. The Ulea arrived at West Hartlepool at 5 a.m. on Jan. 12, 1938. The respondents, after making such an examination of the consignment as was practicable before unloading, by letter dated Jan. 12, 1938, rejected the documents on the ground that the specification did not comply with the contract terms. The Ulea's cargo was discharged under lien on to the quay and there piled and measured. (d) The specification of the lengths and top sizes shipped in the Ulea showed certain lengths and sizes shipped which were not within the contract description. These props amounted to about 4 standards out of a consignment of about 466 standards. The respondents further objected to the Ulea specification on the ground that it did not include a "fair proportion" of lengths and top sizes within the stipulated ranges as required by cl. 6 of the contract. After examination the respondents also objected to the consignment on the ground that the props were unevenly cut and an excessively large number were cut through knots giving a "bell top." (e) The claimants after rejection of the documents amended the specification by deleting the 4 standards of props outside the contract description, amended the invoice price and re-tendered the documents on or about Jan. 17, 1938. The Ulea documents as amended were rejected by the respondents. Great emphasis was laid by the claimants at the hearing before me upon the fact that the market price of pit-props had fallen substantially between the date of the contract and the date of shipment. I find that there had been a substantial fall in price, but in my view such circumstance is irrelevant to the rights of the parties under the contract. (f) The shipping documents in relation to the Onto consignment were tendered on behalf of the claimants to the respondents on Jan. 17, 1938. The shipping documents were in similar form to those in respect of the Ulea consignment, but the specification contained no lengths or sizes outside the contract description. The respondents retained the Onto's documents without making any payment until after the Onto had arrived at West Hartlepool on or about Jan. 19, 1938, and then after making an inspection similar to that carried out in the case of the Ulea rejected the Onto documents. The Onto consignment was discharged under lien on to the quay and piled and measured. (g) The out-turn specifications of the Ulea and Onto consignments as made by the measurers at West Hartlepool were substantially different from those attached to the shipping documents, in particular there was substantially more than 10 per cent. of $2\frac{1}{2}/3\frac{1}{2}$ ins. tops in the $4/6$ ft. lengths although by cl. 6 of the contract a maximum of 10 per cent. was stipulated. In so far as it is relevant to the present dispute I find on the evidence before me that both consignments were sound and merchantable and of the average quality of Polish pit-props shipped from Danzig. (h) In so far as they are questions of fact I also find (1) that the Ulea's shipping documents as originally tendered indicated a consignment of goods substantially different from that required by the contract, (2) that the Ulea's documents as re-tendered were on the face of them in order, (3) that the Onto's documents were on the face of them in order, and (4) that both the Ulea and Onto consignments were in fact substantially different from the goods described in the contract, whether the consignments are considered separately or together. 2. The question for the decision of the court is whether in the case of one or both of the said consignments the respondents ought to have taken up the shipping documents and made payments in accordance with the terms of payment in the contract. By cl. 10 of the contract it is provided (*inter alia*): "Should any dispute or claim arise out of this contract the buyers shall not reject the goods herein named nor any part of them, nor refuse acceptance or payment for same in terms of contract." 3. Subject to the opinion of the court I award and declare that the respondents were entitled to reject the Ulea's shipping documents as not being in accordance with the contract and that as the contract was a single indivisible contract the rejection of the first consignment under the contract absolved the respondents from taking up the second consignment even though the documents in regard to the second consignment were in order.

Then in para. 4 of his award the umpire deals with the question of costs. Then in para. 5 he says:

Alternatively if in the opinion of the court the respondents were legally bound to take up the documents in respect of the Ulea and Onto consignments or of one

of them I hereby declare and award that the respondents shall pay to the claimants the price of the said consignments or of one of them in accordance with the terms of payment in the said contract and shall bear the cost of discharge, piling and measurement of the said consignments or of one of them at West Hartlepool and I further award and direct that the respondents shall pay the above-mentioned costs of the arbitrators and of this my award and that the respondents shall pay the reasonable costs of the claimants in respect of this arbitration (to be taxed if not agreed between the parties).

A

Counsel for the sellers has argued in the main two points. He said first of all that the umpire was wrong in holding that the buyers were entitled to refuse to take up the documents, and secondly that the buyers were not entitled to reject the cargoes, or either of them.

B

This was a c.i.f. contract. Under such a contract, as is well known, the seller is bound within the specified time to ship to the destination named goods in accordance with the contract, and to tender to the buyer the shipping documents—namely, bills of lading, policy of insurance, and invoice. These documents must be complete and regular, and, on their

C

presentation, it is the duty of the buyer to pay for the goods, whether or not the goods have arrived, or whether or not they are then in existence. The contract is a contract for the sale of goods, to be performed by the delivery of documents. Those documents, however, must be proper documents, and from the invoice—and, in cases where there is a specifica-

D

tion attached to the invoice, from the specification—the buyer must be able to see that the goods named in the invoice and/or specification are the goods which he has contracted to buy, and which have been shipped. In the present case, the shipping documents tendered by the sellers to the buyers in respect of the Ulea cargo showed a shipment of 466 standards

E

of timber, of which 4 standards consisted of lengths and sizes not within the contract description. In my opinion, these shipping documents so tendered were not in order, and were not proper documents. It is said by Mr. Schapiro that the proportion of goods appearing in the invoice and specifications which did not conform to the contract description—

F

amounting to something under 1 per cent. of the cargo—was so small that the doctrine of *de minimis non curat lex* should be invoked. I cannot accede to that argument. It seems to me that the shipping documents showed on the face of them goods of the contract description mixed with goods of a different description, and that, relatively small though the

G

number of the goods of the different description was, it is sufficient to entitle the buyers to refuse to take up the documents. I was referred to *Shipton, Anderson & Co. v. Weil Brothers & Co.* (1), where buyers rejected a cargo of wheat because 55 lbs. over and above the contract quantity of 4,950 tons was tendered, the excess being of the contract description.

H

LUSH, J., held that the quantity was so trifling as to be negligible, but, at p. 577, he explained the fact that the sellers had not asked the buyers to pay for the 55 lbs. excess, the price of which would have been 4s. As I read the case, it would seem that that fact influenced the judge to find as he did—namely, that the buyers were not entitled to reject. I was also referred to *Tamvaco v. Lucas* (2). I am, therefore, of the opinion that

the buyers were entitled to refuse to take up the documents of the Ulea cargo. The fact that they put forward further reasons for their refusal, which the umpire has found were not well-founded, does not, in my view, affect the matter.

When the amended documents of the Ulea cargo and the documents of the Onto were presented, there had been an opportunity of examining the cargo on both ships, and, as the umpire has found, both cargoes were substantially different from the goods described in the contract. The umpire has not set out in the award, nor has he attached to the award as part of it, the actual figures, and it was suggested in argument that without them it was impossible for me to say that the amount of the goods not of the contract description was so great as to render the cargo a cargo not in accordance with the contract. However, the use in the award of the words "substantially" and "substantial," in particular in para. 1 (*h*) of the award, indicates to me that the umpire had this matter in mind, and that the quantity of goods not in accordance with the contract was not a mere negligible quantity on which it might be unreasonable for the buyer to claim to reject the goods : see *per* GREER, L.J., in *Montague L. Meyer, Ltd. v. Osakeyhtio Carelia Timber Co., Ltd.* (3), at p. 25. I think that it is impossible to say that a "substantial" difference is a difference so slight as to compel a buyer to take goods which he has not contracted to buy. Clause 6 of the contract fixed a maximum of 10 per cent. for excess delivery over the contract quantity, and the umpire has found in para. 1 (*g*) of his award that the cargoes of both the Ulea and the Onto were substantially different from the shipping documents, "in particular" in that substantially more than 10 per cent. of certain sized tops in the 4/6 ft. lengths were shipped. Mr. Schapiro, however, has contended before me that, even if the umpire is right on these points, he is wrong in holding that the buyers were entitled to reject by reason of cl. 10 of the contract. It is pointed out that that clause does not contain the language usual in this sort of clause, in that the words are, "the buyers shall not reject the goods herein named nor any part of them," whereas the usual language of the clause, which almost invariably appears in these contracts, is : "Buyers shall not reject the goods herein specified"—*Green v. Arcos, Ltd.* (4), *Montague L. Meyer, Ltd. v. Kivisto* (5)—or "buyers shall not reject any of the goods"—*Vigers Brothers. v. Sanderson Brothers* (6). Such a clause is to deal with cases where the right to reject could be alleged as a right in law belonging to the purchaser. The clause was not necessary to deal with breaches of warranty : see *per* GREER, L.J., in *Montague L. Meyer, Ltd. v. Kivisto* (5). The object and interpretation of such a clause was dealt with in 1901 by BIGHAM, J., in *Vigers Brothers v. Sanderson Brothers* (6), and all the authorities lay down that the benefit of that clause cannot be invoked by a seller where the goods he has delivered are not the goods specified, in that they are not the goods which the buyer bought. It is said, however, that the wording of the clause has been altered, and altered

advisedly, so as to get rid of the effect of these decisions, and reliance is placed upon the *dictum* of ROMER, L.J., as he then was, in *Green v. Arcos, Ltd.* (4), at p. 232. I have listened to an attractive argument by Mr. Schapiro, but I am not altogether satisfied that the words of ROMER, L.J., mean what Mr. Schapiro contends they mean. However, assuming

A that they do, I am not disposed to follow an expression of opinion which was not necessary for the decision of that case, and which would have the effect of entirely revolutionising the law and practice established for so many years and familiar to commercial men dealing with these contracts.

B I think, therefore, that the opinion of the court is in favour of para. 3 of the award, with the result set out in para. 4 of the award. Some discussion arose as to whether this was an instalment contract or a single indivisible contract. Assuming, however, that the umpire was wrong in his finding that it was a single indivisible contract, it seems to me that

C the breach on the part of the sellers was such as to entitle the buyers to treat it as a repudiation of the whole contract. The buyers were, to use the language of BIGHAM, J., in *Millar's Karri & Jarrah Co. (1902) v. Weddel, Turner & Co.* (7), entitled to draw the inference that the seller "cannot or will not deliver any other kind of goods in the future,"

D and in fact the goods delivered in the cargo of the *Onto* were not of the contract description, but, like the cargo of the *Ulea*, were "substantially different from the goods described in the contract": see para. 1 (h) (4) of the award. I think, therefore, that the buyers are entitled to succeed, that the award (paras. 3 and 4) must be upheld, and that the buyers are

E entitled to the costs of this argument.

Judgment for the respondents with costs.

Solicitors: *Sinclair, Roche & Temperley*, agents for *Temperley, Tilly & Hayward*, West Hartlepool (for the claimants); *Middleton, Lewis & Clarke*, agents for *Middleton & Co.*, West Hartlepool (for the respondents)

F [Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

Considered. *Re GAPE'S WILL* SIFTON v. SIFTON. *Dictum of LORD ROMER, at p. 445, applied. Re BOUVERIE (dec'd.). [1952]*
TRUSTS. [1952] 1 All E.R. 827. 1 All E.R. 408.

G [PRIVY COUNCIL (Lord Thankerton, Lord Romer and Sir Lancelot Glynne)] **19 May 20, 23, June 24, 1938.**

Distinguished. Re GAPE'S WILL
TRUSTS. [1952] 2 All E.R. 579.
Privy Council—Canada—Ontario—Will—Direction by the testator that payments be made to his daughter "only so long as she shall continue to reside in Canada"—Impossibility of determining what future conduct would fall within the terms of the will—Condition subsequent—Void for uncertainty.

H The testator, who died in 1928, left him surviving his widow and his daughter and only child, the appellant, then aged 13 years. By his will, made in 1926, he gave his real and personal property to his executors upon trust to pay to or for the appellant a sum sufficient in their judgment to maintain her suitably until she became 40 years of age, when the whole income of the estate should be paid to her annually. The will then proceeded as follows: "The payments to my said daughter shall be

made only so long as she shall continue to reside in Canada." Since 1936, the appellant had maintained an apartment of her own in Montreal, which she had taken on lease and fully furnished, and, the appellant being desirous of leaving Canada for the purposes of study and travel for a period of 11 months during each of two or three years, the respondent executors applied to the Supreme Court of Ontario for the direction of the court on the question whether during her temporary absence from Canada she would still "continue to reside in Canada" within the meaning of those words as used in the will :— A

HELD : (i) having regard to the presumption in favour of early vesting, the condition was a condition subsequent.

(ii) as the precise events upon which the appellant's interest would determine could not be defined so that she could know at all times whether she was committing a breach of the provision, the condition was too vague and uncertain to be enforced. B

[EDITORIAL NOTE. In the case of a condition subsequent, the effect of the condition, if it is to have any validity at all, must be seen, and be capable of definition, at the time the interest vests in possession. The court, or the trustees of the will, must be able to say precisely and distinctly upon the happening of what events the clause will cease to operate, and the beneficiary must be in a position to know wherefore he or she is committing a breach of the provision. As this could not be done in the case of so wide a provision as that contained in the present will, the clause was void for uncertainty. C

AS TO UNCERTAINTY, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 536, 537, para. 1059; and FOR CASES, see DIGEST, Vol. 44, pp. 440-444, Nos. 2667-2687.] D

Cases referred to :

- (1) *Clavering v. Ellison* (1859), 7 H.L.Cas. 707; 44 Digest 440, 2667; 29 L.J.Ch. 761; affg. (1857), 8 De G.M. & G. 662; affg. (1856), 3 Drew. 451.
- (2) *Fillingham v. Bromley* (1823), Turn. & R. 530; 44 Digest 442, 2675.
- (3) *Re Sandbrook, Noel v. Sandbrook*, [1912] 2 Ch. 471; 44 Digest 444, 2686; 81 L.J.Ch. 800; 107 L.T. 148. E
- (4) *Re Exmouth (Viscount), Exmouth (Viscount) v. Praed* (1883), 23 Ch.D. 158; 44 Digest 441, 2668; 52 L.J.Ch. 420; 48 L.T. 422.
- (5) *Re Lanyon, Lanyon v. Lanyon*, [1927] 2 Ch. 264; 44 Digest 456, 2782; 96 L.J.Ch. 487; 137 L.T. 806.
- (6) *Walcot v. Botfield* (1854), Kay, 534; 44 Digest 468, 2880; 23 L.T.O.S. 127.
- (7) *Dunne v. Dunne* (1855), 7 De G.M. & G. 207; 44 Digest 442, 2676; 25 L.T.O.S. 60. F
- (8) *Wynne v. Fletcher* (1857), 24 Beav. 430; 44 Digest 442, 2677.
- (9) *Re Moir, Warner v. Moir* (1884), 25 Ch.D. 605; 44 Digest 468, 2881; 53 L.J.Ch. 474; 50 L.T. 10.
- (10) *Re Wilkinson, Page v. Public Trustee*, [1926] Ch. 842; 44 Digest 442, 2678; 95 L.J.Ch. 528; 135 L.T. 736. G
- (11) *Re Ross* (1904), 7 O.L.R. 493; 44 Digest 442, case q.
- (12) *Re Reich, Public Trustee v. Guthrie* (1924), 40 T.L.R. 398.
- (13) *Re Borwick, Borwick v. Borwick*, [1933] Ch. 657; Digest Supp.; 102 L.J.Ch. 199; 149 L.T. 116.
- (14) *Re Tegg, Public Trustee v. Bryant*, [1936] 2 All E.R. 878; Digest Supp.
- (15) *Re Boulter, Capital & Counties Bank v. Boulter*, [1922] 1 Ch. 75; 44 Digest 459, 2804; 91 L.J.Ch. 250; 126 L.T. 653. H
- (16) *Levene v. Inland Revenue Comrs.*, [1928] A.C. 217; Digest Supp.; 97 L.J.K.B. 377; 139 L.T. 1; 13 Tax Cas. 486.
- (17) *Re Talbot-Ponsonby's Estate, Talbot-Ponsonby v. Talbot-Ponsonby*, [1937] 4 All E.R. 309; Digest Supp.
- (18) *Wemyss v. Wemyss's Trustees*, [1921] S.C. 30; 44 Digest 443, case b.

(19) *Re Wright, Mott v. Issott*, [1907] 1 Ch. 231; 44 Digest 468, 2883; 76 L.J.Ch. 89; 95 L.T. 697.

(20) *Balfour's Trustees v. Johnston*, [1936] S.C. 137.

(21) *Auld v. Pinney* (1910), 54 Sol. Jo. 399.

APPEAL from a judgment of the Court of Appeal for Ontario
A (ROWELL, C.J.O., LATCHFORD, C.J.A., FISHER, J.A., and KINGSTONE, J.,
HENDERSON, J.A. dissenting), dated June 17, 1937, varying an order of
MIDDLETON, J.A., dated Feb. 18, 1937, upon a motion raising certain
questions of construction of the will of Clifford Winfield Burrows Sifton.
The facts of the case are set out in the judgment of their Lordships
B delivered by LORD ROMER.

Cyril Radcliffe, K.C., and *Grant Gordon* for the appellant.

G. P. Slade for the respondent the Official Guardian.

Hon. Charles Russell for the respondents the executors and trustees
of the will.

C *Radcliffe, K.C.*: This is a condition subsequent, and is void for un-
certainty. The condition, if it is to operate as a valid defeasance of the
appellant's interests under her father's will, must be such that the court
can see from the date when the will comes into operation precisely and
distinctly what is the event the happening of which is to effect the
D defeasance. Such an event cannot be precisely or distinctly foreseen,
nor have the judges in the courts below been able to agree with any cer-
tainty what it is to be. The appellant, at the date of the will, was a child
of 13 years of age. The words cannot mean that she is to continue to
keep up any particular residence in Canada. They must have the vaguer
E sense of to continue to maintain some sort of a home in Canada. On a
proper view, the condition is void. [Counsel referred to *Clavering v.*
Ellison (1), *Fillingham v. Bromley* (2), *Walcot v. Botfield* (6), *Dunne v.*
Dunne (7), *Wynne v. Fletcher* (8), *Re Moir, Warner v. Moir* (9), *Re*
Wilkinson, Page v. Public Trustee (10), *Re Ross* (11), *Re Sandbrook,*
F *Noel v. Sandbrook* (3), *Re Exmouth (Viscount), Exmouth (Viscount) v.*
Præd (4), *Re Reich* (12), *Re Lanyon, Lanyon v. Lanyon* (5), *Re Borwick,*
Borwick v. Borwick (13), *Re Tegg, Public Trustee v. Bryant* (14) and *Re*
Boulter, Capital & Counties Bank v. Boulter (15).]

Slade: The grandchildren of the late Sir Clifford Sifton (of whom there
G are some living) and any unborn issue, whom the Official Guardian
represents, are interested in any income to which the appellant may
become disentitled by any breach of the condition. This is not a con-
dition subsequent. It is either a condition precedent or a provision which
is a term of the gift and upon which the gift is dependent. Until the
H appellant attains 40 years of age, there is nothing in the nature of a vested
gift. It is not a vested interest, but merely a direction for a series of
periodical payments, which are to be made to her until a certain event
happens—i.e., until she does not continue to reside in Canada. *Re*
Wilkinson, Page v. Public Trustee (10) is a very close analogy to the
present case. There is no difficulty in giving effect to this condition if

one construes the words "reside in Canada" as being equivalent to "ordinarily reside," a term often met with in income tax cases, as in *Levene v. Inland Revenue Comrs.* (16), where the words "to reside" are dealt with. The principle in *Clavering v. Ellison* (1) has no application here, and, even if it is applied, the condition can still be held to be valid by construing it so as to make her ordinary place of abode within the Dominion of Canada. [Counsel referred to *Re Lanyon, Lanyon v. Lanyon* (5), *Re Talbot-Ponsonby's Estate, Talbot-Ponsonby v. Talbot-Ponsonby* (17), *Fillingham v. Bromley* (2), *Walcot v. Botfield* (6), *Dunne v. Dunne* (7), *Wynne v. Fletcher* (8), *Wemyss v. Wemyss's Trustees* (18), *Re Wright, Mott v. Issott* (19), *Re Boulter, Capital & Counties Bank v. Boulter* (15).] A B

Russell : The executors are anxious to carry out the trusts of the will, and to do so in accordance with any order the court may make, and, if the condition as to residence is valid, desire such directions as will, so far as possible, make it plain in what circumstances related to the presence in or absence from Canada of the appellant they may properly make payments to her out of the testator's estate. [Counsel referred to *Wemyss v. Wemyss's Trustees* (18), *Balfour's Trustees v. Johnston* (20) and *Auld v. Pinney* (21).] C

Radcliffe, K.C., in reply. D

LORD ROMER : This is an appeal from a judgment of the Court of Appeal for the province of Ontario, which varied a judgment of MIDDLETON, J.A., given upon an application by way of originating motion brought by the respondents, Clifford Sifton and Wilfred Victor Sifton, the surviving trustees of the will of Clifford Winfield Burrows Sifton, deceased. By the motion the trustees sought the opinion, advice and direction of the court on certain questions arising in the administration of that testator's estate. The testator died on June 13, 1928, leaving him surviving his widow, the respondent Mabel Cable Sifton, and his daughter and only child, the appellant, who was then of the age of 13 years. The will (dated July 12, 1926), after bequeathing the testator's furniture and effects to the appellant, continued as follows : E F

I give devise and bequeath all other property real and personal to my executors upon the following trusts namely to manage the corpus of the estate in accordance with their best judgment continuing any investments that exist at the time of my death if they see fit and to pay to or for my said daughter a sum sufficient in their judgment to maintain her suitably until she is 40 years of age after which the whole income of the estate shall be paid to her annually. G

The will then proceeded as follows :

The payments to my said daughter shall be made only so long as she shall continue to reside in Canada. H

The principal question arising upon this appeal is whether this last-mentioned direction is not void for uncertainty. No light is thrown upon this question by the remainder of the will, which merely provided that, if the appellant should die leaving issue, her children should receive the

whole estate in equal shares on attainment respectively by each child of the age of 25 years, but that, if the appellant should die leaving no issue, the corpus of the estate should be divided equally between the then living grandchildren of the testator's father Sir Clifford Sifton by the testator's mother the late Lady Elizabeth Sifton. The will contained no express direction as to what was to happen to the income of the estate during the rest of the appellant's life after she should have ceased to "reside in Canada."

The testator is stated in the evidence to have been "domiciled" in England during the years 1915 to 1925, but to have returned to Canada in the last-mentioned year with his daughter, and to have taken up his residence (presumably with her) at Assiniboine Lodge in the county of Leeds, Ontario, where he continued to reside, except for temporary absences on business or pleasure, until his death in 1928. After the death of her father, the appellant appears to have remained in Canada continuously until Oct., 1934, during the latter part of which period she was taking a course in modern languages at the University of Toronto. This course provided an option to take the third year thereof by travelling abroad, and the appellant accordingly spent the period between Oct., 1934, and Sept., 1935, in European countries, travelling and studying for the purpose of completing her education. Thereafter she returned to Canada, where she has remained down to the present time. Since June, 1936, she has maintained in the city of Montreal an apartment of her own, which she has taken on lease and fully furnished. In Feb., 1937, however, she was desirous of going abroad again for the purposes of study and travel, but very naturally was anxious to know to what extent she could gratify that desire without any risk of it being held that she did not "continue to reside in Canada" within the meaning of the will. It was in these circumstances that the respondent trustees issued their originating motion for the determination by the court of certain specific questions. The first five of these questions illustrate so well the difficulties that arise in trying to ascertain the meaning of the words "continue to reside in Canada" that it is worth while setting them out in full. They were as follow :

(a) In the event of Elizabeth Arminella Burrows Sifton maintaining a residence in Canada but temporarily going abroad (out of Canada) for the purpose of travelling and/or studying for a period not exceeding 11 months and returning to Canada thereafter, would the said Elizabeth Arminella Burrows Sifton during her temporary absence from Canada "continue to reside in Canada" within the meaning of the words "continue to reside in Canada" as used in said will?

(b) If the answer to question (a) be in the affirmative, could Elizabeth Arminella Burrows Sifton after a lapse of not less than one month again go abroad under similar circumstances and similarly "continue to reside in Canada"?

(c) In the event that Elizabeth Arminella Burrows Sifton so temporarily goes abroad for a period of 11 months should constitute a failure on her part to so "continue to reside in Canada" may Elizabeth Arminella Burrows Sifton absent herself from Canada for any period under any circumstances and still so "continue to reside in Canada" and, if so, for what periods and under what circumstances may she so absent herself?

(d) Is the purpose for which Elizabeth Arminella Burrows Sifton absents herself from Canada material to the question of whether or not she so "continues to reside in Canada"?

(e) If the answer to question (d) be in the affirmative: I. Is any temporary purpose sufficient? II. If the answer to (e) I. be in the negative, what purposes would be sufficient? III. If intention be material, would the written statement of Elizabeth Arminella Burrows Sifton of her intention delivered to the executors of said estate sufficiently evidence said intention?

The motion in due course came on for hearing before MIDDLETON, J.A., the appellant being the only respondent to the motion. The only question argued before him was as to the meaning of the words "continue to reside in Canada." The point that such words were void for uncertainty was not raised on that occasion.

On Feb. 18, 1937, the judge delivered judgment. In the course of it, after referring to the contention, at that time being advanced by the appellant, that the will required her only to maintain a residence in Canada, and that so long as she maintained such a residence she was at liberty to spend as much of her time outside Canada as she thought fit, he continued as follows:

After very careful consideration, I am of opinion that the testator contemplated a far more restricted meaning to this clause of his will than the daughter apparently thinks. I agree with her that a merely temporary absence from Canada for the purpose of education or travel will not bring about a forfeiture. The absence during 1934 and 1935 was for such a temporary purpose, and I think worked no forfeiture, but it is impossible to say that an absence during each of the following years for 11 months in the year will not bring a forfeiture. That would, I think, work a forfeiture unless the executors are satisfied that any particular trip or extended period of residence abroad is in good faith for the purpose of completing her education. It is impossible for the court to define with any accuracy what future conduct will fall within the terms of the will.

Later he added these words:

The questions as propounded in the notice of motion do not admit of categorical answers.

In the judgment as drawn up, however, an attempt was made to give the executors somewhat more specific directions. It was, so far as material, in these terms:

1. This court doth declare that the true intent, meaning and construction of the clause, "The payments to my said daughter shall be made only so long as she shall continue to reside in Canada" used in the said last will and testament is (a) that the words "to reside in Canada" are equivalent to "spend substantially all of her time in Canada," but that mere temporary absences from Canada in certain circumstances would not bring about a forfeiture of the interest of the said daughter in the estate; (b) that any and all absences of the said daughter from Canada not exceeding 2 calendar months in the aggregate on one or more occasions during any one calendar year, or not exceeding 2 calendar months on one continuous occasion and one additional calendar month on one or more additional occasions in one calendar year, be in all events incapable of constituting a failure to continue to reside in Canada. . . . (c) that the absence of the said daughter from Canada abroad between Oct., 1934, and Sept., 1935, does not work a forfeiture of such interest; (d) that an absence from Canada for a period of 11 months during the next two or three years will work a forfeiture of such interest unless the executors . . . are satisfied it is in good faith for the purpose of completing the education of the said daughter. . . . 2. And this court doth further order and adjudge that the questions propounded in the notice of motion do not now admit of categorical answers but the parties may apply to this court from time to time as circumstances arise, for the advice, opinion, and direction of the court on the matters in question.

Their Lordships realise to the full the difficulty of construing the words in question, but, with all respect to MIDDLETON, J.A., they cannot feel

- that his solution of the difficulty is a satisfactory one. It merely introduces further difficulties of construction. What, for instance, is the meaning to be attributed to the words "substantially," "temporary" and "certain circumstances" in subpara. (a) of the declaration? Subpara. (b) was no doubt added for the purpose of indicating what the judge meant to indicate by the word "temporary," and that subparagraph and those lettered (c) and (d) may be regarded as intended to throw some light upon the expression "certain circumstances." However, the indication contained in subpara. (b) that absences from Canada for 3 calendar months in the aggregate on one or more occasions during any one calendar year are not or may not be permissible when no one absence is a continuous one for 2 calendar months, yet are permissible if one of such absences is a continuous one for 2 calendar months, only adds to the difficulty of construing the word "temporary." Subpara. (b) moreover covers absences for the periods therein mentioned in all circumstances and for any purpose, whereas subparas. (c) and (d) are dealing with absences for the purpose of completing the appellant's education. However, when (if ever) a person's education can be said to be completed is not an easy matter to determine. It is further to be observed that the judgment as drawn up in no way refers to any obligation upon the appellant to maintain a residence in Canada, though in giving his decision the judge had said :

The word "residence" is an elastic word ; it takes colour from the context in which it is used. Here it means an actual permanent residence, a home. It will not cease to be a residence by reason of mere temporary absence.

- Whether or not he considered the maintenance of a house or other place of residence to be obligatory is therefore left in some doubt.

The judge had plainly stated that it was impossible to define with any accuracy what future conduct would fall within the terms of the will, and, although the judgment was a meritorious attempt to assist the parties,

- it abundantly confirmed the truth of that statement.

- On Mar. 5, 1937, the appellant issued a notice of appeal from the judgment of MIDDLETON, J.A., to the Supreme Court of Ontario, inviting that court to disagree with the construction placed by the judge upon the words in question. On Apr. 8, 1937, however, having presumably by that time come to the conclusion that the judge was right in his view as to the impossibility of defining the words with any accuracy, the appellant gave notice of her intention of submitting, upon the hearing of the appeal, that the clause containing the words was a condition subsequent, and, as such, was void for uncertainty. She had, in other words, determined to avail herself if possible of the principle enunciated by LORD CRANWORTH in *Clavering v. Ellison* (1). In that case, a testator devised his real estate to the children of his son for what were held to be vested equitable estates in tail liable to be divested on breach of a condition subsequent. The condition was in these terms (at p. 709) :

Provided farther, and I do hereby declare that the devises herein before con-

tained to the children of my said son, are made upon this express condition, that the children of my said son be educated in England and in the Protestant religion according to the rites of the Church of England, and in case any one or more of such children shall be educated abroad, or not in the Protestant religion according to the rites of the Church of England, then I do hereby revoke all and every devise to such child or children so educated as aforesaid. . . .

Questions having arisen whether there had been a breach of this condition subsequent in the case of some of the son's children, the matter ultimately came before the House of Lords. It was held by LORD CAMPBELL, L.C., that the condition had not in fact been broken. LORD CRANWORTH agreed with LORD CAMPBELL, L.C., that there had been no breach of the condition as to the children being educated in the Protestant religion, but he did not find it necessary to come to any definite conclusion upon the question whether the children had in fact been educated abroad, as he held the condition to be void for uncertainty. He said, at pp. 725, 726 :

... I consider that, from the earliest times, one of the cardinal rules on the subject has been this : that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.

In my opinion, if there was no direct authority for it, I should still have arrived at the same conclusion ; but I have looked at the authorities, especially that of LORD ELDON in the case of *Fillingham v. Bromley* (2). I think that looking at the language here used, it is far too indefinite and uncertain to enable the court to say what it was that the testator meant should be the event on which the estate was to determine.

Then, after giving instances in which it would be difficult to say whether a child had or had not been educated abroad, he added, at p. 726 :

But the question is, not whether in the particular case he was educated abroad, but whether you can predicate on reading the will, what it was that was to defeat the vested estate ? I concur in LORD ELDON's observations about an estate being defeated by a person not living and residing in a particular house, which he thought too remote ; and I think that this is far more remote than that.

Much to the same effect has been said in later cases, of which it will be sufficient to mention three. In *Re Sandbrook*, *Noel v. Sandbrook* (3), PARKER, J., stated the principle in these words, at p. 477 :

... conditions subsequent, in order to defeat vested estates, or cause a forfeiture, must be such that from the moment of their creation the court can say with reasonable certainty in what events the forfeiture will occur.

In *Re Exmouth (Viscount)*, *Exmouth (Viscount) v. Praed* (4), FRY, J., used the following language, at p. 164 :

... the condition must be clear and certain. That, in my opinion, includes, not only certainty of expression in the creation of the limitation, but also certainty in its operation. It must be such a limitation that, at any given moment of time, it is ascertainable whether the limitation has or has not taken effect.

These words of FRY, J., were considered by RUSSELL, J., in *Re Lanyon*, *H. Lanyon v. Lanyon* (5). He said, at p. 269 :

They do not, I think, mean that the person affected must be in a position at all times to know whether he is committing a breach of a provision the nature of which is clearly expressed.

Their Lordships respectfully agree. If the provision be clearly expressed,

it is the fault or the misfortune of the person affected if he should fail to know whether he is committing a breach of it. This is implied, however, in the language used by FRY, J. He said that it must be "ascertainable" whether the provision has taken effect or not, not that it must be ascertained in fact by the person affected, or even that it must be ascertainable

A by him without difficulty.

In the particular case with which RUSSELL, J., was dealing, the condition was that a person should not marry a relation by blood. The judge held the condition to be void, as tending to the prohibition of marriage altogether. He declined, however, to hold it void for uncertainty, inasmuch as he considered the meaning of blood relationship to be clear enough. If the words included the whole of the human race, the person affected by the condition would know that any and every marriage would cause a forfeiture, and the condition, though bad on other grounds, would not be void for uncertainty. If, however, they did not include the whole human race—and presumably they could not have been intended to do so—the testator had failed to specify the number of generations in which no common ancestor of the spouses was to be found, and, in their Lordships' opinion, and with all respect to the judge, the condition might on that ground have been held to be void for uncertainty. Had any particular number of generations been specified, the fact that it might be difficult to ascertain whether or not there was a common ancestor in such generations would not, their Lordships respectfully agree, have rendered the condition void, for whether there was such a common ancestor or not would necessarily be ascertainable if the search were sufficiently diligent.

In the present case, the appellant raised the contention before the Court of Appeal that it is impossible to tell with any certainty what she may do in the matter of absence from Canada without incurring the risk of losing her income under her father's will, and that the provision for cessation of payment of that income is a condition subsequent, which, in accordance with the principle laid down in the case to which reference has been made, is void for uncertainty.

In view of this contention on her behalf, the Official Guardian had on Apr. 21, 1937, been appointed to represent the grandchildren of the late Sir Clifford Sifton mentioned in the will, and also any unborn infants. It had also been ordered that the widow of the testator might be represented at the hearing of the appeal. She did not, however, avail herself of this order, nor was she represented at the hearing before their Lordships. The appeal came on for hearing on June 17, 1937, before ROWELL, C.J.O., LATCHFORD, C.J.A., FISHER and HENDERSON, JJ.A., and KINGSTONE, J. In the result, it was dismissed (HENDERSON, J.A., dissenting), though the court varied the judgment of MIDDLETON, J.A., in manner indicated later. ROWELL, C.J.O., was of opinion that there is nothing uncertain or ambiguous about the words "to reside in Canada." The words "to reside," he said, have a clear and definite meaning. They mean to live

in a place. He agreed, however, that a person residing in Canada does not cease to reside or to live in Canada because he goes abroad occasionally for business or pleasure. An unmarried woman, he said, having no actual residence of her own in Canada, and having no profession or occupation to which she is devoting her life in Canada, may be said to be residing wherever she is living for the time being. If such a person, **A** he said, left Canada, save for a limited period for a purely temporary purpose, a court might conclude that she had ceased to reside in Canada. He did not, however, say what would be a "limited" period, or what would be a "purely temporary" purpose. He added, indeed, that whether or not the appellant had at any time ceased to reside in Canada **B** would be a question of fact which would have to be determined in view of all the circumstances. LATCHFORD, C.J.A., said that he agreed in substance with ROWELL, C.J.O., but he, too, refrained from indicating with any precision what were the obligations imposed upon the appellant by the condition in question. He did not think that the court could at **C** present be properly called upon to decide how long, or for what period, Miss Sifton might absent herself from Canada without infringing the restriction imposed upon her as to residing in Canada. If that question should arise at any time, the executors, he said, must apply their judgment to it, whatever the consequences. FISHER, J.A. (according to the **D** report of his judgment supplied to their Lordships), said that what the word reside meant, and what the testator meant it to mean, was that his daughter must live in Canada and make Canada her permanent place of abode. The word "permanent," however, would appear to be a clerical error in the report for "principal," for he agreed with the other members **E** of the court that absence from Canada would be permissible for definite and particular purposes, and for definite periods of time, but he, too, refrained from indicating with precision either the purposes or the periods that would be permissible. It is, he said, always a question of fact for the executors to determine before making payments of income, to **F** satisfy themselves that the daughter has up to that time resided and continued to reside in Canada. KINGSTONE, J., said that, on the argument, he was of opinion that the words "as long as she shall continue to reside in Canada" were so indefinite and uncertain as to be incapable of being properly and satisfactorily determined, but that on further **G** reflection he thought that the words "to reside in Canada" must be held to mean what they say: "to live in a place"—namely, Canada. He added, however, that it might well be that, when certain events (which he did not specify) happened, there would be difficulty in saying whether or not they fell within the proviso in the will, but that that was not a **H** matter with which the court was then concerned, or on which it should attempt to express itself. HENDERSON, J.A., dissented. He was of opinion that the clause in question was a condition subsequent and was void for uncertainty on the principle enunciated in *Clavering v. Ellison* (1).

By the order of the Court of Appeal as drawn up, the judgment of MIDDLETON, J.A., was varied, and, as varied, was ordered to be as follows :

A 1. This court doth declare (1) that the clause or condition, "The payments to my said daughter shall be made only so long as she shall continue to reside in Canada," used in the said last will and testament, is not void for uncertainty ; (2) that the true intent, meaning and construction of the said clause or condition is that the words "to reside in Canada" are equivalent to "to live in Canada" ; (3) that leaving Canada for a limited period and for a purely temporary purpose with the intention of returning to Canada and actually returning when the temporary purpose is accomplished, would not be a breach of the condition ; (4) that the absence of the said daughter from Canada abroad between Oct., 1934, and Sept., 1935, pursuing her studies as part of her University course, does not work a forfeiture of such interest ; and doth order and adjudge the same accordingly.

B 2. And this court doth further order and adjudge that the questions propounded in the notice of motion do not now admit of categorical answers but the parties may apply to this court from time to time, as circumstances arise, for the advice, opinion and direction of the court on the matters in question.

C With the greatest respect to the majority of the Court of Appeal, their Lordships are unable to agree with their decision. If the clause in question be in truth a condition subsequent—a point with which their Lordships will deal later on—it can be of no validity unless, to use the words of LORD CRANWORTH, the court—and, their Lordships venture to add, the parties concerned—can see from the beginning precisely and distinctly D upon the happening of what events it is that the payments to the appellant are to cease. In their Lordships' opinion, it is impossible to define these events precisely or distinctly. HENDERSON, J.A., said that a cogent argument for this conclusion was furnished by the statement of MIDDLETON, J.A., in the court below, that it was impossible for the court E to determine with any accuracy what future conduct would fall within the terms of the will. Their Lordships agree. They also venture to think, however, that equally cogent arguments are to be found in the reasons of the majority of the Court of Appeal and in the formal judgment of that court. None of those judges defined, or attempted to define, precisely F or distinctly the events that would constitute a ceasing on the part of the appellant to reside in Canada. Had they attempted to do so, they must, in their Lordships' judgment, have failed, because they would have been attempting the impossible.

G Their Lordships' attention was called during the arguments to numerous authorities in which the court has been called upon to consider the meaning of the words "reside" and "residence" and the like. These authorities, however, give their Lordships no assistance in construing the present will. The meaning of such words obviously depends upon the context in which the words are used. A condition, for instance, attached H to the devise of a house that the devisee should reside in the house for at least 6 weeks in a year can present no difficulty. In some contexts, the word "reside" may clearly denote what is sometimes called "being in residence" at a particular house. In other contexts, it may mean merely maintaining a house in a fit state for residence. It is plain, however, that in the present case the word "reside" means something different

from either being in residence or merely maintaining a residence. No one can suppose that the testator intended either that his daughter should never leave Canada, or that, so long as she maintained a residence in Canada, she might spend the whole of her time abroad. He must have intended that, though Canada was to be her home in general, yet she was to be at liberty to leave Canada for some purposes and for some periods of time. Unfortunately, he omitted to define either the purposes or the periods. The result is that the majority of the Court of Appeal have found themselves unable to give any more precise direction than that the appellant may leave Canada for a limited period and for a purely temporary purpose, without being able to define either the word "limited" or the word "temporary." It necessarily followed that they, in common with MIDDLETON, J.A., were of opinion that the questions propounded in the trustees' notice of motion do not at present admit of categorical answers. Their Lordships are of the same opinion. However, if the appellant's interest under the will is to be forfeited upon her "ceasing to reside in Canada," she has a right to have those questions categorically answered, and, inasmuch as they cannot be so answered, the words, if constituting a condition subsequent, are void for uncertainty. A B C

It only remains to consider whether the words in question are a condition subsequent. As to this, their Lordships feel no doubt. HENDERSON, J.A., was of opinion that the words constituted a condition subsequent, and in this, as in other respects, their Lordships agree both with his conclusions and with the reasons he gave for them. Where it is doubtful whether a condition be precedent or subsequent, the court *prima facie* treats it as being subsequent, for there is a presumption in favour of early vesting. It was said, on behalf of the Official Guardian, that, even without the condition, the appellant took no vested interest in the income of the testator's estate accruing between his death and the time she attains the age of 40 years. However this may be, the appellant, apart from the condition, would plainly take a vested life interest in the estate as from that time. The condition must therefore be treated as a condition subsequent, so as not to interfere with the vesting of that interest. It was further contended on behalf of the Official Guardian that the words in question merely limit the duration of the trust for payment, and are not in the nature of a condition at all. The trusts for payment to the appellant are quite distinct, however, from the words with which their Lordships are concerned, which are in a separate clause. These words do not, in their opinion, qualify the trusts for payment. They are merely designed to abrogate the trusts in a certain event. In substance, no doubt, there is not much difference between a trust to pay until the happening of a certain event and a trust to pay that is abrogated on the happening of that event, but the legal effect in the two cases of the event being described with insufficient certainty are widely different. In the first case, the trust will fail altogether. In the second case, the trust will remain, and it will be the clause of abrogation that will fail. For these D E F G H

reasons, their Lordships are of opinion, and will humbly advise His Majesty, that this appeal should be allowed, that the judgment of MIDDLETON, J.A., as varied by the Court of Appeal, should be set aside, except in so far as it dealt with the costs of the hearing of the motion and of the appeal, and that a declaration should be made that the clause in the will of the testator directing that the payments to the appellant should be made only so long as she continues to reside in Canada is void for uncertainty. The costs of all parties represented on this appeal, those of the respondent trustees and the Official Guardian as between solicitor and client, should be paid out of the estate of the testator.

B *Appeal allowed with costs.*

Solicitors : *Lee & Pembertons* (for the appellant) ; *Charles Russell & Co.* (for the respondents the surviving executors and trustees of the will) ; *Blake & Redden* (for the respondent the Official Guardian)

C *[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]*

SMITH v. MACGOWAN.

[CHANCERY DIVISION (Luxmoore, J.), June 15, 1938.]

D *Contract—Memorandum or note—Purchase of three lots at auction—No authority to combine purchases—Memorandum of one contract—Law of Property Act, 1925 (c. 20), s. 40.*

E The defendant's solicitors, acting upon the defendant's instructions, bid for and purchased three separate lots of freehold property at an auction. No separate memorandum in respect of each lot was made, but there was one memorandum duly signed by such agents of the defendant whereby the defendant agreed to purchase the three lots at the price of £775. The agents had no authority to combine the three purchases into one. In an action for specific performance of an agreement to purchase the three lots for £775 :—

F **HELD :** as the facts showed three separate agreements to purchase the three separate lots and no authority to combine these separate agreements into one indivisible agreement, the memorandum was not a proper memorandum of any of the contracts shown to have been entered into, and therefore did not satisfy the statute.

G **[EDITORIAL NOTE.]** The memorandum, in order to satisfy the statute, must be a memorandum of a contract actually made. In the present case, there having been no amalgamation of the three separate contracts made by the acceptance of the bid at the auction, the memorandum should have been one of the three separate contracts which are the only contracts shown to have been made.

AS TO MEMORANDUM TO SATISFY THE STATUTE, see HALSBURY, Hailsham Edn., Vol. 7, pp. 112-115, paras. 160-162 ; and FOR CASES, see DIGEST, Vol. 12, pp. 129-136, Nos. 857-915.]

H Cases referred to :

- (1) *Bell v. Balls*, [1897] 1 Ch. 663 ; 3 Digest 9, 63 ; 66 L.J.Ch. 397 ; 76 L.T. 254.
- (2) *Chaney v. Maclow*, [1929] 1 Ch. 461 ; Digest Supp. ; 98 L.J.Ch. 345 ; 140 L.T. 312.
- (3) *Emmerson v. Heelis* (1809), 2 Taunt. 38 ; 3 Digest 8, 57.

ACTION for specific performance of an alleged agreement, dated Sept. 24, 1937, and made between the plaintiff and the defendant, whereby the defendant agreed to purchase from the plaintiff at the price of £775 (a) a freehold dwelling-house, (b) another dwelling-house, and (c) 4 cottages and certain shop premises.

Sir Herbert Cunliffe, K.C., and *J. V. Nesbitt* for the plaintiff. A

H. B. Vaisey, K.C., and *E. M. Winterbotham* for the defendant.

Cunliffe, K.C.: The authority to bid is one to put oneself in the position of the purchaser, and, therefore, having bid, to sign the contract. [Counsel referred to *Bell v. Balls* (1), *Chaney v. Maclow* (2) and *Emmerson v. Heelis* (3).] B

Vaisey, K.C.: There is no proper memorandum of any one of these three separate sales, nor any memorandum sufficient to satisfy the Law of Property Act, 1925, s. 40. The authority was to make three separate bids for three separate lots. Here there is a document which is merely an agreement to buy all three lots for £775, and therefore the purchaser C cannot get specific performance of any one lot.

LUXMOORE, J.: It is, I think, essential to look at the pleadings and see how the plaintiff states that the contract has been made. In para. 1 of the statement of claim, he states that on Sept. 23, 1937, there was a sale by auction of certain freehold properties, which included, among other things, three separate lots—Lot 1, Lot 2 and Lot 3. Then in para. 2 it is stated that: D

The defendant authorised his solicitors, Messrs. Slaney & Swann, to bid for and purchase on the defendant's behalf all the aforesaid properties at or under the following prices, viz. . . . E

Then there is a separate price for each of the three lots. Then in para. 3 he states that at the auction the solicitors bid for each of the lots—that is, for each of them separately—and that each of those lots was knocked down to them, and they became the purchasers thereof at three separate and distinct prices. Pausing, there, it is quite plain that there were three separate contracts, one in respect of each of the lots. Directly the bid was made for Lot 1, at £250, that was a separate agreement, and it had nothing to do with the purchase of the second lot. In the same way, when the bid was made for Lot 2, and that bid was accepted F by the auctioneer, there was a separate contract to buy Lot 2. In the same way, there was a separate contract to buy Lot 3. G

What happened was not that a separate memorandum was made of each of those contracts, but that on the next day, as is stated in para. 4 of the statement of claim, there was an agreement in writing made between the plaintiff of the one part—that is, the vendor—and the defendant by his said agents of the other part, and duly signed by such agents, whereby the defendant agreed to purchase from the plaintiff the aforesaid lots at the price of £775. H

Looking at the form of the agreement, it is a form of agreement between

- the vendor and the purchaser whereby it is agreed that the vendor shall sell and the purchaser shall purchase Lots 1, 2 and 3 described in the above particulars at the price of £775, independent of any valuation money, subject to certain special conditions which are therein mentioned, and the purchase price of £775 is stated. That is not a memorandum of
- A the actual contract which was entered into. There was not one undivided contract for the purchase of the three properties as an undivided whole for £775, and, as Mr. Swann, through his counsel, quite frankly admits, he is not in a position to say that, as agent, assuming that he had authority to sign a contract in respect of each of the separate lots, he
- B had any such authority to combine those three separate agreements into one indivisible agreement for the whole of the properties.

- That being so, I think that it is plain that there is no memorandum of any of the contracts which are relied upon by the plaintiff, or which the plaintiff desires to enforce, which would satisfy the statute. The only
- C agreement, indeed, of which specific performance is asked is not three separate agreements but one indivisible agreement, which was not in fact the agreement entered into at the auction at all. In those circumstances, I think that it is quite plain that, whatever other questions might arise in the action, the action must fail, and specific performance
- D could not be granted.

Action dismissed with costs.

Solicitors : *Garrard, Wolfe, Gaze & Clarke*, agents for *Slaney & Swann*, Newcastle-under-Lyme (for the plaintiff) ; *Waterhouse & Co.*, agents for *Sherratt, Nelson & Mason*, Kids Grove (for the defendant).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

Re SHARPE'S DEED OF RELEASE, SHARPE v. FOX.

- F [CHANCERY DIVISION (Morton, J.), June 29, 30, 1938.]

Settlements—Settled land—Land subject to equitable interests and then held on trust for sale—Legal estate vested in the persons who are the trustees for sale but not as such trustees—Compound settlement—Deeds forming compound settlement—Trustees of compound settlement—Settled Land Act, 1925 (c. 18), s. 1 (1) (v), (7)—Law of Property (Amendment) Act, 1926 (c. 11), Sched.

- G By a settlement of 1818, the legal estate in fee simple of the H. estate was vested in a trustee upon trust (so far as any of the trusts remained subsisting) for the payment of £1,000 per annum for 1,000 years “by and out of the residue which shall from time to time remain of the moneys to be received by way of fines or premiums on the demising granting or letting or to arise from the rents and profits of the said hereditaments and premises.” By a marriage settlement of 1830, the
- H trustee was to stand seised of the H. estate for a term of 500 years from the date thereof in trust “by and out of the moneys to be received for fines or premiums on the demising granting or letting or to arise from the rents and profits of the said hereditaments and premises or by other means that may be deemed expedient” to pay £400 per annum to trustees. Under the will of W. H. S. S. senr., who died on Apr. 2, 1868, the H.

estate, subject to the above annuities of £1,000 and £400 per annum, passed to J. W. S., subject (so far as the trusts were still subsisting) to a further annuity of £100 per annum given to a daughter of the testator. J. W. S. died on Aug. 10, 1917, and by his will gave all his estate to trustees upon trust for sale, certain annuities being payable out of the proceeds of sale, which, subject to those payments, were to be held for W. H. S. S. junr., absolutely. At the time of the hearing, the trustees of the will of W. H. S. S. senr., were the same persons as the trustees of the will of J. W. S. :—

HELD : (i) the terms of the marriage settlement of 1830 did not create a legal rentcharge, but a purely equitable interest.

(ii) the trustees as the trustees of W. H. S. S. senr., held the legal estate in the land, subject to the annual payments of £1,000 and £400. As trustees of J. W. S., they held only the beneficial interest of J. W. S. given to him by the will of W. H. S. S. senr., upon trust for sale. The land, therefore, was not subject to a trust for sale within the Settled Land Act, 1925, s. 1 (7), and was settled land.

(iii) the land was now settled land held under a compound settlement consisting of (a) the settlement of 1818, (b) the marriage settlement of 1830, (c) the will of W. H. S. S. senr., and (d) the will of J. W. S.

(iv) there was under the compound settlement no tenant for life, nor a person having the powers of a tenant for life, and therefore the trustees, as statutory owners, had the powers of a tenant for life.

(v) there were no trustees, for the purposes of the Settled Land Act, of the compound settlement, and, upon an application being made and properly supported by an affidavit of fitness, the trustees would be appointed as such.

[EDITORIAL NOTE.] This case decides a point which at one time during the hearing of *Re Norton* (3) appeared to arise for decision in that case, but that case was ultimately decided upon a side issue, since the trustees were not in the position required by the Settled Land Act, 1925, s. 7 (5) to call for the legal estate. In *Re Norton* (3), as in this case, the interests having priority to the trust for sale were purely equitable ones. The position here differs from that in *Re Norton* (3) in that here the prior interests were equitable in their origin, whereas in *Re Norton* (3) the prior interest had originally been a legal interest but had become equitable upon the execution of the vesting deed. The position where the prior interests are legal ones had been determined in *Re Parker* (1), the land being held to be settled land, and it had there been suggested that the opposite conclusion would be reached where the prior interests were equitable. This latter view (the point here falling for express decision) is rejected. In *Re Norton* (3), the legal estate was vested in special personal representatives, but not in the trustees, who were the trustees to exercise the trust for sale, so that the trustees would have to call for the legal estate under the Settled Land Act, 1925, s. 7 (5), as referred to above. In this case, it will be seen that, by the same persons being ultimately appointed trustees of the two wills, the land became vested in the trustees, who were the persons to exercise the trust for sale. Thus in the present case the question which has been litigated in this line of cases is carried two steps further, and it is now decided (i) that, if there are only equitable interests prior to the trust for sale, the land is settled land, and (ii) that, though the legal estate in the land may be vested in the trustees for sale, the land is still settled land unless it is so vested in them as such trustees for sale.

AS TO WHAT IS SETTLED LAND, see HALSBURY, Supp., Settlements, para. 1096; and FOR CASES, see DIGEST, Vol. 40, pp. 773, 774, Nos. 3046, 3047.]

Cases referred to :

- (1) *Re Parker's Settled Estates*, *Parker v. Parker*, [1928] Ch. 247; 40 Digest 774, 3047; 138 L.T. 360.

- (2) *Re Leigh's Settled Estates*, [1926] Ch. 852; 40 Digest 739, 2678; 95 L.J.Ch. 511; 136 L.T. 395.
 (3) *Re Norton, Pinney v. Beauchamp*, [1929] 1 Ch. 84; Digest Supp.; 98 L.J.Ch. 219; 140 L.T. 348.
 (4) *Re Astor, Astor v. Astor*, [1922] 1 Ch. 364; 40 Digest 733, 2632; *sub nom. Re Astor (Viscount)*, *Astor v. Adams*, 91 L.J.Ch. 277.

A

ADJOURNED SUMMONS for the determination of questions concerning the title to the Hoxton estate, the main issue being whether land subject to a trust for sale but also subject to prior equitable interests can be settled land.

B

G. P. Slade for the plaintiffs, the trustees.

J. M. Lightwood for the defendants Francis William Gullick and Edward William Taylor Jones.

H. Lloyd-Williams for the Royal Exchange Assurance.

Hon. B. L. Bathurst for the defendants Edith Ella Sharpe and Ellin

C

Mary Caryll Usborne.

MORTON, J.: The first question asked by the summons is:

Whether the land and premises known as the Hoxton estate comprised in or affected by the above-mentioned deeds and wills or some of them are settled land within the meaning of the Settled Land Act, 1925 (as amended by the Law of Property (Amendment) Act, 1926), under a compound settlement consisting of the above-mentioned deeds and wills or of some, and if so, which, of them.

D

The history of the Hoxton estate is as follows. On Mar. 10, 1818, a settlement was made between William Sharpe and Rebecca Sharpe of the first part, Elizabeth Sharpe of the second part, James Birch Sharpe of the third part, and Robert Davies of the fourth part. After recitals of the title to the property, it was witnessed as follows:

E

The said William Sharpe and Rebecca Sharpe his wife James Birch Sharpe and Elizabeth Sharpe by and with their mutual consent and approbation testified by their respectively being parties to and sealing and delivering these presents have and each and every of them hath granted bargained sold released appointed and confirmed and by these presents do and each and every of them doth grant bargain sell release appoint and confirm unto the said Robert Davies (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said William Sharpe and Rebecca Sharpe his wife James Birch Sharpe and Elizabeth Sharpe by an indenture bearing date the day next before the day of the date and executed before the execution of these presents for the term of one whole year to be computed from the day next before the day of the date of the said indenture of bargain and sale and by force of the statute made for transferring uses into possession) and

G

his heirs all that piece or parcel of land or ground. . . .

Then follows a description of the Hoxton estate. The habendum is in the following terms:

. . . to have and to hold the said piece or parcel of land or ground . . . unto the said Robert Davies and his heirs . . . to the use of the said James Birch Sharpe his heirs and assigns for ever nevertheless upon the trusts and to and for the intents and purposes hereinafter expressed or declared of and concerning the same.

H

Then follow certain portions of the deed which I need not read, but the portion which declares the trusts begins as follows:

. . . as to the estate of the said James Birch Sharpe his heirs and assigns for ever upon the trusts and to and for the intents and purposes hereinafter expressed or declared of and concerning the same (that is to say). . . .

Then follow certain trusts which have long since ceased, and the only subsisting trust is in the following terms :

. . . and upon this further trust that in case the decease of the survivor of them the said William Sharpe and Rebecca Sharpe his wife shall happen before the said Dec. 25, 1821, then that the said James Birch Sharpe his heirs and assigns shall from and after the said Dec. 25, 1821, or in case the decease of such survivor shall happen after the same Dec. 25, 1821, then that he and they do and shall from and after the decease of such survivor and thenceforth for the term of 1,000 years to be computed from the said Dec. 25, 1821, or the decease of such survivor which shall last happen by and out of the said residue which shall from time to time remain of the moneys to be received by way of fines or premiums on the demising granting or letting or to arise from the rents and profits of the said hereditaments and premises as aforesaid pay one annual sum of £1,000 of lawful money of Great Britain unto them the said James Birch Sharpe Robert Davies and William Ingle their executors administrators and assigns by quarterly payments . . . and it is hereby declared that the said James Birch Sharpe Robert Davies and William Ingle their executors administrators and assigns shall stand and be possessed of and interested in the said annual sum of £1,000 upon the trusts to and for the intents and purposes and with under and subject to the powers provisoes agreements and declarations expressed or declared and contained of and concerning the same for the benefit of the said Elizabeth Sharpe and her children or husband being her appointee in and by the said indenture bearing date the day next after the day of the date of these presents.

The indenture there referred to is a deed of Mar. 11, 1818, which I mention hereafter. I do not think that I need read any other portion of the settlement of Mar. 10, 1818. The result is that the legal estate in fee simple was vested in James Birch Sharpe upon trust for the payment of the sum of £1,000 per annum for the term of 1,000 years. Nobody has contended before me that this trust created anything other than an equitable interest.

The document next in date is the document of Mar. 11, 1818, which contains the trusts upon which the £1,000 per annum is to be held. The defendants Gullick and Jones are the present trustees of this document. I do not think that it is material for the purpose of this case to read that document, or to refer to the trusts thereof.

By a deed dated Mar. 2, 1830, made between James Birch Sharpe of the first part, Thomas Kelly of the second part, and the Rev. Anthony Plimley Kelly, the Rev. Walter Kelly and George Samuel Heales of the third part, James Birch Sharpe covenanted in the following terms :

In pursuance of the said agreement [an agreement in contemplation of marriage] and in consideration of the said intended marriage he the said James Birch Sharpe doth hereby for himself his heirs and assigns covenant promise and declare with and to the said Anthony Plimley Kelly Walter Kelly and George Samuel Heales their executors administrators and assigns that in case the said intended marriage shall take effect within 6 calendar months from the date hereof he the said James Birch Sharpe his heirs and assigns shall and will from and after the solemnisation thereof for during and unto the full end and term of 500 years to be computed from the day of the date of these presents stand seised of the piece or parcel of ground messuages buildings and other hereditaments hereinbefore described with the appurtenances . . . in trust by and out of the moneys to be received for fines or premiums on the demising granting or letting or to arise from the rents and profits of the said hereditaments and premises or by other means that may be deemed expedient to pay one annual sum of £400 of lawful money of Great Britain and Ireland unto them the said Anthony Plimley Kelly Walter Kelly and George Samuel Heales their executors administrators and assigns by equal quarterly payments [on the days specified].

The hereditaments and premises therein referred to are the Hoxton

estate. Then there follows a covenant by James Birch Sharpe in the following terms :

A James Birch Sharpe his heirs executors and administrators or some or one of them shall and will from and after the solemnisation thereof for during and unto the full end and term of 500 years to be computed from the day of the date of these presents well and truly pay or cause to be paid the said annual sum of £400 unto the said Anthony Plimley Kelly Walter Kelly and George Samuel Heales their executors administrators and assigns at the times and in manner hereinbefore mentioned for payment thereof without any deduction whatsoever.

I understand that there is no dispute that the intended marriage did take place within 6 calendar months from the date of the deed.

B It has been contended by Mr. Lloyd Williams that the effect of the passages in that deed which I have read was to create a legal rentcharge. I cannot accept that contention. The trusts upon which James Birch Sharpe covenants that he will stand seised of the Hoxton estate are :

C . . . by and out of the moneys to be received for fines or premiums . . . or to arise from the rents and profits of the said hereditaments and premises or by other means that may be deemed expedient to pay one annual sum of £400. . . .

D That seems to me to be an active trust for the payment of an annual sum. I have paid careful attention to the argument of Mr. Lloyd Williams that, under the Statute of Uses, a legal estate is vested in the persons to whom this sum of £400 per annum is payable, but I am unable to accede to this argument. It seems to me that this deed creates only an equitable interest in respect of the sum of £400 per annum. I may say that at the present time the Royal Exchange Assurance, one of the defendants to the summons, is entitled to receive this sum of £400 per annum.

E On Feb. 11, 1861, James Birch Sharpe made his will. He died on Apr. 28, 1863. Under his will, the Hoxton estate, subject to the annuities of £1,000 per annum and £400 per annum which I have mentioned, passed in fee to William Henry Sharpe Sharpe, the son of James Birch Sharpe and the grandfather of the plaintiff William Henry Sharpe Sharpe. F William Henry Sharpe Sharpe, to whom I shall refer as William Henry Sharpe Sharpe senior, made his will on Jan. 13, 1864, and died on Feb. 15, 1867. His will was proved on Apr. 2, 1868. By his will, after appointing David Lynch and Alexander John Ellis executors and trustees, he continued as follows :

G I devise and bequeath to the said David Lynch and Alexander John Ellis their heirs executors administrators and assigns respectively according to the nature and quality thereof all my real estate and all my personal estate whatsoever and wheresoever upon trust (subject to the payment of my debts and funeral and testamentary expenses) to pay the annual income thereof to my wife Hannah Ida Sharpe during her life if she shall so long continue my widow. . . .

H The widow of William Henry Sharpe Sharpe senior is dead. Then the will continues :

. . . and upon further trust after the death or marriage of my said wife out of the said annual income to pay or apply to or for the benefit of each of my children by my said wife other than and except my eldest and second son hereinafter named the annual sum of £100 during his or her life respectively and upon further trust after the death or marriage of my said wife to raise out of my said real and personal estate or some part thereof the principal sum of £4,000 for my second son Henry Birch Sharpe the same to be vested in him in point of interest at my death. . . .

Nothing turns upon the sum of £4,000. I understand that it was raised some time ago. Then there are certain provisions which I need not read, and the will continues :

... and subject and charged and without prejudice as aforesaid I direct my trustees to stand possessed of my said real and personal estate in trust for my eldest son James William Sharpe absolutely.

The position is that one of the children of William Henry Sharpe Sharpe senior, to whom an annuity of £100 per annum was given by the will, is still living. She is the defendant Edith Ella Sharpe. Thus, the subsisting trusts under the will of William Henry Sharpe Sharpe senior, are to pay an annuity of £100 to Edith Ella Sharpe, and, subject thereto, in trust for James William Sharpe absolutely. The plaintiffs are the present trustees of the will of William Henry Sharpe Sharpe senior, and the devolution of the trusteeship is set out in the affidavit of the plaintiff William Henry Sharpe Sharpe junior, filed on Mar. 18, 1929, in certain other proceedings, the last link in the chain of trusteeship being a deed of appointment dated Dec. 14, 1917, under which the plaintiff Arthur Wingrave Fox is appointed to be a trustee jointly of that will with the plaintiff William Henry Sharpe Sharpe junior. The Hoxton estate was duly assured and transferred so as to vest in the plaintiffs jointly upon the trusts of the will of William Henry Sharpe Sharpe senior.

As regards James William Sharpe, to whom the property was given absolutely under his father's will, subject to the annuity thereby given to his sister, the position is as follows. James William Sharpe made his will on Mar. 11, 1917, and died on Aug. 10, 1917. His will was proved on Feb. 14, 1918. By his will, after appointing his wife Catherine Sharpe and his son William Henry Sharpe Sharpe (the plaintiff) and the Public Trustee executors and trustees of his will, he devised and bequeathed :

all my real estate of every tenure and all my personal estate and effects whatsoever and wheresoever not hereby otherwise disposed of (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto and to the use of the said Catherine Edith Sharpe William Henry Sharpe Sharpe and the Public Trustee their heirs executors and administrators respectively according to the nature thereof [upon trust for sale].

By cl. 10 the trustees are directed to invest the proceeds of sale. They are to pay to the testator's daughter Ellin Mary Caryll, the wife of Commander Cecil Vivian Usborne, and the last defendant to the summons

... during her life for her sole and separate use without power of anticipation by equal quarterly instalments commencing with an apportioned payment on the quarter day immediately following my death such sum as will provide her with a fixed income of £400 per annum and the income tax she is liable to pay thereon.

Then followed in cl. 13 and 14 the following provisions :

... and subject to such annual charge in favour of my said daughter shall stand possessed of the said trust premises in trust to raise and pay thereout to my said daughter the sum of £3,000 at such time or times within the 10 years immediately following my death as they in their absolute discretion shall think fit. ...

Then there is a direction as to the sum bearing interest, but nothing

turns upon this, as the sum in question has been raised some time ago. Then cl. 14 is in the following terms :

. . . and subject to such annual charge and legacy in favour of my daughter shall stand possessed of the residue of the said trust premises in trust for my said son William Henry Sharpe Sharpe if he shall be living at my death absolutely.

A The position as I see it is that the legal estate in the Hoxton estate passed from W. H. Sharpe Sharpe senior to the trustees of his will. The trustees of his will had their duties to perform. They had to pay the annuity of £100 per annum to the defendant Edith Ella Sharpe. Subject to the payment of that annuity, they held the estate upon trust for the legal personal representatives of James William Sharpe, to whom the property
B was devised by the will of William Henry Sharpe Sharpe senior. It so happens that at the present time the plaintiffs are not only trustees of the will of William Henry Sharpe Sharpe senior but also trustees of the will of James William Sharpe. The devolution of the trusteeship of the latter will is set out in the affidavit to which I have referred. The last
C stage was that, on June 23, 1928, by a deed of appointment of that date, made between the plaintiff William Henry Sharpe Sharpe of the first part, the Public Trustee (who was then a trustee of the will of James William Sharpe) of the second part, Mrs. Osborne of the third part, and the plaintiff Arthur Wingrave Fox of the fourth part, Arthur Wingrave Fox
D was appointed to be a trustee of the will in the place of the Public Trustee and jointly with the plaintiff William Henry Sharpe Sharpe.

The question which I have to determine is one which has been brought before the court for the purpose of clearing the title to the Hoxton estate. The propositions which were put before me by Mr. Slade, on behalf of the
E plaintiffs, are briefly these. He says that the Hoxton estate is settled land under the Settled Land Act, 1925, and that the plaintiffs are trustees of the settlement for the purposes of that Act. He relies on the Settled Land Act, 1925, s. 1 (1) (v), which is in the following terms :

F (1) Any deed, will, agreement for a settlement or other agreement, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, after the commencement of this Act, stands for the time being . . . (v) charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rentcharge for the life of any person, or any less period, or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of
G any persons, with or without any term of years for securing or raising the same ; creates or is for the purposes of this Act a settlement and is in this Act referred to as a settlement, or as the settlement, as the case requires.

Mr. Slade submits that, under the documents to which I have referred, the Hoxton estate stands for the time being charged with the payment of certain annual sums for the benefit of certain persons, and is therefore the
H subject of a settlement, and, unless sect. 1 (7) (to which I shall now refer) applies, that argument would appear to be well-founded. Subsect. (7), which was introduced by the Law of Property (Amendment) Act, 1926, provides as follows :

This section does not apply to land held upon trust for sale,

I must therefore consider whether or not the Hoxton estate was held upon trust for sale within the meaning of sect. 1 (7). The meaning of the words "upon trust for sale" in this section was considered by ROMER, J., in *Re Parker's Settled Estates*, *Parker v. Parker*, (1). Before referring to that case, I ought to refer to the Settled Land Act, 1925, s. 117 (1) (*xxx*), which provides, *inter alia* :

In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say . . . (*xxx*) . . . "trust for sale" "trustees for sale" and "power to postpone a sale" have the same meanings as in the Law of Property Act, 1925.

The Law of Property Act, 1925, s. 205, provides as follows :

(1) In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say . . . (*xxix*) "Trust for sale," in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without a power at discretion to postpone the sale ; "trustees for sale" mean the persons (including a personal representative) holding land on trust for sale ; and "power to postpone a sale" means power to postpone in the exercise of a discretion.

In *Re Parker's Settled Estates*, *Parker v. Parker* (1), ROMER, J., said, at p. 257 :

Now "trust for sale" is defined as meaning, in relation to land, an immediate binding trust for sale whether or not exercisable at the request or with the consent of any person, and it was contended before me that the land is not held upon an immediate binding trust for sale within the meaning which it was said had been given to those words by TOMLIN, J., in *Re Leigh's Settled Estates* (2). In that case the learned judge came to the conclusion that where the subject-matter of a settlement is the whole unincumbered fee simple, "the land" is not "subject to an immediate binding trust for sale," so long as there is not a trust for sale which is capable of overriding all charges having, under the settlement, priority to the trust for sale.

At the time that this decision was given, the Law of Property (Amendment) Act, 1926, had not been passed, so that the judge was not dealing with the Settled Land Act, 1925, s. 1 (1). He was merely dealing with sect. 20 (1) (*viii*) of the Act. ROMER, J., continued, at p. 258 :

But I feel some little doubt as to whether the learned judge held that "the land" in the case before him was not subject to any trust for sale, inasmuch as the subject-matter of the trust was merely the fee simple subject to the incumbrance, or whether he held that no land can ever be subject to a binding trust for sale, unless the trustees have power to overreach prior equitable interests. If the latter be the real reason of his decision, I find myself, with the greatest respect, unable to follow it. For it means that there cannot be, within the meaning of the Settled Land Act, any trust for sale of land that is subject to equitable interests, unless the trustees have a legal estate and are either two or more individuals approved or appointed by the court, or the successors in office of such individuals or a trust corporation.

He then went on to give his reasons for the view he expressed, and said, at p. 261 :

There is therefore, in my opinion, a trust for sale in the present case affecting the legal estate in fee simple vested in the trustees of the 1924 deed. But is there a trust for sale that brings the present case within the exception to sect. 1 of the Settled Land Act introduced by the new subsect. (7) ? In my opinion there is not. It is, I think, reasonably clear that that subsection only applies where "the land" that would otherwise be the subject of a settlement under subsect. (1) is held upon trust for sale.

Then he refers again to the decision of TOMLIN, J., in *Re Leigh's Settled Estates* (2), and continues, at p. 262 :

... it would, I think, be proper and in accordance with the general spirit of the Acts to regard all cases in which the whole legal estate, that would otherwise be comprised in a settlement, is vested in trustees for sale, as coming within sect. 1 (7). But in the present case there is a legal estate in the term of 1,000 years which cannot be disposed of under the trust for sale, and which, upon the coming into force of the Law of Property Act, 1925, would seem to have vested in the trustees of the portions term by virtue of para. 3 of Part II of Sched. I of that Act. The whole legal estate which is the subject-matter of the settlement is not therefore subjected to a trust for sale, and in my opinion subsect. (7) has no application to the case.

B The decision in *Re Parker's Settled Estates*, *Parker v. Parker* (1) is not directly in point, because in that case there was a legal estate in a term of 1,000 years which could not be disposed of under the trust for sale. However, agreeing, as I do, with both the conclusions and the reasoning in that case, I derive assistance from certain observations of the judge, and in particular the words at p. 263 :

The whole legal estate which is the subject-matter of the settlement is not therefore subjected to a trust for sale. . . .

D He seems to have regarded that as being the test whether the Settled Land Act, 1925, s. 1 (7), applies. In *Re Norton*, *Pinney v. Beauchamp* (3), ROMER, J., again had to consider the meaning of the Settled Land Act, 1925, s. 1 (7), and I find that that case also assists me in coming to the conclusion at which I have arrived.

E The position in that case was that, upon the death of the second Lord Norton, who had been a life tenant of the land, a question arose as to the meaning of the words "trust for sale" in the Settled Land Act, 1925, s. 3. ROMER, J., said, at p. 88 :

F ... what I have to consider here is whether, on the death of Lord Norton, the legal estate in the whole subject-matter of the settlement, which undoubtedly had existed up to that date, was thereafter held upon trust for sale. Up to his death he had had the legal estate in fee simple, and that was the legal estate which was the subject of the settlement. On his death it vested in his personal representatives, his special representatives to whom probate had been granted, and was not vested in the trustees for sale [the trustees for sale under certain trusts which arose on Lord Norton's death].

Then the judge turns to sect. 7 (5) of the Act, and proceeds, at pp. 88, 89 :

G But the trustees for sale in this case have not become absolutely entitled to the settled land free from all charges taking effect under the settlement. There are certain equitable rentcharges which take effect in priority to the trust for sale. That being so, it appears to me that not only was the whole legal estate the subject-matter of the settlement not held upon trust for sale upon the death of the second Lord Norton, but that the trustees for sale as such had not, and have not now, a right to call for the legal estate. So far, I must, as it seems to me, come to the conclusion that on the death of the second Lord Norton the land did not cease to be settled land, but continued to be settled land and is still settled land.

H Again the judge applies the test, "Is the whole legal estate the subject of the settlement held upon trust for sale?" In the present case, it seems to me that the trustees of the will of William Henry Sharpe Sharpe senior hold the Hoxton estate upon trust (i) to pay the two annual sums payable

under the deeds of 1818 and 1830, and (ii) to pay Miss Sharpe's annuity under the will, and, subject thereto, on trust for the estate of James William Sharpe. It is true that the trustees of the will of William Henry Sharpe Sharpe senior happen also to be the trustees of the will of James William Sharpe. I do not think that by reason of that fact they hold the Hoxton estate on trust for sale within the meaning of the Settled Land Act, 1925, s. 1 (7). If the trustees of James William Sharpe's will had to-day been persons who were not also trustees of the will of William Henry Sharpe Sharpe senior, it would, I think, have been clear that the whole legal estate in the land was held by the latter trustees upon trusts which did not include a trust for sale, and that the former trustees held upon trust for sale only the beneficial interest in the land which was given to James William Sharpe by the will of William Henry Sharpe Sharpe senior. If this is so, the fact that the same persons are to-day trustees of both wills cannot, in my view, have the result that the whole legal estate in the land is held, at the present time, on trust for sale within the Settled Land Act, 1925, s. 1 (7).

In my view, the settlement under which the Hoxton estate is now settled land is a compound settlement, and the documents constituting the compound settlement are (i) the deed of Mar. 10, 1818, to which I have referred, (ii) the deed of Mar. 2, 1830, to which I have referred, (iii) the will of William Henry Sharpe Sharpe senior, and (iv) the will of James William Sharpe. Mr. Lightwood has invited me to add to these documents constituting the compound settlement a deed of Mar. 11, 1818, by which trusts are declared of the annuity of £1,000 per annum created by the document of Mar. 10, 1818. I cannot appreciate why a document which merely declares the trusts upon which an annuity is to be held can be said to be one of the instruments under which the Hoxton estate, "the land," "stands for the time being charged with the payment of certain annual sums." It seems to me that that document does not come within the words of the Settled Land Act, 1925, s. 1. I do not think that it is included in the documents constituting the compound settlement.

I now have to deal with Question 2 of the summons, which, as amended pursuant to the leave I have already given to add Mr. Arthur Wingrave Fox, the first defendant, as a plaintiff, will read as follows :

If the answer to Question 1 be in the affirmative whether the plaintiffs are trustees for the purposes of the Settled Land Act, 1925, and statutory owners under the compound settlement.

During the discussion of this question, Mr. Bathurst has submitted that the plaintiff William Henry Sharpe Sharpe is a person having the powers of a tenant for life under the Settled Land Act, 1925, s. 20 (1) (*viii*).

The position is, as appears in my judgment on Question 1, that the plaintiff William Henry Sharpe Sharpe, subject to the various annuities created by the various documents to which I have already referred, is, under the will of his father James William Sharpe, absolutely entitled to the proceeds of sale of the Hoxton estate. Mr. Bathurst has submitted

that he comes within this clause of the subsection to which I have referred :

A person entitled to the income of land under a trust or direction for payment thereof to him . . . until sale of the land.

A My own view is that a person in the position of the plaintiff William Henry Sharpe Sharpe does not come within that definition, but, even if I had inclined to the contrary view, I should have hesitated to accede to Mr. Bathurst's argument in view of the judgment of the Court of Appeal in *Re Astor, Astor v. Astor* (4), and in particular the judgment of WARRINGTON, L.J.

B Mr. Slade has submitted that the plaintiffs are trustees of the compound settlement by virtue of the Settled Land Act, 1925, s. 31. He suggests, as I understand his argument, that, if one regards the will of James William Sharpe by itself, there is a tenant for life or statutory owner under that document, and that the plaintiffs are trustees of that document for the purposes of the Act. He then goes on to argue that the concluding words of sect. 31 (1) apply to the present case. I am unable to appreciate why that is so. It may be that I have not fully appreciated the force of Mr. Slade's argument, but I cannot find that sect. 31 constitutes the plaintiffs trustees of the compound settlement.

D His Lordship then stated that the trustees of the will of William Henry Sharpe Sharpe senior, who were also the trustees of the will of James William Sharpe, should, subject to the production of an affidavit of fitness, be appointed the trustees of the compound settlement.

E Solicitors : *Frere, Cholmeley & Co.* (for the plaintiffs and for the defendants Edith Ella Sharpe and Ellin Mary Caryll Osborne) ; *Jutsum, Jones, Arthur & Light* (for the defendants Francis William Gullick and Edward William Taylor Jones) ; *George Brown, Son & Vardy* (for the Royal Exchange Assurance).

F [Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

Re SALISBURY-JONES, HAMMOND v. SALISBURY-JONES.

G [CHANCERY DIVISION (Simonds, J.), July 5, 6, 1938.]

Gifts—Between husband and wife—Advancement—Husband joining as surety in mortgage—Required by mortgagees to pay as surety—Proof in wife's estate.

H Upon a mortgage by the wife, the husband joined as surety, the two covenanting jointly and severally to pay the mortgage debt. The wife received the mortgage money from the mortgagees. Later the mortgagees during the lifetime of the wife called upon the husband as such surety to repay the mortgage moneys, which he did. After the death of the wife the husband sought to prove in her estate as a creditor for the sum so paid, when it was contended that he had no right to prove as a creditor since the payment was an advancement of the wife :—

HELD : the husband in paying the mortgagee was discharging a legal obligation under his guarantee, and, in such circumstances there could

be no question of making a gift and no presumption of an advancement. Upon payment he became entitled to all remedies of a surety who has paid the debt of the principal debtor, and, in the absence of any evidence of a release by him, he was entitled to prove in the estate as a creditor.

[EDITORIAL NOTE. Where the person in whose name a purchase or transfer is taken is the wife of the man paying the purchase money or making the transfer, there is a presumption that a gift is intended. An attempt is here made to extend this doctrine to the case where the husband pays as surety for his wife, it being shown that the wife in fact received the money in respect of which the husband became surety. This attempt has failed, the husband being held in such a case to be entitled to pursue all the legal remedies of a surety unless he has expressly released them.

AS TO PRESUMPTION OF ADVANCEMENT, see HALSBURY, Hailsham Edn., Vol. 15, pp. 716, 717, para. 1247; and FOR CASES, see DIGEST, Vol. 27, pp. 161-167, Nos. 1302-1360.]

ADJOURNED SUMMONS asking for the administration of the estate of the intestate and for all proper accounts, inquiries and directions. The matter came before the court on a claim by the husband to be reimbursed a sum he had paid as a surety for the benefit of the wife's estate. The facts are fully set out in the judgment.

C. D. Myles and *H. E. Francis* for the plaintiff, an administratrix of the estate of the intestate.

Hon. B. L. Bathurst for the first defendant, an administrator of the estate of the intestate who claimed to be beneficially interested in the estate.

The second defendant did not appear.

SIMONDS, J.: This case comes before me in a rather curious and, I think, somewhat irregular way. The proceedings are instituted in the matter of the estate of one Harriet Letitia Salisbury-Jones, who died on Aug. 16, 1936. The plaintiff, Ada Grace Hammond, is one of the two persons to whom letters of administration of her estate were granted on Nov. 5, 1936, she having died intestate. The respondents to the summons are, first, Frederick William Salisbury-Jones, the husband of the deceased, and the other of the persons to whom the grant was made, and, secondly, one Elizabeth Harriet Robson, who was one of the next of kin of the deceased.

The summons asks, in common form, for administration of the estate of the deceased, with all the necessary and proper accounts and inquiries, but, when the matter was opened before me, it appeared that the question which the parties wished to have primarily determined, as a prelude to the determination of the question whether there should be administration of the estate, was in regard to a claim made by the first defendant, the husband, against the estate of the deceased, and, with the view of saving expense, I assented to that question being determined in the first place.

The claim of the first defendant, the husband, arises in this way. The

- deceased was the owner of certain leasehold property of considerable value in and about Berkeley Square. That leasehold property consisted of No. 1, Jones Street, No. 2, Jones Street, Berkeley Square, No. 27, Berkeley Square, and certain coach-houses and stables. That was her property. On Dec. 3, 1930, she mortgaged that property to the Woolwich Equitable Building Society for the sum of £12,000. Her husband, the first defendant, joined in the mortgage. He is described as a surety, and he joins in the mortgage for the purpose of guaranteeing the repayment of the principal debt and interest. The mortgage recites that the deceased, there called the mortgagor, is the estate owner of the property in question, and that she has requested the society to advance to her the sum thereafter mentioned—namely, £12,000. It witnesses that, in consideration of the sum of £12,000 paid to her, the receipt whereof she thereby acknowledges, she and her husband, who is described as a surety, jointly and severally covenant with the society that they will duly and punctually repay the said sum of £12,000 with interest in the monthly instalments therein mentioned. There was a further charge, dated Jan. 28, 1931, in substantially the same terms, the husband again joining as surety. I think that the only difference between the two documents is that in this second document it is stated that the £6,000 was paid to the mortgagor at the request of the surety. Then there was a second further charge of Sept. 26, 1935, to which the same persons were parties, the husband again joining as surety, whereby a further sum of £3,000 was paid to the mortgagor, the deceased, the receipt whereof she thereby acknowledged.
- Those advances having been made, demands for repayment were made—presumably to the principal debtor, but of that there is no evidence. Whether or not that was so, a demand was made upon the first defendant, as surety, for repayment of the sums repayment of which he had guaranteed, and, in accordance with that demand, he, as he was bound to do, repaid certain moneys to the mortgagees, the Woolwich Equitable Building Society. The sums which he claimed originally to have repaid in respect of those several mortgages amounted to £13,768, but that figure has been adjusted, and his claim is now limited to £11,203 and some odd shillings and pence. I presume that he claims to be entitled to interest in respect of those sums. It is clear that he has paid those sums, and that he has paid them in consequence of the demand made upon him as surety to repay the principal sum and interest due by the principal debtor to the mortgagees. If that were all, the claim which he makes would be unanswerable, but it is urged on behalf of the estate of the intestate that that claim cannot be sustained, and cannot be sustained for two reasons. In the first place, it is said that, the relation between the parties being that of husband and wife, the sums paid by the husband to the mortgagee society are to be deemed to be gifts made by the husband to the wife, and that claim is based upon this. It is said that, where a husband purchases property in the name of

a wife, and there is no evidence to show that it was not a gift, the presumption that it is a gift prevails. It is urged that a similar equity is applicable in a case of this kind, where the husband has joined as surety to guarantee a debt due by the wife to the husband. No authority of any kind has been adduced in support of that view. I decline to extend the doctrine of advancement in that way. The case has been put, really, A
 in two ways. First of all, it is said that at the inception of the transaction, when the husband entered into a contract of guarantee, he did so by way of advancement. That is to say, from the moment the transaction began, he is to be deemed, in the absence of evidence to the contrary, to be in some way advancing his wife and making a gift to B
 her. That view, I think, was not persisted in, but at a later stage it was urged that at any rate at the moment of every payment so made in pursuance of his obligation the husband is to be deemed to be advancing his wife. That seems to me to be a quite untenable proposition. The husband made the payments, at the moment when he made them, in C
 pursuance of a legal obligation which he was under to the mortgagee society. A demand being made, he fulfilled his obligation, and, from the moment of fulfilling his obligation, he became entitled to claim against the principal debtor for the sums which he so paid. He had all the rights at law and in equity of a surety who pays D
 off the principal debtor's debt, and, as it appears to me, the wife, or those claiming through her, must show that in some way he released that right. There can be no question of making a gift at the moment of making a payment in pursuance of a legal obligation, and, if that is, as I conceive it to be, the position, she could only support her claim E
 that it was a gift to her if she could show that, by some act in the law, he released the claim which he then had against her, and of that there is no evidence whatever. It appears to me that, whether they are regarded as contractual or implied, the rights in equity which he had to be repaid by her the sums which he had paid under his guarantee persist, and F
 accordingly I must disallow the objection which is made on behalf of the wife's estate to the husband's claim.

Next, however, it was urged that this is a claim by a creditor against the estate of a dead person, and that it must therefore be scrutinised with the utmost vigilance, and it would appear that, from the relations G
 between the parties, and indeed from statements made by the claiming creditor himself, there are grounds for thinking that there is no valid claim. I agree that it is a well-established principle that claims against the estate of a dead man who is not here to explain the circumstances have to be scrutinised with vigilance, but the claim is clear upon the face H
 of the documents. Here the property was, it is conceded, the property of the wife, and it is clear upon the face of the documents that the money was paid to her. There is some evidence—but it is unsatisfactory, because it is incomplete—that the money was paid to her, or a substantial part of it was paid to her, or on her behalf, in accordance with what

appears on the face of the document, and I find nothing to displace the right which thus appears in the husband to recover from the wife, except that at a recent date, writing to explain his position, he used certain expressions which appeared to suggest that the relations between him and his wife were such that neither of them expected repayment of moneys which the one had paid on behalf of the other. That may well be, but, if the fact is, as I have held it to be, that, when he paid moneys in discharge of his obligation in satisfaction of his guarantee, he was entitled to be repaid them unless he did some act in the law which amounted to a release, the mere fact that at a later date he writes to say that neither party expected to be repaid what he or she paid on account of the other does not appear to me to affect the legal relation, nor in any way to pass doubt upon the legal relation which was established as soon as he, on her behalf, paid off the debts for which she was primarily liable.

In my view, therefore, scrutinising jealously the claim which he makes against the estate, as I must do, I see no ground for displacing the right, which upon the face of the documents would appear to be plain. The plaintiff in these proceedings was, of course, amply justified in bringing the matter before the court to test this claim, and I have been assisted by Mr. Myles' able argument in coming to my conclusion. I think that the proper course for me to take now will be to send the matter back to chambers upon the footing that I hold the husband entitled to recover against the estate of the intestate the sum of £11,203 14s. 1d.

Solicitors : *Ashurst, Morris, Crisp & Co.* (for the plaintiff) ; *J. Hampson Fogg* (for the first defendant).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* THE PERSONAL REPRESENTATIVES OF SIR HARRY MALLABY-DEELEY, BART. THE PERSONAL REPRESENTATIVES OF SIR HARRY MALLABY-DEELEY, BART. *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), **June 29, 30, 1938.**]

Income Tax—Disposition for more than 6 years—Payment to company in annual sums—Capital or income payment—"Valuable and sufficient consideration"—Annual payments of decreasing amount—Finance Act, 1922 (c. 17), s. 20 (1) (b).

The appellant entered into an undertaking by deed to pay to a company £28,000 by five annual amounts of £5,600 payable quarterly. When £14,690 had been paid, he entered into a fresh deed to pay the balance over a period of 7 years in annual amounts decreasing in value from £5,600 to £700, such sums to be the net amount after deduction of tax. Upon this, three questions were raised : (a) whether the payments were capital payments or income payments, (b) whether the deed was made for valuable and sufficient consideration, and (c) whether these sums payable under the deed were within the meaning of the words "any income" in the Finance Act, 1922, s. 20 (1) (b) :—

HELD : (i) the payments were income payments.

(ii) the commissioners having found as a fact that the deed was not entered into for valuable and sufficient consideration, that was a finding of fact which they were entitled to make and with which the court would not interfere.

(iii) the only sum which could be said to come within the meaning of the words "any income" in the Finance Act, 1922, s. 20 (1) (b), which, by the section, had to be applicable for the benefit of a person other than the person by whom the disposition was made for the period of 7 years, was the minimum sum of £700. A

[EDITORIAL NOTE. The Finance Act, 1922, s. 20 (1) (b), is well known as the provision under which deeds of covenant are entered into to pay subscriptions to charities for a period of more than 6 years, and as the provision upon which many schemes for the avoidance of tax have been based. The decision of the commissioners as to what sums are within this provision perhaps goes a little further than is required for the decision in this case, but it is decidedly helpful to anyone drawing deeds or arranging schemes based upon this para. (b). Generally such deeds provide for the payment of an annuity, i.e., equal sums in each year, subject only to variation caused by the variation in the rate of tax. The commissioners, however, suggest that the equality of the annual payments is not essential, and in the present case the judgment upholds their finding that, though the annual amounts vary within wide limits, there is still a disposition within the paragraph of the minimum amount of such annual payments. The commissioners also suggest that, if the annual amounts, though varying, represent the income from a particular property or block of shares, they will also be within this paragraph. B

AS TO DISPOSITIONS FOR MORE THAN 6 YEARS, see HALSBURY, Hailsham Edn., Vol. 17, p. 269, para. 538; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 575a-576d, 674cc.] C

CASE STATED under the Finance Act, 1927, s. 42 (7), and the Income Tax Act, 1918, s. 149, by the commissioners for the special purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court. The sole question before the commissioners was whether certain sums which Sir Harry Mallaby-Deeley, Bart., covenanted to pay annually to the Genealogical Publishing Co., Ltd., were in whole or in part proper deductions in the computation of his liability to sur-tax. On Nov. 29, 1926, Sir Harry Mallaby-Deeley, Bart. (hereinafter referred to as the appellant) entered into an undertaking under seal to pay to the above company £28,000 by five annual amounts of £5,600 to be paid by quarterly payments. On Mar. 30, 1930, when £14,690 had been paid under the undertaking, the appellant executed a deed to secure the payment of the balance, namely, £13,310. By this deed he covenanted for himself and his personal representatives that he would pay on Mar. 31 in each year from 1930 to 1936 such a sum as after deduction of income tax at the rate then in force would leave the net sums of £5,600, £3,000, £2,500, £2,000, £1,500, £1,500 and £700 in those years respectively. The deed contained no reference to the undertaking. D

It was contended on behalf of the personal representatives of Sir Harry Mallaby-Deeley, Bart. (who had died during the course of the proceedings) that : E

(a) the payments under the deed were annual payments and were proper deductions in the computation of the appellant's total income for sur-tax purposes ; F

(b) the deed was a "disposition made for valuable and sufficient consideration" and therefore the payments under it did not come within the Finance Act, 1922, s. 20 (1) (b);

(c) even if the deed was not a "disposition made for valuable and sufficient consideration," the payments under it were payments of income for the period which exceeded 6 years, and were therefore unaffected by the aforesaid provision;

(d) the gross amounts, before deduction of income tax . . . were proper deductions for sur-tax purposes. . . .

A

It was contended on behalf of the Inland Revenue Commissioners that :

(a) the payments under the deed were capital payments and were inadmissible as deductions for sur-tax purposes ;
alternatively, if the payments were income payments,

B

(b) the deed was not a "disposition made for valuable and sufficient consideration" ;

(c) the words "any income" in the Finance Act, 1922, s. 20, could apply only to a sum common to the whole of the seven-year period—namely, such a sum as after deduction of income tax would leave £700, and any income paid in excess of this sum in any year must be deemed to be the appellant's income for sur-tax purposes.

The commissioners decided as follows :

C

Viewed apart from the deed, the payments which have been made by the appellant were not, in their own nature and origin, stamped with the character either of capital or of income. In our view the payments under the deed are income payments in virtue of the terms of the deed and are unaffected in their character by the undertaking, to which the deed makes no reference.

D

We have no doubt that, when the deed was entered into, it was understood that the company would not sue for the continuance of payments under the terms of the undertaking. In the circumstances, and in the absence of any special urgency—of which no evidence was adduced—such forbearance would, we think, almost go without saying, and it has in fact gone unexpressed in the deed. On the material before us, we do not think that the deed was "a disposition made for valuable and sufficient consideration" within the meaning of those words in the Finance Act, 1922, s. 20 (1) (b).

E

There remains the question whether the whole of the payments made each year under the deed are outside the mischief of the section. The words which we have to interpret are the opening words of subsect. (1), "any income," in conjunction with the words in para. (b), "which by virtue or in consequence of any disposition . . . is payable . . . for a period which cannot exceed 6 years." These words, in our opinion, do not simply denote income payable for any year by virtue or in consequence of any disposition for a period which cannot exceed 6 years.

F

On the contrary, the words of the section appear to imply the recurrence in each year of some definable unit of income, only that income which is payable for a period which can exceed 6 years not being deemed to be the income of the donor. A payment equal, e.g., to the yearly dividend from a given block of ordinary shares would be such a recurring unit, and the variation in amount would not be relevant. But when stated sums of varying size are to be paid in successive years, the only definable unit which can be found to recur throughout the series is the minimum sum.

G

Accordingly we hold that, in the computation of the appellant's liability to sur-tax, the deductions which can be allowed in respect of the payments under the deed are restricted each year to the gross amount, before deduction of income tax, corresponding to the net sum of £700.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the Inland Revenue Commissioners.

Cyril King, K.C., and F. N. Bucher for the personal representatives of
H Sir Harry Mallaby-Deeley, Bart.

LAWRENCE, J. : The case raises three points which are not altogether simple. The first point is whether the payments which the appellant was to make were of the nature of capital or income, the appellant contending that they were income payments and the Crown contending that

they were capital payments. The second question is whether the disposition under which these payments were to be made was a disposition made for valuable and sufficient consideration within the meaning of the Finance Act, 1922, s. 20 (1) (b). The third question is, assuming that they were income payments and that the disposition was not made for valuable and sufficient consideration, how much of these payments is to be deemed the income of the appellant on the true interpretation of sect. 20 (1) (b), which is in these terms : A

Any income . . . (b) which by virtue or in consequence of any disposition made, directly or indirectly, by any person after [a certain date] (other than a disposition made for valuable and sufficient consideration), is payable to or applicable for the benefit of any other person for a period which cannot exceed 6 years, . . . shall . . . be deemed for the purposes of . . . income tax (including super-tax) to be the income of the person . . . by whom the disposition was made . . . B

The appellant's contention is that each payment which he covenanted that he would make is to be deemed his income for the purposes of sur-tax, and that it was made by virtue of a disposition which exceeded C 6 years.

The facts of the case, which are set out in the special case, are that Sir Harry Mallaby-Deeley appears to have been interested in a publication which was called THE COMPLETE PEERAGE, OR HISTORY OF THE HOUSE OF LORDS AND ALL ITS MEMBERS. In 1925, certain volumes of this publication had been finished and others were in contemplation, and the publishers required financial assistance. In those circumstances, in 1926, the appellant entered into an undertaking. That undertaking stated that, with reference to his offer to provide a sum of £33,000 to enable the Genealogical Publishing Co., Ltd., to complete the publication of THE COMPLETE PEERAGE, of which sum he had already provided £5,000 in the form of a guarantee, he offered and undertook to pay the remainder in 5 annual instalments of £5,600, and he undertook that his undertaking should be binding upon his executors. That was in 1926, and payments were made under that undertaking, which had been F executed under seal. It was not contended before the commissioners, and was contended before me only faintly, that that undertaking was an undertaking for valuable and sufficient consideration.

On Mar. 10, 1930, the appellant executed another deed, which does not refer in terms to the undertaking, but is a covenant by the appellant to G pay to the company such sum as, after deducting income tax therefrom at the rate then in force, would leave the net sum in the year ending Mar. 31, 1930, of £5,600, and in the succeeding years down to 1936—that is to say, 7 years—other sums which produce the net sum then owing under the original undertaking, namely, £13,310.

In these circumstances, the commissioners have decided (i) that the payments which were to be made under the deed of Mar. 10, 1930, were not of a capital nature, but were of an income nature, (ii) that the deed was not a disposition made for valuable and sufficient consideration, and (iii) that the only income which, by virtue or in consequence of the H

disposition of Mar. 10, 1930, was payable to the company for more than 6 years was the gross sum which, after deduction of income tax, would produce £700—that is to say, the smallest sum which was payable in the instalments provided for in the deed of Mar. 10, 1930.

It is contended for the Crown that the commissioners' decision was
A right on the second and third questions, but was wrong on the first, and that in truth, having regard to the history of the case, these payments were of the nature of capital, and not of income.

On the second question, the Crown support the view of the commissioners—that the disposition was not made for valuable and sufficient
B consideration—by contending that the meaning of those words in sect. 20 (1) (b) is “made for valuable and adequate consideration,” that that is a question of fact, that the commissioners have upon the evidence determined that as a question of fact, and that there is satisfactory evidence upon which they might arrive at that conclusion. Lastly, it is
C contended for the Crown that the words of sect. 20 (1) (b) are clear, and that the only income of which it can be said that it was payable by virtue of this disposition for the benefit of a person other than the donor for a period of more than 6 years was the sum which would produce £700, because it cannot be said that for more than 6 years the donor was
D paying a sum which would produce any of the other sums mentioned in the agreement of Mar. 10, 1930, either the £5,600 or the £3,000 or the £2,500 or the other sums.

On behalf of the appellant, it was contended that the commissioners were right on the question of capital or income, that it was not right to
E connect the deed of Mar. 10, 1930, with the undertaking upon the assumption that it was of a capital nature because of the mention of the offer to pay £33,000 as a lump sum, but that the agreement of Mar. 10, 1930, must be looked at by itself, and, having regard to its own terms, it is a disposition which covenants to pay sums as income, and not as capital,
F and, although those sums fluctuate, yet they are recurrent, and therefore have the character of income. I think that the appellant further relies upon the fact that, although there may be said to have been an antecedent debt in 1930, yet there was no antecedent debt in 1926, the debt being created only by the undertaking of 1926.

G On the second point, it was contended that it was necessary to look at the history of the transactions, and, having regard to the facts and to the second paragraph of the opinion of the commissioners, it was clear that the deed of Mar. 10, 1930, had been given in consideration of the discharge of the binding undertaking of 1926, and that, in so far as the
H deed of 1930 gave time to the appellant, and provided that he should pay £5,110 by the end of 1931, instead of paying £13,310, as the undertaking provided, those circumstances constituted valuable and sufficient consideration—certainly substantial consideration and sufficient consideration, even if to that word is given the meaning “adequate consideration”—and therefore that there was no evidence upon which the

commissioners could reasonably come to the conclusion that the disposition was not made for valuable and sufficient consideration.

Lastly, it is contended for the appellant that the source of the income must be looked to, and that, if the source of the income endures for a period of 7 years, then the income is not touched by the provisions of sect. 20 (1) (b), and reliance was placed upon the fact that, in what was called by Mr. Bucher, in his able argument, the classic instance of covenants to pay such sum as would produce a stated sum for a period of 7 years, those cases are treated as outside sect. 20 (1) (b), although the income covenanted to be paid is in reality a gross sum, which varies according to the income tax imposed each year. Although, as I say, those covenants are treated by the revenue as being outside sect. 20 (1) (b), although the sum is variable, yet here, on the Crown's contention, the only sum which is treated as being income outside sect. 20 (1) (b) is the minimum sum of the various sums dealt with by the disposition.

I have come to the conclusion that the decision of the commissioners is right upon all the points. In the first place, I think that they were right in taking the view that these sums were of an income nature. It was open to the appellant, in conferring this benefit upon the company, to have done it in any form that he chose. He certainly could have done it by way of capital payment or by way of an income payment, and I see nothing to prevent him from changing his mind in 1930 and, if he could do so, altering the form of the covenant into which he had entered, and entering into a covenant which, without referring to the previous undertaking, treated the payments to be made thereunder as income payments, and as nothing else. There was no debt in existence before 1926. He created the debt in 1926, and he could do it in any form he chose, as I have said, and I think that there was nothing to prevent him from altering the form in 1930. That seems to me to have been the view of the commissioners, who have looked for this purpose solely at the deed of 1930, and who, on the construction of that deed, have held that the payments were of an income nature.

Difficulty, no doubt, does arise from the contention of the appellants that the disposition is one made for valuable and sufficient consideration, because, whereas they argue that, on the question of capital and income, the deed is to be looked at entirely by itself, on the question as to whether it is a disposition made for valuable and sufficient consideration or not, they seek to link it up with the undertaking, and to say that the discharge of the undertaking and the different obligations undertaken by the deed of 1930 constitute valuable and sufficient consideration. In my judgment, it was open to the commissioners, when considering all the facts of this transaction, and when considering that it arose out of an undertaking which I hold was a voluntary undertaking on the part of the appellant, to find, as they have found, that the deed which took the place of this voluntary undertaking was not made for valuable and sufficient consideration. I read the passage in the commissioners' decision beginning

"We have no doubt that" as meaning that they are of opinion that the deed was entered into on the terms that the undertaking was discharged, but that, having regard to all the other circumstances of the case, among which is the circumstance that the undertaking was a voluntary undertaking, they do not consider that the deed was entered into for valuable and sufficient consideration, and that is a finding of fact which I think

A that they were entitled to make.

As to the last point, I think that it is impossible to read the words of sect. 20 (1) (b) in the sense contended for by the appellant. I do not see how it can be said that the £5,600, for instance, which was payable in the year ending Mar. 31, 1930—or perhaps I should say such a sum as,

B after deducting income tax therefrom at the rate in force, would leave the net sum of £5,600—was, by virtue of this disposition, applicable for the benefit of any person other than the disponent for a period of 7 years. In fact, it was not, nor were any of the sums mentioned in the deed of Mar., 1930, payable for 7 years, with the exception of the sum of £700.

C Mr. King argued, as I understood him, that the sum of £700 was embedded in the other sums covenanted to be paid, and therefore could not be treated as being "any income" within the meaning of sect. 20 (1) (b) because of that. In my opinion, however, sums of money do not become

D embedded in or fused with other sums of money by being added to them, and they do not cease to be covered by such words as "any income" by the fact that they are added to, and form part of, other sums. I hold that the only sum which it can be said is income within the meaning of sect. 20 (1) (b) is the sum which, after deduction of income tax, leaves a sum of £700, and that is the decision of the commissioners. I there-

E fore dismiss this appeal and the cross-appeal of the Crown.

Appeal and cross-appeal dismissed. No order as to costs.

Solicitors: *Solicitor of Inland Revenue* (for the Inland Revenue Commissioners); *F. R. Allen* (for the personal representatives of Sir Harry Mallaby-Deeley, Bart.).

F *[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]*

BURLINGTON PROPERTY CO., LTD. v. ODEON CINEMAS, LTD.

G [COURT OF APPEAL (Greer, Slessor and MacKinnon, L.JJ.), **July 6, 7, 1938.**]

Boundaries—Party wall—Appellants entitled to half of wall and to use of entire wall for support—Wall rebuilt as an arcade by respondents—Whether appellants' rights infringed—London Building Act, 1930 (c. clviii), s. 117.

H The respondents had obtained an award under the London Building Act entitling them to pull down a wall which contained windows and to rebuild it with openings reaching down to the ground. This work was being done at the suggestion of the local authority and in order to provide against congestion among persons coming out of a cinema. By virtue of an indenture dated June 24, 1906, the appellants were

entitled "to one half of the wall . . . and to the use of the said wall for the support of any buildings or erections which he or they may at any time erect or rebuild over Hunt's Court":—

HELD: the rebuilding of the wall in such a form was an interference with the appellants' rights, and the surveyors who made the award had exceeded their jurisdiction.

[EDITORIAL NOTE.] This case presents a contest between an improvement for the benefit of the public and private rights under a deed *inter partes* in a party wall. The right of support reserved in the deed is held to be paramount in the circumstances of this case to needs of the public for more convenient egress from a cinema.

AS TO SUPPORT FROM PARTY WALLS, see HALSBURY, Hailsham Edn., Vol. 3, pp. 159-161, paras. 275, 276; and FOR CASES, see DIGEST, Vol. 7, p. 302, Nos. 250, 251.]

Cases referred to:

- (1) *Leadbetter v. Marylebone Corpn.*, [1904] 2 K.B. 893; 7 Digest 306, 284; 73 L.J.K.B. 1013; 91 L.T. 639; *subsequent proceedings*, [1905] 1 K.B. 661.
- (2) *Wells v. Ody* (1836), 1 M. & W. 452; 19 Digest 135, 914; 5 L.J. Ex. 199; *previous proceedings* (1835), 2 Cr. M. & R. 128.
- (3) *Crofts v. Haldane* (1867), L.R. 2 Q.B. 194; 19 Digest 92, 564; 36 L.J.Q.B. 85; 16 L.T. 116.

APPEAL from a decision of His Honour Judge DUMAS at the Westminster County Court dated Dec. 3, 1937. By an indenture dated June 24, 1905, material parts of which are set out in the judgment of GREER, L.J., the plaintiffs' predecessor in title had conveyed to the defendants' predecessor in title freehold land on the edge of which a wall, the subject of the present action, had then been standing for some years, but had reserved to himself one half of the wall, and the use of the whole wall for support. The wall extended along one side of Hunt's Court, on the other side of which property of the plaintiffs was situate. There was a public right of way along Hunt's Court. At the request of the London County Council, the defendants, who were proposing to build a block of buildings, including a cinema, adjacent to this wall, wished to rebuild it, replacing windows that were in it by openings extending to the ground, in order to facilitate the egress, in case of emergency, of persons attending the cinema. The wall was pulled down, and a dispute then arose as to the rebuilding, which was referred to surveyor under the London Building Act, 1930, s. 117. An award was made permitting the rebuilding of the wall in this manner, and the county court judge upheld the award, on the ground that as the piece of the wall which was being altered was between the ground and the first floor, and there was the public right of way, the plaintiffs could not rely on that part of the wall for support, and had therefore suffered no damage.

H. B. Vaisey, K.C., and *J. T. Edgerley* for the appellants.

E. J. Rimmer for the respondents.

Vaisey, K.C.: This award was not justified by the London Building Act. This was a party wall within the meaning of that Act, and the respondents were not entitled to demolish a part of it. The award should have provided for the restitution of the wall with only those apertures

that were in it before. [Counsel referred to *Wells v. Ody* (2) and *Crofts v. Haldane* (3).]

Rimmer : The award dealt fully with all questions affecting this party wall. The London Building Act gives authority to pull down a party wall and to rebuild. If there has been any trespass, there is the usual
A remedy, but that is not an action under the London Building Act.

Vaisey, K.C., in reply.

GREER, L.J. : I have come to the conclusion, after consideration, that the county court judge made a mistake in law in affirming the award
B in the form in which the award was made. I do not think that it is necessary to go back further than the indenture of June 24, 1905, between Oscar Philippe and Henry John Treadwell and Benjamin Wells. The material part of that document is in cl. 4, which says :

C The said Oscar Philippe [the client now represented by the appellant] and the persons deriving title under him to the land now belonging to the said Oscar Philippe on the north side of and abutting on Hunt's Court shown on the said plan shall be entitled without payment to one half of the wall along the northern boundary of the said premises hereby conveyed from Charing Cross Road to the point marked X on the said plan and to the use of the said wall for the support of any buildings or erections which he or they may at any time erect or rebuild over Hunt's Court.

D That seems to me to reserve to them out of the land conveyed by that conveyance the right to half of the party wall which had been erected at that time by the owner to whom the land is conveyed, as we are told by counsel for the respondents. That it can be confined to the portion of the wall underneath the Court, and the portion immediately above the
E girder which has been placed across the wall, is, I think, an impossible contention. It is a reservation of a party wall from the place where the party wall is first constructed—namely, upon the soil below—right up to the top of the building, and it includes that part of the party wall which extends from the court to the next floor just as much as it does the other portions of the party wall. As I understand the award, the
F award has excluded that part which I have so described from the rights vested in the appellants to have the wall reserved to them kept in existence and as it then was. It includes not only the wall just fronting on to the main road but also the wall further along Hunt's Court, and what has happened is this. Instead of the three windows which existed in the party
G wall, there have been placed two entrances to, or exits from, the theatre which is at the back of Hunt's Court, thereby interfering with the rights vested in Mr. Vaisey's clients to have the party wall in existence in the same form as that in which it had been for many years before. For these reasons, I think that the county court judge was wrong in affirming the
H award, and the award must go back, if there is no agreement between the parties, to the arbitrator to be dealt with in accordance with what this court has said.

SLESSER, L.J. : I am of the same opinion, for the reasons stated by *GREER, L.J.* I think it unarguable that the whole of the wall here in

question at the side of Hunt's Court opposite to the property of the appellants is not a party wall. It is so described in the conveyance of 1905 in the words "half of the wall," and in that conveyance there followed provisions as to their rights over the whole of the wall—of course, for the purposes of support. As a matter of fact, this half-wall appears in an indenture dated Dec. 31, 1879, as is seen in a plan copied from a deed of that date, as being at that time part of the property of the predecessors in title of Mr. Vaisey's clients. I think that the probability is that there never was in that conveyance of 1905 any conveyance of this half of the wall away from the persons owning it in 1879 and a reconveyance back to them, but merely a reservation of that which had been theirs at all times, made necessary because it was also thought fit to deal with the rest of the wall for the purposes of support. However that may be, as GREER, L.J., says, it is sufficient to say that in 1905 there was there a party wall, and that the half of the wall with regard to which complaint that it has been interfered with is now made was, and has been at all material times, the property of the appellants. In those circumstances, unless the respondents here can show some statutory right to interfere with what, on the face of it, is the absolute property of the appellants, it must necessarily be that an award which gives to them a power to do that which in law they have no power to do must be bad. In the only statute suggested to be competent to give them the right, I seek in vain for any power whatever in this behalf. The London Building Act, 1930, s. 114 (7), seems to me to have nothing to do with the case. It confers :

A right to pull down any party structure which is of insufficient strength for any building intended to be built and to rebuild the same of sufficient strength for the above purpose. . .

The whole complaint which Mr. Vaisey makes is that his moiety of the party structure has not been rebuilt at all, and has certainly not been rebuilt with any consideration of strength, seeing that the apertures in it are considerably wider than they were in the original building. The county court judge, however—and this is where the case becomes important—has misdirected himself in a manner which, if it were allowed to stand, might have very far-reaching consequences. He appears to be of the opinion that, by reason of sect. 117 of the same Act, which provides that, where a difference arises between a building owner and an adjoining owner in respect of matters connected with the work, the necessary notice being given, the surveyors are to settle any matter from time to time during the continuance of the work, and are by their award to determine the time and manner of doing any work, the surveyors in making the award which they did, in so far as they purport to deal with the difference, did not exceed their powers. That seems to me to be not only entirely contrary to all recognised principles that persons not having differences at large submitted to them, but limited powers under the statute, cannot, under pretext of the difference, adjudicate upon matters which the statute gives them no power to adjudicate

upon in an unimpeachable manner, but first of all, it has to be pointed out that in terms the right of appeal is given by the statute, and, secondly, as I read it, SIR RICHARD HENN COLLINS, M.R., in *Leadbetter v. Marylebone Corporation* (1), at p. 900, points out in terms that the jurisdiction which the surveyors have over such a dispute was a strictly limited jurisdiction. They have exceeded such jurisdiction in that part of their award which has been impugned. If authority is necessary for such a proposition—that persons cannot make binding awards upon matters outside their jurisdiction—there it is. In any event, I am unable to understand how the county court judge, unless he had considered that there was a justification for this interference under the statute, can have decided in favour of the respondents merely upon the grounds that the parties had submitted their differences within sect. 117. The differences there contemplated are differences of matters competent within the statute, and not matters incompetent.

MACKINNON, L.J. : I agree, not without regret, the regret arising because I think that this did not cause the least damage to the appellants.

Appeal allowed with costs in both courts. Case referred back to the surveyors.

Solicitors : *Barnes & Butler* (for the appellants) ; *Simmons & Simmons* (for the respondents).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

WARDELL v. KENT COUNTY COUNCIL.

[COURT OF APPEAL (Greer, Slessor and MacKinnon, L.JJ.), June 24, 27, July 11, 1938.]

Workmen's Compensation—Hospital nurse—Injury while preparing a poultice—Whether working under a contract of service—Workmen's Compensation Act, 1925 (c. 84), s. 3.

The applicant was employed by the respondent council as a hospital nurse. She was fully qualified, and was normally under the control of a hospital sister, who would tell her what to do but not how to do it. While preparing a poultice to be applied to a patient—which operation required heating the poultice in a tin—an explosion occurred, and she was injured. The respondent council maintained that she was employed under a contract for services and not a contract of service, and was not, therefore, within the provisions of the Workmen's Compensation Acts :—

HELD (GREER, L.J., dissenting) : the applicant was employed under a contract of service, and was entitled to compensation under the Acts.

Hillyer v. St. Bartholomew's Hospital (Governors) (1), distinguished.

[EDITORIAL NOTE. It seems clear that there are some persons employed in hospitals and like institutions who, while they may be commonly called nurses, would have that discretion as to the way in which their duties should be carried out which would make them subject to a contract for services rather than employed under a contract of service. The present case deals with a hospital nurse working under the supervision of a sister, and, although there is some authority to say that

she may be carrying out professional, rather than purely ministerial or administrative services, she is here held to be "a workman" within the Workmen's Compensation Acts.

AS TO "WORKMAN," see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 154-157, paras. 327-329; and FOR CASES, see DIGEST, Vol. 34, pp. 239-244, Nos. 2043-2078. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 146-151.]

A

Cases referred to :

- (1) *Hillyer v. St. Bartholomew's Hospital (Governors)*, [1909] 2 K.B. 820; 34 Digest 26, 52; 78 L.J.K.B. 958; *sub. nom. Hillyer v. London Corp'n. (St. Bartholomew's Hospital, Governors)*, 101 L.T. 368.
- (2) *Lindsey County Council v. Marshall*, [1937] A.C. 97; [1936] 2 All E.R. 1076; Digest Supp.; 105 L.J.K.B. 614; 155 L.T. 297.
- (3) *Evans v. Liverpool Corp'n.*, [1906] 1 K.B. 160; 34 Digest 40, 160; 74 L.J.K.B. 742.
- (4) *Hall v. Lees*, [1904] 2 K.B. 602; 34 Digest 26, 51; 73 L.J.K.B. 819; 91 L.T. 20.
- (5) *Strangways-Lesmere v. Clayton*, [1936] 2 K.B. 11; [1936] 1 All E.R. 484; Digest Supp.; 105 L.J.K.B. 385; 154 L.T. 463.
- (6) *Walker v. Crystal Palace Football Club, Ltd.*, [1910] 1 K.B. 87; 34 Digest 239, 2045; 79 L.J.K.B. 229; 101 L.T. 645; 3 B.W.C.C. 53.
- (7) *Simmons v. Heath Laundry Co.*, [1910] 1 K.B. 543; 34 Digest 21, 15; 79 L.J.K.B. 395; 102 L.T. 210; 3 B.W.C.C. 200.
- (8) *Armour v. British International Pictures* (1930), 23 B.W.C.C. 367; Digest Supp.
- (9) *Dow v. M'Neill*, [1925] S.C. 50; 34 Digest 259, 2216i.
- (10) *Powell v. Streatham Manor Nursing Home*, [1935] A.C. 243; Digest Supp.; 104 L.J.K.B. 304; 152 L.T. 563.

APPEAL from an award of His Honour JUDGE CLEMENTS at the Maidstone County Court dated May 17, 1938. The facts of the case are fully set out in the judgments.

Gilbert Paull and *S. Seuffert* for the appellant.

Sir Walter Monckton, K.C., *B. H. Waddy* and *R. Morrison* for the respondents.

Paull : This was clearly a contract of service within sect. 3 of the Act. A professional footballer has been held to be a workman; *Walker v. Crystal Palace Football Club, Ltd.* (6). On the other hand, a film star is not; *Armour v. British International Pictures* (8). [Counsel also referred to *Simmons v. Heath Laundry Co.* (7).] The only case in which the position of a nurse has been considered is *Dow v. M'Neill* (9).

Monckton, K.C. : The burden is on the applicant to show that she was a workman, and she has failed so to do. [Counsel referred to *Hillyer v. St. Bartholomew's Hospital (Governors)* (1), *Simmons v. Heath Laundry Co.* (7); *Walker v. Crystal Palace Football Club, Ltd.* (6), *Strangways-Lesmere v. Clayton* (5) and *Powell v. Streatham Manor Nursing Home* (10).]

B. H. Waddy followed.

Paull, in reply : The applicant was either within the Act whatever she was doing or outside it whatever she was doing. A workman is any person who enters into or works under a contract. These words are dis-

junctive. It is immaterial what the applicant was doing at the moment of the accident.

GREER, L.J. : This is an appeal by the applicant, Nurse Annie Wardell, from the decision of a county court judge, sitting as arbitrator under the
A Workmen's Compensation Act, in which he made an award in favour of the county council, the respondents, with costs, on the ground that the contract between the applicant and the county council was one for services, and not for service.

The relevant facts of the case are few, and not in dispute. The appli-
B cant was a trained nurse, acting under the direction of another trained nurse who had acquired the superior nursing title of " sister " and was the sister in charge of the ward in which the applicant was working at the time she met with her injuries. According to her evidence, she would be told by the sister what to do, but not how to do it. According to the
C matron, the applicant would be under the instructions of the sister while the sister was in the ward, and, before going off duty, the ward sister would give the applicant instructions as to what was to be done during her absence—that is, as appears in her cross-examination, she would be told what to do, but not how to do it. When she met with the accident
D which was alleged to entitle her to compensation, the applicant was preparing a poultice of antiphlogistine to be applied, when prepared, to the patient in the ward. At some time before she began to apply it to the patient, and while she was still preparing the poultice it exploded in the can in which it was being heated, and caused the
E injuries in respect of which she claimed compensation.

The question involved in the appeal is whether, at the time the applicant met with her injuries, she was acting under a contract of service which she had entered into with the county council as her employer to serve such employer, or whether she was in fact engaged in duties which
F were not duties of service to her employer, but were duties she was performing, not as a servant or agent, but, like a surgeon, as somebody nominated or appointed to do professional nursing work, which was independent of such service. I think that the authorities with regard to liability for injury occasioned by the negligence of surgeons, physicians
G and nurses to patients are authorities which can rightly be used for the purpose of determining whether an act which causes damage to such persons can be regarded as an act done under a contract of service. I may take, for example, the instance of a house-surgeon, who is very frequently paid only a small salary, and sometimes no salary at all. Could it be
H said that, in taking part in the performance of a surgical operation, such house-surgeon could be held to be acting pursuant to a contract of service with the proprietors of the hospital ? It seems to me that the decision in *Hillyer v. St. Bartholomew's Hospital (Governors)* (1) involves a decision that, in performing his surgical duties, a house-surgeon is not doing anything as a servant of the proprietors or governors of the hospital. In

providing surgeons or nurses, the proprietors of the hospital are not providing such surgeons or nurses to perform acts of service on behalf of such proprietors. They are merely appointing them as persons who are fit to exercise, in accordance with their own judgment, their professional powers. In deciding in what capacity surgeons or nurses are acting when they exercise their skill in hospitals, FARWELL, L.J., A used the following words, at p. 826 :

The three nurses and the two carriers stand on a somewhat different footing, and I will assume that they are the servants of the defendants. But although they are such servants for general purposes, they are not so for the purposes of operations and examinations by the medical officers. If and so long as they are bound to obey the orders of the defendants, it may well be that they are their servants, but as soon as the door of the theatre or operating room has closed on them for the purposes of an operation (in which term I include examination by the surgeon) they cease to be under the orders of the defendants, and are at the disposal and under the sole orders of the operating surgeon until the whole operation has been completely finished ; the surgeon is for the time being supreme, and the defendants cannot interfere with or gainsay his orders. This is well understood, and is indeed essential to the success of operations ; no surgeon would undertake the responsibility of operations if his orders and directions were subject to the control of or interference by the governing body. The nurses and carriers, therefore, assisting at an operation cease for the time being to be the servants of the defendants, inasmuch as they take their orders during that period from the operating surgeon alone and not from the hospital authorities. B C

Later he said, at p. 827 :

The nurses and attendants are not put in the place of the hospital to do work which the governors of the hospital intended to do themselves. . . . D

In *Lindsey County Council v. Marshall* (2) both VISCOUNT HAILSHAM, L.C., and VISCOUNT SANKEY expressed agreement with what FARWELL, L.J., said in *Hillyer v. St. Bartholomew's Hospital (Governors)* (1) and VISCOUNT SANKEY said, at p. 113 : E

The learned counsel for the appellants in my view correctly summed up the law as laid down in those cases [*Evans v. Liverpool Corpn.* (3), *Hillyer v. St. Bartholomew's Hospital (Governors)* (1), and (*Hall v. Lees* (4))] in the following way : " In the case of a nursing home conducted by local authorities, the local authority is not responsible for negligence of doctors, matron or nurses while acting in the exercise of their professional functions and knowledge." F

It seems to me that the meaning of the decisions in the cases referred to is that in so acting doctors, matrons and nurses are not acting as servants of the proprietors of the hospital. If they were, the hospital would be liable for their acts. It is true that a nurse may be engaged in a dual G capacity. That is to say, she may be appointed to do work which is outside any contract of service and she may also be appointed to do what is compendiously called administrative work—namely, the work she does as a servant of the proprietors of the hospital. If she causes injury while in the latter capacity, or suffers injury herself arising out of and in the H course of her employment in such capacity, the proprietors of the hospital in the one case will be liable in an action for damages by the person injured and in the other case will be liable to pay compensation to the nurse if the nurse suffers injury. When she is doing her work as a nurse, the proprietors of a hospital are, in my judgment, neither liable to persons

injured by her negligent acts nor liable to her under the Workmen's Compensation Acts for injuries received by her while she was acting as a nurse. As soon as a nurse or sister goes to her ward and starts her nursing duties, she passes from the territory in which she is serving her employer under a contract of service to the territory in which she is engaged to give her services as a skilled nurse for the benefit of the hospital patients. For these reasons, I think that the judge was entitled to find as he did, and that the appeal should be dismissed with costs.

SLESSER, L.J. : The only question which calls for consideration in this court is whether the applicant, Annie Wardell, a hospital nurse who has sustained injury by accident while working in the county hospital of the Kent County Council, is a workman within the meaning of the Workmen's Compensation Act, 1925. The definition of a workman, so far as is here material, is "any person who has entered into or works under a contract of service." The problem that arises is whether this lady, when she met with her accident, was so working.

In so far as the matter is one of fact, the evidence is uncontradicted that at the time of the accident she was working in a ward in the defendant's hospital, and had been instructed by the sister to prepare and apply to a patient a preparation known as antiphlogistine. While she was heating the preparation, it exploded, and she was seriously injured.

The applicant is found by the county court judge to be a fully qualified hospital nurse, and as such took up her employment at the hospital. She was subject to the rules and regulations of the hospital as to the times of sleeping, meals and recreation, and was generally under the control of the matron. When in a ward, she was normally subject to the control of the sister alone, and she was carrying out the instructions of the sister when the accident happened. It would appear from the evidence of the matron that the sister would give the nurse instructions as to what was to be done during her absence. In case of disagreement as to the method of carrying out the sister's orders, the nurse would be obliged to obey the sister's instructions. In these circumstances, it is clear to my mind that at all times the nurse was required by her contract to obey directions as to the manner in which she should do her work, though the particular person who would prescribe that manner might well vary according to the particular work on which the nurse was engaged. In *Hillyer v. St. Bartholomew's Hospital (Governors)* (1), it was pointed out generally that nurses and other attendants, otherwise under the direction of these employers, while assisting at an operation may be required to take their orders during that period from the operating surgeon alone, and not from the hospital authorities. As a consequence, in an action against the hospital authorities for negligence of the members of the hospital staff alleged to have occurred during an operation, it was held that the action was not maintainable. FARWELL, L.J., points out

that the nurses, he will assume, are servants of the hospital authority, and says, at p. 826 :

But although they are such servants for general purposes, they are not so for the purposes of operations and examinations by the medical officers. If and so long as they are bound to obey the orders of the defendants, it may well be that they are their servants, but as soon as the door of the theatre or operating room has closed on them for the purposes of an operation . . . they cease to be under the orders of the defendants, and are at the disposal and under the sole orders of the operating surgeon. . . . The nurses and carriers, therefore, assisting at an operation cease for the time being to be the servants of the defendants, inasmuch as they take their orders during that period from the operating surgeon alone, and not from the hospital authorities.

Later, KENNEDY, L.J., says, at p. 829 :

It may well be . . . that the hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like.

These observations were, of course, made in regard to the circumstances of the particular case, but they afford useful guidance as to the general position with regard to obligations of obedience of persons such as the applicant.

The county court judge, however, in this case does not appear to have considered that nurses were the servants of the Kent County Council even when they were performing only administrative duties. He says :

Speaking generally, the contract under which the nurse is working does not include a right of control by the Kent County Council.

Again, limiting the matter for the moment to administrative or non-curative services, this appears to me to be contrary to the evidence and admitted facts. The county council, as such, appoints the matron and the sister, both of whom may be free in the manner in which they do their work, and consequently may not be under contracts of service. That is not, however, the material question. The material question is whether or not the nurse is under a contract of service. In the case of a limited company, which must of necessity act through agents, the control of the company's servants may be exercised through a manager or agent, himself free of any contract of service, yet it may be an express or implied term of the contract of any particular servants of the company that they shall comply with the instructions of such manager or agent, and so be under a contract of service with the company. So here, in their administrative duties at least, the evidence goes to show that the nurses are under the complete direction of the matron or sister, as the case may be. Had this nurse injured herself while performing an administrative duty on the instructions of a sister, I entertain no doubt that she would have been acting under a contract of service, and so be a workman. Had she, for example, as a matter of hospital routine, been engaged in the placing of a hot-water bottle into a patient's bed upon a cold night—an operation quite distinct from any curative act—and had the bottle burst, and had she therefor claimed compensation, she would have been a workman, although, as I read the county court judge's judgment, he

would have been of the contrary opinion. Does it make any difference that the hot-water bottle was, on the directions of the sister or the doctor, to have been placed upon the body of a patient for curative purposes, so that at one moment the nurse is to be deemed a workman and at another, being under the orders of the doctor or the sister in a curative capacity, and acting under a doctor or sister who does not take instructions as to the manner of working from the hospital, the nurse is not under such a contract ? This is, I think, the result of the conclusion for which Sir Walter Monekton contends.

In my view, Mr. Paull is right when he says that the cases of negligence *respondeat superior* are of no assistance to a solution of this problem. He contends that, on the facts of this case, the nurse has entered into one contract, and not into several, and that, whether or not she is performing curative services, she has agreed to take the orders of the respondents as to the manner of the performance of her work exercised either through the doctor, the matron or sister, as the case may be. The highest way in which the respondents can put their case is that, during the sovereignty of the doctor, the respondent authority have loaned to him the services of the nurse. I do not think that the Act makes any such nice distinctions. Under sect. 5 of the Act, the "employer," where the services of a workman are temporarily lent to another person by the person with whom the workman has entered into a contract of service, shall be deemed to continue to be the employer of the workman whilst he is working for that other person. Again, under sect. 9, the compensation is to be a weekly payment, calculated on the basis of the workman's average weekly earnings, and by subsect. (2) (i) the weekly payment shall, subject to rules, be a sum not exceeding 50 per cent. of the workman's average weekly earnings during the previous 12 months, if he has been so long employed by the same employer. For the purpose of such calculations, sect. 10 (3) speaks of employment by the same employer as being taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or other unavoidable cause. I cite these provisions, which, on the respondents' view, would require the omission of all consideration of payment during the curative duties—and there are many others which raise the same point—as illustrations of the impracticability of dividing the contract of service which has been entered into, and of which the Act speaks, by intervals, omitting those times when the person giving the direction is not for the moment acting under the general authority of the employer, but under the authority of his nominee. I think that the more reasonable way of looking at the matter, which is one more consistent with the whole structure of the Workmen's Compensation Act, 1925, as applied to this case, is that this nurse, on the evidence, was always under obedience to the respondents, though the hospital authority from time to time might choose the person whose orders she would be called upon to obey.

It may well be that, for the purposes of making an employer responsible at common law for the negligent acts of a servant, the employer can escape by showing that the alleged servant was, at the time of the wrong complained of, acting outside the sphere of his employment, or working for another. This fact may well co-exist with the continuance of a contract of service. *Hillyer's case* (1), *Strangways-Lesmere v. Clayton* (5) A and *Lindsey County Council v. Marshall* (2) do not establish more than the fact that it may well be that the governors of a hospital do not themselves undertake to operate or assist in operating, but only to supply qualified persons to act as nurses and to act under the control of the operating surgeon: per SIR RICHARD HENN COLLINS, M.R., in *Hall v. Lees* (4), at p. 615. This alone does not necessarily enable them to contend that they have not employed the nurse on the footing that she must comply with the directions of such persons as they may prescribe. B

I think that throughout the execution of all her duties there is a contract of service, and I am, therefore, of opinion that the county court judge was wrong in holding that this nurse was not a workman within the meaning of the Act, and that this appeal succeeds. C

MACKINNON, L.J.: In this case, the applicant, Miss Wardell, was employed as a nurse in a hospital maintained by the Kent County Council at Farnborough. She was paid a salary of £3 per week, and she was a qualified nurse. As to the nature of her duties, there was very little evidence. It was, no doubt, assumed that her primary task was to perform the duties well known as falling upon a qualified nurse in attendance on patients in a hospital. She herself said that she worked in a ward under the directions of a sister who was in charge of the ward. D

It was my duty to obey the instructions of the sister. I was fully trained. I would be told what to do but not how to do it. I would be told what quantity in case of an injection, and that would be checked. E

The matron's evidence was that the nursing staff under her control numbered 160. F

Miss Wardell was in a children's ward. That was in charge of the sister, Miss Morris. The applicant would be under the sister's instructions while she was present in the ward. Before going off duty, the sister would give her instructions what to do in her absence. She would instruct her what to do, but not how to do it. If there was any disagreement between her and the sister as to the method of carrying out the sister's orders, she would be obliged to obey the sister's instructions. G

That was the whole of the evidence with regard to her position and her duties. H

On June 15, 1937, the sister told Miss Wardell to apply an antiphlogistine poultice to a patient. It was necessary for her to prepare this substance by heating it in a tin. While she was doing this, there was some sort of explosion, the antiphlogistine flew into her eyes, and the applicant was injured. In respect of this accident she claimed compensation. The only defence filed by the respondents was:

that the applicant is not a workman to whom the Act applies.

This defence has been accepted and upheld by the arbitrator.

The material part of the definition of "workman" in sect. 3 of the Act of 1925 is as follows :

In this Act, unless the context otherwise requires, the expression "workman" . . . means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise. . . .

A Apart from authority, I should have thought it clear that the applicant was working under a contract of service with the respondents as her employers within the terms of that definition. It is true that she possessed the skill of a trained and qualified nurse, and no doubt impliedly agreed to exercise that skill in return for her weekly wage, but many a person
B who is clearly a workman within the definition possesses, and is engaged to exercise, some qualification of skill, e.g., a chef, or a cabinet-maker, or a compositor, or even a professional football-player, as was held in *Walker v. Crystal Palace Football Club, Ltd.* (6).

In a classic judgment in *Simmons v. Heath Laundry Co.* (7), SIR H. H.
C COZENS-HARDY, M.R., pointed out that it must be a contract of service, and not a contract for services. He illustrated the contrast by pointing out that an usher in a private school, or a teacher in an elementary school, or a nursery governess, would ordinarily be within the Act. On the
D other hand, it would be absurd to hold that a skilled music master giving a music lesson is to be regarded as a workman and the pupil as the employer. In the present case, applying that test, the arbitrator has held that the applicant (and, I suppose, all the 160 nurses in the hospital) was working under a contract for services to be rendered by her, not under a contract of service. He likens her status as a nurse to that of the
E doctors or dentists attending the patients in the hospital. I cannot agree with this conclusion. A teacher in a school has, or ought to have, at least as high a degree of skill of his own sort as a trained hospital nurse has of hers. That he should be a workman, under a contract of service, and she in the more glorified position of a professor condescending
F to render services, and thereby beyond the protection of the Act, seems to be a totally wrong application of the principle indicated by SIR H. H. COZENS-HARDY, M.R.

So much for the Act, and the authorities that have explained it, but, in regard to the position of those who work in hospitals, there is another
G line of authorities on which reliance is placed for the respondents, and I think it is the existence of those cases which has led the arbitrator astray in the present case. They have nothing directly to do with the Workmen's Compensation Act, and, in my opinion, equally they have no indirect bearing on the question whether or not a nurse is a workman
H within the Workmen's Compensation Act.

The type of case to which I refer deals with the responsibility towards patients in a hospital of the managers or proprietors of a hospital for the negligent acts or omissions of the doctors, surgeons, or nurses whom they employ in the hospital to tend the sick. *Hillyer v. St. Bartholomew's Hospital (Governors)* (1) is one of them. The governors of the hospital,

it was held, were not liable for any negligence by nurses during an operation. FARWELL, L.J., said, at p. 826: "The three nurses . . . I will assume . . . are the servants of the defendants. But although they are such servants for general purposes"—and, if he had thought of it, I believe he would have said "under the Workmen's Compensation Act"—"they are not so for the purposes of operations . . . by the medical officers." A

The true *ratio decidendi* of such cases, however, is to consider what is the contract between the governors or proprietors of the hospital and the patients. If the contract were "We will treat you in our hospital by the doctors and nurses we employ," then they might be liable for negligence by such servants. However, the contract in truth is: "We will provide a hospital, and we will provide duly qualified doctors and nurses." Then, if they have done all they promised to do, and have provided duly qualified nurses, they are not liable for their negligence. This is clearly stated by FARWELL, L.J., at p. 826: B C

The contract of the hospital is not to nurse during the operation, but to supply nurses and others, in whose selection they have taken due care.

The truth is that, as between the hospital and the nurses, the nurses are so manifestly in the service of the hospital that for that very reason it becomes necessary to inquire whether, as between the hospital and the patients, the hospital is liable for the negligence of those who are in their service. D

In my view, the question whether or not the present respondents would have been liable to a claim for negligence by Miss Wardell if the tin which burst had injured a patient has absolutely nothing to do with the question whether or not she can claim as a workman under the Workmen's Compensation Act. If such a claim were made, its fate would depend on the nature of the contract between the patient and the respondents. If it were of the same nature as that found in *Hillyer's* case (1)—namely, that the respondents would provide for the patient duly qualified nurses, and no more—they would have fulfilled their contract. However, as between the applicant and the respondents in the present case, no doubt, to adapt the language of FARWELL, L.J., in that case, at p. 826, she is the servant of the respondents for general purposes. I think that she was under a contract of service with them within the Workmen's Compensation Act. E F G

In the result, I think, that this appeal must be allowed.

Appeal allowed with costs here and on scale C below; case referred back to the county court judge to assess the compensation payable; leave to appeal to the House of Lords. H

Solicitors: *W. H. Thompson* (for the applicant); *Joynson-Hicks & Co.*, agents for *Bracher, Son & Miskin*, Maidstone (for the respondents).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

THE AIZKARAI MENDI.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), June 20, 21, July 11, 1938.]

Negligence—Personal injuries—Damages—Assessment—Shortened expectation of life—Overlapping of damages—Fatal Accidents Act, 1846 (c. 93)—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1.

(i) As a result of a collision between two steamships 9 members of the crew were drowned. Four of these men were aged between 41 and 44, 2 were between 35 and 37, and 3 were between 23 and 26. There was a claim under the Fatal Accidents Acts and also a claim under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of loss of expectation of life:—

HELD: treating the £1,000 awarded to the deceased girl of 23 years of age in *Rose v. Ford* (3) as the standard, it was necessary to reduce this standard, by reason of the fact that the men were engaged in a dangerous trade. It was then necessary further to reduce the standard by reason of the fact that all likely participants had been liberally compensated under the Fatal Accidents Acts. Having regard to the ages of the deceased, the assessment in respect of the 3 seamen aged from 23 to 26 ought to be £400 in each case, and in respect of the 2 seamen aged 35 and 37, £350 in each case, and in respect of the 3 seamen aged 41 to 44, £300 in each case. These sums were in some cases further reduced because the widows had, in the judge's view, been over-compensated.

(ii) Where in the assessment of damages there can be no suggestion that the registrar has erred in principle, or that the assessments are extreme or absurd, the court will not interfere with those assessments, even though it is of opinion that they are too great by as much as 25 per cent.

[EDITORIAL NOTE. In this case, we have again a full consideration of the subject of the assessment of damages for loss of expectation of life. The opinions in *Rose v. Ford* (3) are again examined and applied to the cases of men of varying ages, the point of interest in such application here being that the men were engaged in a highly dangerous occupation. There is also a careful consideration of the reduction of such damages by reason of damages also being given under the Fatal Accidents Acts. This latter view of the question is here treated with special reference to the fact that, in the judge's opinion, the assessment of the damages under the Fatal Accidents Acts had been very generous.

AS TO DAMAGES FOR PERSONAL INJURIES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 724, 725, para. 1016; and FOR CASES, see DIGEST, Vol. 36, pp. 125, 126, Nos. 831-838.]

Cases referred to:

- (1) *Admiralty Comrs. v. S.S. Amerika*, [1917] A.C. 38; 34 Digest 182, 1489; 86 L.J.P. 58; 116 L.T. 34; *affg.* S.C. *sub nom. The Amerika*, [1914] P. 167.
- (2) *Flint v. Lovell*, [1935] 1 K.B. 354; Digest Supp.; 104 L.J.K.B. 199; 152 L.T. 231.
- (3) *Rose v. Ford*, [1937] A.C. 826; [1937] 3 All E.R. 359; Digest Supp.; 106 L.J.K.B. 576; 157 L.T. 174.
- (4) *May v. Sir Robert McAlpine & Sons (London), Ltd.*, [1938] 3 All E.R. 85; Digest Supp.

OBJECTIONS and CROSS-OBJECTIONS to the Registrar's report. This report only deals with the objections to the assessment of damages under

the Fatal Accidents Acts and in respect of the loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act, 1934.

H. G. Willmer for the plaintiffs.

Owen L. Bateson for the defendants.

LANGTON, J. : The collision out of which this matter arises took place on Mar. 26, 1936. As a result of the collision, the plaintiffs' vessel, the *Borre*, was lost, and 9 members of her crew were drowned. By a decree of this court dated Mar. 11, 1937, the *Borre* was held liable as to one-fifth of the damages, and the defendants' vessel, the *Aizkarai Mendi*, was held liable for the remaining four-fifths of the damage caused by the collision. The case went to the Court of Appeal, but the finding of the Admiralty Court was not disturbed, and the appeal was dismissed on Dec. 2, 1937. The plaintiffs then proceeded to present their claim to the Admiralty registrar, who delivered his report thereon on Mar. 30, 1938.

The matter comes before me in the form of objections and cross-objections to the registrar's report. The items of objection and cross-objection are all concerned with the awards made by the registrar in respect of claims arising out of the deaths of the 9 members of the crew who were drowned. The objections raised by the defendants to the amounts awarded under the Fatal Accidents Acts have put me in a situation of very great difficulty. Under each of the principal items, 16 to 24, the registrar has awarded separate and individual amounts to each of the relatives. This is, of course, the best, and only proper, way of dealing with such a body of claims. The method has the additional advantage that it gives a clear and ready *conspectus*, not only of what any individual will receive, but also of the total compensation which any family has been awarded.

To take item 16 as an illustration, it will be seen that the widow of the second engineer, *Mme. Chourot*, has been awarded £4,060 for herself, that her son of 2 years of age is to receive £700, and that her mother-in-law, of 60 years of age, £440. The whole family of three will thus receive a total of £5,200 under the Fatal Accidents Acts alone, irrespective of any amount awarded to the second engineer's estate under the Law Reform (Miscellaneous Provisions) Act, 1934. I have dwelt especially upon the family aspect of the matter, because it seems to me to be material, in considering the compensation awarded to the widow, that, while she has been awarded more than twelve times the full value of the highest wage that her husband has ever earned, she will neither have to provide for nor keep a home for her husband in the future, nor have her son or her mother-in-law fully dependent upon her.

Mr. Willmer, on behalf of the plaintiffs, argued that I was not entitled to make any use of such knowledge as I might myself possess of economic conditions, or of earnings and chances of earnings, in France. Further, in presenting a very reasonable argument that one must move with the times, he pushed it so far as to say that judges in this division must move

with the juries in the King's Bench Division, and that the standard of damages set up in that Division afforded the real criterion upon which this Division should proceed. I mention these arguments only in order to record that I do not assent to them. It would serve no good purpose to state the reasons for my disagreement, since, in view of another consideration which Mr. Willmer has put before me, whether I agree or dissent is a matter of only academic importance.

Upon a careful review of all the evidence in the case, I arrived at the conclusion that Mme. Chourot, widow of the second engineer (item 16) and Mme. Le Cavorzin, the widow of the vessel's cook (item 17), Mme. B Hery, widow of Ange Hery, a sailor (item 18), and Mme. Rouget, widow of Jean Rouget, a seaman (item 22) have all been awarded amounts which appear to me to be excessive to the extent of about 20 per cent. or 25 per cent. I would accept immediately that, where a difference between the original award and that which a tribunal of review would be inclined to C give is no more than 10 per cent. of the total, it is difficult, if not impossible, to say that one is wrong and the other is right. Where, on the other hand, the difference between the two figures is so considerable as to amount to one-fifth or even one-quarter of the whole, there does not seem to be much difficulty in saying that one must be right and the other wrong. I D cannot, however, read the various pronouncements of the Court of Appeal of recent times upon this topic of review of quantum as allowing me to interfere with the awards of the registrar in this case. In *The Amerika* (1), this subject came to the notice of the Court of Appeal upon the finding of the registrar and merchants with regard to the value of a lost submarine. E SIR SAMUEL EVANS, P., reduced the amount of £26,500 awarded by the registrar to £23,850, but a very strong Court of Appeal, consisting of BUCKLEY and KENNEDY, L.JJ., and SCRUTTON, J., as he then was, held that SIR SAMUEL EVANS, P., was wrong to interfere with the award, and restored the original figure arrived at by the registrar and merchants. F BUCKLEY, L.J., said at p. 182 :

The court refuses to interfere with quantum except in exceptional circumstances. More than one instance may be put. The first which occurs to my mind is in respect of salvage. The court does not interfere unless the case is so strong that the court thinks a wrong sum has been arrived at as a matter of principle, or the award is so unfair, either to the salvor or the salvaged, that the conscience of the court is shocked.

G A second case is the taxation of costs, when there arises a question as to the proper sum to be allowed. The court never interferes there in the absence of some question of principle. The present case is another instance.

In an attempt to summarise all the cases in which a tribunal of review might interfere, KENNEDY, L.J., presents the following summary, at H p. 184 :

I apprehend that in a general way the assessment of damages takes place before a specially constituted tribunal, and I may add a tribunal so constituted as to include both skilled and legal elements—the element of skill in business and mercantile affairs, as well as a trained lawyer with special admiralty knowledge. The court above ought not, therefore, except in very exceptional circumstances, to interfere with the decision of the assessing tribunal unless some error in principle is pointed out or there is an obvious error in the calculations regarding figures, or a plain mis-

understanding of some material portion of the evidence before the assessing tribunal. I can think of no other reason upon which the court above ought to interfere with the assessment, and it is not suggested here that there is any error in principle, or error in calculation, or plain misunderstanding of evidence, which lay at the root of the assessment to which the learned assistant registrar and his assessors came.

It is true that the matter then before the court was not a question of life claims, and that KENNEDY, L.J., does not specially mention that A class of case in his summary. As Mr. Bateson pointed out, the registrar and merchants would hardly claim any special skill in business and mercantile affairs which put them upon a higher plane or in a better position in dealing with such claims than that of a jury, or even a judge. I cannot perceive, however, that there is any real difference in principle B between awards of salvage and awards of damages either for loss of property or loss of life or assessments of costs. As lately as 1934, GREER, L.J., in dealing with *Flint v. Lovell* (2), said, at p. 360 :

In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either C that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

I take this statement from one who has sat for very many years in the Court of Appeal as being completely authoritative, and, taking it together with the language used by the Lords Justices in *The Amerika* (1), I cannot D think that a difference of opinion even amounting to 25 per cent. could justify an interference upon quantum only. There is no suggestion here of an error in principle, and it would be straining language out of all ordinary meaning to say that the assessments here were either extreme or absurd. Neither could it by any stretch of imagination be said that any of the E registrar's figures are so "unfair that the conscience of the court is shocked." It is indeed only fair to the registrar to add that, in respect of the items here objected to by the defendants, he was not invited to state his reasons, and I have not, therefore, had the opportunity, which I might otherwise have been afforded, of understanding fully the lines F upon which his assessments were based.

Passing now to the plaintiffs' objections, the point here arising under items 16a, 17a to 24a, rests, in the first instance, upon a consideration of the thorny topic of loss of expectation of life. The registrar has dealt G with the claims under this head by awarding the sum of £150 to each personal representative, irrespective of station, earnings, or age of the deceased man. The objection of the plaintiffs to this assessment proceeds upon two lines. In the first place, they object on the ground that all the assessments are too low, and, secondly, they say that under no correct H principle of assessment could all have worked out at the same figure. Accordingly, they present their objections in the form of saying that there is an error in principle in the method of assessment, and that all the awards should be increased, though in varying amounts.

Happily, in this instance we are not without guidance in the shape of the reasons of the registrar. In a very clear and careful statement, the

registrar has pointed out how he has attempted to apply the law laid down by the House of Lords in *Rose v. Ford* (3). The registrar will, I know, forgive me for saying (indeed, I rather suspect that he will cordially indorse the view) that this is a most unfortunate subject to be dealt with by the vehicle of registrar's reasons. If I have read the
A opinions of the Law Lords in *Rose v. Ford* (3) rightly, especially the outspoken view of LORD ROCHE at pp. 860-862, they are inclined to think that the greater part of the difficulty which has lately come to surround this subject arises from the fact that an undue prominence has been assigned in recent cases—notably in *Flint v. Lovell* (2)—to
B a head of damage which had hitherto always existed as an element, though not a very prominent one, in the assessment of general damages. The fault lies, therefore, in over-analysis, and it is much to be deplored that the registrar should be placed in a position in which he is forced to analyse with particularity the various elements that have gone to the
C composition of his awards. At any rate, no complaint can be made on the score that he has shirked a difficult and ungrateful task.

Taking first the factor of pain and suffering endured respectively by the deceased men between the occurrence of the negligent act causing their deaths and the respective deaths, he gives convincing reasons why
D in the present case it is not possible to make any distinction between them. Taking next the point as to the individuals who may be expected to profit under this head of damage, he points out that, since there is no evidence in this case concerning the law of France, he has presumed that it is identical in this matter with the law of England. He accordingly
E arrives at the conclusion, which is not challenged by either side, that the widows, in each instance where such exist, will be the first, and perhaps the only, individuals to profit under the Act of 1934. He then records the fact that the eldest of these men was 44 years of age, whilst the youngest was 23. It is clear, therefore, that the question of disparity in
F age was present to his mind when making these awards. Having noted this somewhat wide disparity, however, he then proceeds to attempt to measure the respective loss in value to each man by the single standard of the amount of enjoyment which they might be expected to have derived from their calling and circumstances. So far as the standard itself is
G concerned, I see no reason at all to quarrel with the very sensible conclusion at which he arrives upon this topic, and which he sums up succinctly in a single sentence :

They are all still in active life, and the joy they get of it is much the same whether they find it in what they have done or in the hope of what they may do.

H This topic of the enjoyment of human life seems to me to be the most difficult and most controversial of all the elements of damage which may fall to be considered under this Act of Parliament, but in the present instance I do not see how the registrar, upon the evidence before him, could have done better than he has done. Having arrived, however, at the conclusion that there are no differences to be made on the score of pain

and suffering, on the one hand, or pleasure in existence, on the other, there arises the question whether he has exhausted all the elements of damage which here fall to be considered. To my thinking, there exists a further question raised by the idea of expectation. I am very loath indeed to seem to disregard the advice of LORD ROCHE in *Rose v. Ford* (3), for which I have nothing but admiration, and to stray still further than A the registrar has been forced to do along the dangerous path of analysis and segregation. Nevertheless, I cannot bring myself to believe that in any question of expectation of life the factor of age can be entirely negligible. I appreciate fully that this age or time factor is not to be handled arithmetically. The chances, and therefore the expectation, of B life of a very young child may not, for obvious reasons, be so good as those of a healthy adult, who has survived the many dangers of childish ailments without physical impairment. Nevertheless, the very notion of expectation seems to me to connote time, and, if the good which forms the subject of expectation is rated equal over a given number of cases, C the time factor seems to me necessarily to assume importance. To apply this reasoning to the present case, if one assumes that the pleasure in existence derived by two men of different ages is equal, it appears to me to follow that, if both are in the same state of health, and are following the same calling with the same kind of risk, the expectation of life of the D younger man must exceed that of his elder. It is upon this question of the time factor—which he seems to have had in mind, but to have ignored deliberately—that the registrar's reasons appear to me to be illogical. It seems perhaps a trifle grandiloquent to describe this very minor illogicality as an error in principle, but, since it is not a mere question of E quantum, it is no doubt, in the language of legal argument, properly so described. Upon the question of quantum, too, I think that the registrar has erred, so far as these claims are concerned, and has erred upon the side of illiberality.

The fact that to my thinking he is wrong in the principle of assessment F would, I suppose, in any event, entitle me to alter his assessments, if I thought it right to do so, even though the alterations which I thought fit to make were of comparatively minor degree. Nor have I been insensible to the temptation to let the evil, if evil there be, remedy itself, by not interfering with the awards under this head, which seems to me to G be too low, and leaving their inadequacy to be compensated by the assessments under the Fatal Accidents Acts, which have seemed to me to be uniformly too high. Without, however, entering into the controversial ethical point as to whether it can ever be permissible to remedy one acknowledged wrong by perpetuating or allowing another, there are further H difficulties in the way of pursuing this tempting course. To state only one of them, it would do nothing to remedy the illogicality of having ignored the time factor.

I have accordingly felt obliged to face the distasteful task with which the registrar was confronted of dealing with these claims under the Act of

1934 in conjunction with the claims under the Fatal Accidents Acts. Again, in order to explain my method of assessment, I have to depart from the wise advice of LORD ROCHE, and to descend to wearisome, and possibly erroneous, depths of analysis. Starting from the passage in the opinion of LORD WRIGHT in *Rose v. Ford* (3), at pp. 852-853, in which he

A lays down how the matter should be put in the direction to a jury in order to avoid duplication, I have followed the application of this direction which was employed by BRANSON, J., in *May v. Sir Robert McAlpine & Sons (London), Ltd.* (4). I have first taken a sum of £1,000, such as was

B awarded in *Rose v. Ford* (3) by the Court of Appeal (and not disturbed in the House of Lords) to an adult young woman of 23 years of age. Next, without usurping the right to correct the registrar's awards under the Fatal Accidents Acts, which the practice laid down by the Court of Appeal forbids me to do, I have thought it right to bear in mind that, in

C my view, all the participants under those Acts have been generously compensated, and that, in the four specific instances which I have mentioned (all of them widows, who will probably receive the whole of the money assessed under this Act), they have been largely over-compensated. Finally, I have endeavoured to classify the 9 claims with due regard to what I have called the age or time factor. Clearly, no one could pretend

D to quantify claims of this character with such exactitude as to measure them exactly year by year. In this case, the 9 claims seem to me to fall easily into three distinct classes. There are 4 men whose ages rank between 41 and 44. Two are in their thirties, being aged 35 and 37 respectively, and 3 are younger men, aged from 23 to 26. I have greatly reduced

E the figure of £1,000 upon the view that all the men in question were engaged upon a dangerous trade in comparison with the deceased girl in *Rose v. Ford* (3), and still further reduced it on the score that all likely participants of which we have any knowledge have already been liberally compensated under the Fatal Accidents Acts. This has left me with a

F standard figure of £400 for the highest class—namely, the men of under thirty. I have graded the three classes as deserving £300, £350 and £400 respectively, and I have given effect to my view as to the over-compensation of the widows Chourot, Le Cavorzin, Hery and Rouget by a very substantial diminution of their standard shares. I am conscious that this

G last line of assessment will have to be justified upon broader grounds than those of strict logic. I have preferred to do a little violence to the logic which would compel me to accept the registrar's awards under the Fatal Accidents Acts as being right, since I cannot disturb them, rather than to perpetrate a paradox of injustice by which I should largely increase the

H compensation awarded to individuals who are already, in my view, too highly recompensed. The awards upon these items will therefore be :

Class I.

17A.	Le Cavorzin (41)	£150
21A.	E. J. M. Clement (41)	£300
18A.	Ange Hery (44)	£150
19A.	Joseph Durand (44)	£300

Class II

23A.	P. L. M. Le Roy (35)	..	..	£350
20A.	Georges Le Guerannic (37)	..	..	£350

Class III

24A.	Fernand Auvray (23)	..	..	£400
16A.	Roland Chourot (25)	..	..	£200
22A.	Jean Rouget (26)	..	..	£200

A

There remains the question which has been argued before me as to the proper rate of interest to be allowed upon all these life claims under either head. The registrar has not dealt with it in his reasons, and has, as I understand the matter, omitted to make any allowance for interest at all. Having weighed very carefully the reasons put before me by Mr. Willmer for changing the practice which has hitherto existed, I do not think that any case has been made out for a change. In so far, however, as the registrar has in this case departed from the usual practice by not giving interest from the date of the report, I think that his report should be varied to render it in accordance with the established practice. There will therefore be interest at the rate of 4 per cent. from the date of the report upon all the items which are the subject of these objections.

B

C

Defendants' objections disallowed with costs. Plaintiffs' objections allowed with costs.

Solicitors: *Bentleys, Stokes & Lowless* (for the plaintiffs); *William A. Crump & Son* (for the defendants).

D

[Reported by REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

Applied. BREWER v. WESTMINSTER BANK, LTD. [1952] 2 All E.R. 650.

HIRSCHHORN v. EVANS.

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.J.J.), July 14, 15, 1938.]

Execution—Garnishee order made against bank—Whether joint account of husband and wife attachable in respect of debt owed by husband alone.

A

A judgment debtor and his wife had a joint account with the appellant bank, on which account either of them could draw. A garnishee order was made on this account in respect of a debt owed by the husband :—

HELD (GREER, L.J., dissenting): a joint account with a bank, even if owned by a husband and wife, cannot be attached under a garnishee order in respect of a debt owed by one of the joint owners.

B

[EDITORIAL NOTE. It is here held that, although a husband and wife had given the usual order to the bank that it was to honour cheques signed by either of them, the account is a joint one—that is, that the bank cannot deal with it otherwise than at the request of both parties (subject always to dealings by cheque in the terms of the above instruction). It follows from this that the moneys in the account cannot be made the subject of a garnishee order.

C

AS TO DEBTS WHICH MAY BE ATTACHED, see HALSBURY, Hailsham Edn., Vol. 14, pp. 107-112, paras. 171-176; and FOR CASES, see DIGEST, Vol. 3, pp. 176, 177, Nos. 317-321.]

Cases referred to :

D

(1) *Joachimson v. Swiss Bank Corpn.*, [1921] 3 K.B. 110; 21 Digest 639, 2188; 90 L.J.K.B. 973; 125 L.T. 338.

(2) *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488; 12 Digest 610, 5042; 60 L.J.Q.B. 734; 65 L.T. 286.

(3) *Rogers v. Whiteley*, [1892] A.C. 118; 21 Digest 627, 2121; 61 L.J.Q.B. 512; 66 L.T. 303.

E

(4) *Harrods, Ltd. v. Tester*, [1937] 2 All E.R. 236; Digest Supp.; 157 L.T. 7.

(5) *Marshal v. Crutwell* (1875), L.R. 20 Eq. 328; 27 Digest 164, 1336; 44 L.J.Ch. 504.

(6) *Macdonald v. Tacquah Gold Mines Co.* (1884), 13 Q.B.D. 535; 21 Digest 630, 2134; 53 L.J.Q.B. 376; 51 L.T. 210.

(7) *Webb v. Stenton* (1883), 11 Q.B.D. 518; 21 Digest 625, 2107; 52 L.J.Q.B. 584; *sub nom. Re Hatton, Webb v. Stenton*, 49 L.T. 432.

F

(8) *Beasley v. Roney*, [1891] 1 Q.B. 509; 21 Digest 630, 2135; 60 L.J.Q.B. 408; 65 L.T. 153.

(9) *Plunkett v. Barclays Bank, Ltd.*, [1936] 2 K.B. 107; [1936] 1 All E.R. 653; Digest Supp.; 105 L.J.K.B. 379; 154 L.T. 465.

(10) *Koch v. Mineral Ore Syndicate (London & South Western Bank, Ltd., Garnishees)* (1910), 54 Sol. Jo. 600; 3 Digest 177, 321.

G

(11) *Hancock v. Smith* (1889), 41 Ch.D. 456; 3 Digest 185, 364; 58 L.J.Ch. 725; 61 L.T. 341.

(12) *Vinall v. De Pass*, [1892] A.C. 90; 21 Digest 636, 2163; 61 L.J.Q.B. 507; 66 L.T. 422; *affg. S.C. sub nom. De Pass v. Capital & Industries Corpn.*, [1891] 1 Q.B. 216.

H

APPEAL from a decision of His Honour JUDGE THOMAS at the Mayor's and City of London Court, dated Feb. 22, 1938, and reported in [1938] L.J.N.C.C.R. 165.

A judgment debtor and his wife had a joint account with the appellant bank, upon which account either of them could draw. This was the only account which the judgment debtor had with this bank. On Jan. 15,

1938, a garnishee order was issued against the bank in respect of a debt of £13 11s. owed by the debtor.

W. N. Stable, K.C., and *George Bankes* for the appellants.

N. K. Lindsay for the respondent.

Stable, K.C. : A garnishee order does not apply to a joint account of a judgment debtor and another person : *Macdonald v. Tacquah Gold Mines Co.* (6) and *Plunkett v. Barclays Bank, Ltd.* (9). The wife had the right to draw cheques. If she had drawn cheques, they might have been dishonoured, and she would have had a right of action against the bank. The wife might have proved that some of this account was her moneys, but she was not a party to these proceedings, and this order was made against her property despite this. This debt is a legal chose in action which the bank owes to these two customers. It can be reduced into possession only by a joint action by the husband and wife. It is a debt which in law belonged to them both, and the wife has said that she put money into this account. The husband would have had no right of action against the bank if the bank had allowed the wife to draw out all the money in the account. The test is : With whom was the contract made ? It was made with them both. The relationship between banker and customer is merely that of debtor and creditor. There never was a debt due from the bank to one only of these two customers. There is no case where a joint account has been attached for a debt owed by one of the joint owners. In *Harrods, Ltd. v. Tester* (4) the judgment debtor was the wife, but all the money in the joint account was the husband's. A garnishee order operates to transfer only assets which a creditor could honestly and properly have transferred himself.

Bankes : *Koch v. Mineral Ore Syndicate* (10), a decision of this court, is an even stronger case in the appellants' favour.

Lindsay : The only question is whether, at the time this garnishee order was served, there was a debt due to the judgment debtor. The money in this account belonged to the husband, as in *Marshal v. Crutwell* (5). The court must look and see in whom the equity is : see *Hancock v. Smith* (11), commented on in *Harrods, Ltd. v. Tester* (4). The wife could not complain if the husband drew a cheque for the full amount of the balance. Therefore she cannot complain if it is taken to satisfy a garnishee order. [Counsel also referred to *Beasley v. Roney* (8), *Vinall v. De Pass* (12) and *Joachimson v. Swiss Bank Corpn.* (1).]

GREER, L.J. : In this case, on the main question I have the misfortune to differ from my two brethren. It is a matter of no consequence, because I am satisfied that the judge had no evidence before him which justified him in coming to the conclusion that the debt owed by the bank was a debt due solely to the husband, because it had originated only in money provided by the husband. The only evidence given was the evidence of the wife, and she leaves it undetermined as to whether

or not the balance of her own account, or whether or not the balance of £1,000 which had been put into the account at an earlier date, was transferred into this account, and it is consistent with her evidence that the account was an account which consisted in part of moneys provided by her and in part of moneys provided by the husband. There was no
A ground on which the judge could find that the whole of the moneys in this account had been provided by the husband, and that therefore the account was the husband's account, and not the wife's account at all. The mere fact that the judge did not accept the wife's account, or was not prepared to accept it, did not provide evidence to the contrary
B of what the wife said. The fact that one does not believe evidence given for the defendant cannot make evidence for the plaintiff in any case.

It seems to me that the judge was wrong in the conclusion that he came to, on the ground that there was no evidence which justified that
C conclusion. If and in so far as it is necessary to decide the other point, the inclination in my mind is to think that Mr. Stable has not made out his point.

The only case, I think, to which I need refer in support of the view I have taken is the decision of BANKES and ATKIN, L.J.J., in *Joachimson v.*
D *Swiss Bank Corpn.* (1). In that case, BANKES, L.J., says, at p. 121 :

Applying LORD ESHER's test, as laid down in *Hamlyn & Co. v. Wood & Co.* (2), to the question whether the term contended for by the appellants must be implied in the contract between banker and customer, I have no hesitation in saying that it must. It seems to me impossible to imagine the relation between banker and customer, as it exists to-day, without the stipulation that, if the customer seeks to withdraw his loan, he must make application to the banker for it. It has been
E suggested that a decision to this effect would run counter to a line of authorities which have recognised and allowed garnishee proceedings in reference to amounts standing to a customer's credit on his current account, upon the ground that such amounts were debts capable of being attached. I do not agree with this suggestion. The effect of the service of a garnishee order *nisi* is, according to LORD WATSON in *Rogers v. Whiteley* (3), to make the garnishee "custodian for the court of the whole funds attached." The service of such an order is, in my opinion, a sufficient demand
F by operation of law, to satisfy any right a banker may have as between himself and his customer to a demand before payment of moneys standing to the credit of a current account can be enforced. As no demand for payment in the present case was made on or before Aug. 1, 1914, it follows, in my opinion, that the plaintiffs had no accrued cause of action on that date, and the claim fails on that ground.

I regard the views of ATKIN, L.J., as agreeing with what was laid down in
G the judgment of BANKES, L.J. If that is so, it seems to me practically conclusive of this case, because, if the garnishee summons was equivalent to a demand by the husband, the husband as well as his wife having the right to demand the payment of the sum, and afterwards moneys were paid on the husband's cheque by the bank, the bank cannot rely on the
H payment of that which had been already demanded through the garnishee summons by the husband for the purpose of the execution creditor. I am inclined to think that that view is supported by the decision of the judges in *Harrods, Ltd. v. Tester* (4), though the point did not directly arise in that case. I think that it is involved in the decision that the husband, and the husband alone, was decided by the court to have a title

to the debt which remained owing to whoever was the true owner of the debt which the bank owed to the true owner.

I am not impressed by the difficulty that a decision on those lines puts the bank in. The bank is in no better position than that of any other debtor. The debtor has got to find his creditor, and has got to pay his creditor where he finds him, and, if there is a difficulty about that, then the bank has got to run the risk of making a mistake by paying somebody whom it ought not to pay. In the present case, there is no real difficulty in the way of the bank, because, under C.C.R., Ord. 27, r. 7, at the time they were served with the garnishee proceedings, the bank could have paid the money into court and then said: "It is no concern of ours whether this ought to be paid to the garnishor of her husband's debt or whether it is really the wife's debt. We will let these two people fight it out amongst themselves." The bank was really put in no difficulty whatever. A

We have had quite a number of cases cited to us, but I do not think that any of them really touch the real point in the case, and I should like to say with regard to *Marshall v. Crutwell* (5) that, in my judgment, it has nothing whatever to do with the point which we have to decide in the present case. On general principles, I am against the argument which has been put forward on behalf of the bank, though I think that it does not matter in the result, because I agree with my brethren that this appeal must be allowed. B

SLESSER, L.J. : On Feb. 8, 1935, the judgment debtor, Lionel Evans, and his wife opened a joint account with Barclays Bank, Highgate branch, in the following terms : C

We request you to receive money from time to time to the credit of this account and hereby authorise you to accept the signature of either [of us] or the signature of the survivors or survivor as a sufficient discharge for the repayment of any moneys so deposited with you. D

That is signed by Lionel Evans and Elaine Evans, his wife. On Jan. 17, 1936, the judgment creditor, Charles Hirschhorn, who had been supplying building material to the firm which was being run by the judgment debtor, the Hampstead Construction Co., recovered judgment for £15 12s. 6d. and certain costs, and upon that there was taken up, on Jan. 15, 1938, or at any rate, then issued, a garnishee order against the bank which recited that : E

the judgment creditor has filed an affidavit stating that you [the bank] are indebted to the said judgment debtor [Lionel Evans] in the sum of £20. F

On that, the principal question which arises, in my opinion, is whether or not it was the fact that the bank at that time were so indebted to the judgment debtor, as there stated. In my view, the right construction to put upon the opening of the account on Feb. 8, 1935, notwithstanding the fact that both the judgment debtor and his wife were thereby authorised to sign cheques, is that that account was a joint account. G

I entertain no doubt that, if the bank had failed to meet its obligations, the rights under this account could only have been exercised by both the persons, the husband and the wife, joining in whatever claim might be appropriate under the account.

A If that view be the right one, I think that the case falls within the principle stated in *Macdonald v. Tacquah Gold Mines Co.* (6). That was a case in some ways simpler than this one, because there was there payable to two persons, one Norton and one Fitzgerald, a debt from a certain company in South Africa. The judgment creditor, one Macdonald, sought to garnishee this company in South Africa in respect
B of a debt of Fitzgerald alone, and it appears that, of the total sum owing both to Norton and to Fitzgerald in equity, a certain proportion would ultimately have been the property of Fitzgerald. It is pointed out there, however, that it could not be said that it was a liquidated sum owing in equity to Fitzgerald, because equity would never have entertained
C an action brought by Fitzgerald alone without making Norton a party. That statement of BRETT, M.R., at p. 538 seems to be material here—apart from the view which GREER, L.J., has expressed that there is here no evidence that the property in this account was solely the property of the husband, as the judge has found—in that the wife was made no party
D to the proceedings, and, although she has given evidence, which was perhaps not accepted, she has not been heard to say whether or not she makes any claim on this property. I do not think, that, in her absence, it would be possible to come to any conclusion as to whether or not the amount, though legally in the names of these two
E persons, was in equity solely the property of the husband, the wife being upon the account merely as trustee. However that may be, I think that the observations made by all three judges in *Macdonald v. Tacquah Gold Mines Co.* (6) are in point. It is pointed out that in that case the company were indebted in the liquidated sum or debt
F payable to Norton and Fitzgerald jointly, but not to either of them alone. There was no debt due in respect of this sum from Norton to Fitzgerald, nor could there be until the money had been paid by Norton to the company. BOWEN, L.J., says, at p. 539 :

G Where money is due on a covenant made with two persons jointly by which it is to be paid to such two jointly, no one of those two has any right to that money without the other of them.

Later FRY, L.J., says also at p. 539.

H I adhere to what was said by this court in *Webb v. Stenton* (7) as to the word “indebted” in that rule. Then can it be said that the defendant company was indebted to the judgment debtor when they were indebted to him and another person jointly only ? It seems clearly it cannot, and that the words of the rule are not applicable to such a case. If they were, the result would be to enable a judgment creditor to attach a debt due to two persons in order to answer for the debt due to him from the judgment debtor alone, which would be altogether contrary to justice.

What is said here is that, in so far as each of these persons has the right to demand payment of the money in the account under the specific

authorisation to accept the signature of either of them, this account is in its nature several as well as joint. I am unable to accept that view. It seems to me that it amounts to no more than that the bank are under an obligation at any time to meet the demand of either the husband or the wife, and to that extent, when that demand is dishonoured, the bank would be responsible for failure to meet that payment. If the argument here for the judgment creditor be well-maintained, it would follow that the bank would be in this dilemma; the whole account being sterilised owing to the operation of this order, they would be unable to meet the demands of the wife which she is entitled, under the contract with the bank, to make, because that would be prevented by an order which, on the face of it, applies to the husband only. I cannot think that any such position arises merely because each party may, as regards a specific cheque, create a specific debt in relation to that matter. A

I think that one has to look at the account as a whole, and, looking at the account as a whole, I think that it is in the nature of a joint account on which the bank are liable to both parties jointly, and, consequently, the garnishee order is misconceived in stating that the bank are indebted to the said judgment debtor in the sum there stated, whereas, in reality, they are indebted to the judgment debtor and to his wife jointly. B C D

I think that *Macdonald v. Tacquah Gold Mines Co.* (6) and the other cases which have since approved that decision determine this case in favour of the bank.

MACKINNON, L.J.: On Jan. 15, 1938, this document was served on the bank. It is headed "Summons to garnishee," and it sets out: E

Charles Hirschhorn, judgment creditor, Lionel Evans, judgment debtor, Barclays Bank, Ltd., garnishees.

It recites that the judgment creditors obtained a judgment for £15 odd against the judgment debtor. It recites that: F

The judgment creditor has filed an affidavit stating that you [the bank] are indebted to the judgment debtor in the sum of £20.

Then it says: G

You are hereby summoned to appear at court to show cause why an order should not be made upon you for the payment to the judgment creditor of the amount of the debt due and owing or accruing from you to the said judgment debtor. Take notice that from and after the service of this summons upon you so much of the debts owing or accruing from you to the judgment debtor as will satisfy the debt due . . . are attached to answer the said judgment. H

Then the amount, the total for which the summons is issued, is specified as £15 7s. If, upon receiving that summons, the bank had any account open in their books in the name of Lionel Evans, the judgment debtor, it would have been their duty not to allow Lionel Evans to draw cheques upon that account so as to reduce the credit balance below the sum of

£15 7s. That obligation would attach to that as regards any account in the name of Lionel Evans, even if the bank had the strongest reason to suppose that Lionel Evans was only a trustee, or that for any other reason he had not the full and beneficial interest in the account.

In fact, on Jan. 15, 1938, the bank had no account in their books
A in the name of Lionel Evans. They had an account in the names of Lionel Evans and his wife, Elaine Evans. I am quite satisfied that that was a joint account. It is true that there was an authority on the bank to honour cheques upon that joint account if the cheques were signed by one or other of them. That simply means: "Either of us
B has authority on behalf of, and as agent for, both of us to sign cheques." It would amount to no more than an added authorisation to the bank. "Upon this our joint account you are authorised to honour cheques drawn by our clerk or agent, John Smith," notwithstanding that it was, and at all times remains, a joint account.

C On that account the bank were debtors for any balance which showed to Lionel Evans and Elaine Evans jointly. They were not debtors on that account to Lionel Evans. On Jan. 15, that joint account was in credit to the amount of £114 7s. 5d. If it had been an account in the name of Lionel Evans only, the bank would have been bound
D not to honour cheques drawn on it so as to reduce that credit balance below £15 7s. As the account was in the joint names, and not in the name of the judgment debtor, the bank took the view that the summons did not attach any part of their debt on the joint account, and they could not dishonour cheques drawn on the joint account.
E I think that they were right in that view.

If authority be needed, it can be supplied by part of a single sentence in the judgment of POLLOCK, B., in *Beasley v. Roney* (8), at p. 512:

... the debt owing by a garnishee to a judgment debtor which can be attached to answer the judgment debt must be a debt due to the judgment debtor alone,
F and that where it is only due to him jointly with another it cannot be attached.

The bank taking that view, and, as I think, rightly taking that view, in the result, cheques were drawn on the joint account, and were honoured by the bank, so that, by Feb. 5, the account was overdrawn, and there was no balance at all. In those circumstances, on Feb. 22, a garnishee
G summons came on for hearing. The judge held that the bank must pay £13 11s. out of its own money, though the Evans's owed that money on this joint account. That was on the basis that, on receiving the summons of Jan. 15, the bank were bound thenceforward to dishonour any cheques on the joint account drawn below the amount specified
H in the summons, and this duty was alleged to arise because the money in the account really belonged to the husband. The judge's judgment ends with the words:

So far as the question of principle is concerned, I see no more difficulty in this case than in a case where they have got the account in one name and it turns out that the money is the property of somebody else.

That seems to be couched in popular language. There is, of course, never any question of property in the credit balance of a bank account. The relation of banker and customer is simply that of debtor and creditor, but if this popular language means, as it appears to do, that, when a garnishee order in regard to some named judgment debtor is served on a bank, the bank must, at its peril, hold up any account in which the judgment creditor can subsequently prove that the judgment debtor had an interest as principal, *cestui que trust*, or in any other way, I think that that proposition is utterly wrong, and that its enforcement would impose quite an unjustified and intolerable burden on the bank. I think that, for these reasons, the judgment was wrong. This appeal should be allowed.

Appeal allowed, with costs below on scale C. Appellants to pay costs of appeal; leave to appeal to the House of Lords provided that the respondent pays the costs of the appeal in the Court of Appeal.

Solicitors: *Richards, Butler, Stokes & Woodham Smith* (for the appellants); *Craigden, Hicks & Co.* (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

MYERS v. ROTHFIELD.

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), June 14, 15, 16, July 11, 1938.]

Solicitor—Alleged unprofessional conduct—Conduct of case left to managing clerk—Inadequate affidavits of documents—False to the knowledge of the clerk—Whether solicitor can be made personally responsible for costs.

The present appellant had been the solicitor on the record to one of the defendants. At the close of the case, the plaintiff made an application that the appellant should be ordered to pay the costs of the action, on the ground that he had been guilty of unprofessional conduct. It was proved that the appellant had left the conduct of the case in the hands of his managing clerk, who was not a solicitor. It was alleged that the appellant had been guilty of unprofessional conduct in that (i) he had filed a defence putting the plaintiff to the proof of her allegations, knowing that the defence was unlikely to succeed, and (ii) had prepared affidavits of documents which no solicitor could help knowing were inadequate:—

HELD: (i) it is not unprofessional conduct on the part of a solicitor to file a defence putting a plaintiff to proof.

(ii) (MACKINNON, L.J., dissenting): a solicitor cannot be punished for misconduct committed by his clerk, but only if he himself has been guilty of improper conduct.

EDITORIAL NOTE. The question here is whether the doctrine of *respondent superior* applies to the case of a solicitor and his clerk. By a majority the court has decided that the punitive powers of the court over solicitors are only exercisable when the solicitor himself has been guilty of some misconduct. Misconduct by a clerk, which cannot be brought home to the solicitor himself, does not render the solicitor subject to the inherent jurisdiction of the court over its officers.

AS TO LIABILITY OF SOLICITOR TO PAY COSTS, see HALSBURY, 1st Edn., Vol. 26, Solicitors, pp. 832-835, paras. 1356-1358; and FOR CASES, see DIGEST, Vol. 42, pp. 337-353, Nos. 3810-4022.]

Cases referred to :

- (1) *Brendon v. Spiro*, [1938] 1 K.B. 176 ; [1937] 2 All E.R. 496 ; Digest Supp. ; 157 L.T. 265.
- (2) *Simmons v. Liberal Opinion, Ltd., Re Dunn*, [1911] 1 K.B. 966 ; 42 Digest 343, 3874 ; 80 L.J.K.B. 617 ; 104 L.T. 264.
- (3) *Re Eyre, Palmer v. Evans* (1856), 1 C.B.N.S. 151 ; 42 Digest 353, 4017 ; 28 L.T.O.S. 125.
- (4) *Dunkley v. Farris* (1851), 11 C.B. 457 ; 42 Digest 343, 3886.
- (5) *R. v. Southerton* (1805), 6 East, 126 ; 42 Digest 398, 4480.
- (6) *Re Cooke* (1889), 5 T.L.R. 407 ; 42 Digest 344, 3900 ; *reversg.* S.C. *sub nom.* *Re A Solicitor*, 5 T.L.R. 335.

A

B

APPEAL from an order of SINGLETON, J., dated May 13, 1938. The facts of the case are fully set out in the judgments.

T. F. Davis and *T. J. F. Hobley* for the appellant.

R. A. Willes and *L. H. Gluckstein* for the respondent.

C

GREER, L.J. : The plaintiff brought an action against the defendant for defrauding her of money and shares by an ingenious combination of inviting members of the public to become subscribers to an Empire produce pool, and to invest their profits and other moneys in a worthless company called Consolidated Gold Alluvials, Ltd. The action was tried

D

by SINGLETON, J., and a special jury, and resulted in a judgment for the plaintiff for £9,400 16s. 1d. Since it appeared very unlikely that the plaintiff would be able to recover either the amount of the judgment or the costs from the defendants, the plaintiff by her counsel asked that the solicitors should be ordered to pay to the plaintiff the costs of the

E

action on the ground of professional misconduct, and the judge, after certain particulars had been delivered pursuant to his order, and after hearing at considerable length counsel for Mr. Elman, the solicitor for the Rothfields, ordered that the appellant, Mr. Elman, should pay to the plaintiff one-third of the taxed costs of the action, and two-thirds

F

of the costs of the application made by the plaintiff for an order that he should pay part of the costs of the action. It is quite clear that the application made to the court was an application that the judge should exercise the disciplinary powers of the court to punish a solicitor, as one of its officers, for misconduct. It was proved in the course of

G

the hearing of the application that Mr. Elman himself left the conduct of the defence and the details of the action in the hands of his managing clerk, a Mr. Osborn. It was urged that the punitive powers of the court should be exercised against Mr. Elman because, with the knowledge that the defence was not likely to succeed, he filed a defence putting the

H

plaintiff to the proof of her allegations. It was urged in the second place that he ought to be punished because the affidavits of documents which were prepared from time to time for his clients were quite inadequate, and they were affidavits that a solicitor ought not to have drawn up to be sworn by his clients, inasmuch as he could not help knowing that they were false, as they did not contain documents such as bank pass-

books and other documents which any intelligent person reading the statements of claim and defence would know must be relevant to the issues in the action.

The judge decided—and, I think, rightly decided—that Mr. Elman was not guilty of any punishable misconduct by reason of his having either by himself or his clerk filed a defence in the action the effect of which was to put the plaintiff to the proof of her case. I agree with the judge's finding in this respect, for the reasons stated by him in his judgment. The judge held that the solicitor was guilty of misconduct by preparing affidavits of documents which were quite inadequate, and by permitting his clients to swear to affidavits which the person who drew them up must have known to be false. He rightly defines misconduct as :

something which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute—for example, wilfully misleading the court in the conduct of a case.

He declined to draw any distinction between what was done by the managing clerk and what was done by the solicitor, and he said :

Mr. Osborn was generally in charge of litigious matters the office, and Mr. Elman as the solicitor and employer is responsible for his acts.

Later he said :

I am unable to draw any distinction between Mr. Elman and his managing clerk, for whom he is responsible.

It seems quite clear from the evidence which was called that Mr. Elman had nothing whatever to do with the discovery of documents until a late stage in the action, and, when he did intervene, he insisted upon pressing for full discovery, with the result that, either in compliance with an order for further and better affidavits of documents or by procuring further documents for inspection, he succeeded in getting from his clients all the relevant documents. In my judgment, the judge was wrong in holding that he could punish Mr. Elman as an officer of the court for misconduct which was not committed by him but was committed by his clerk. Unfortunately, the clerk who may have been blameworthy was not a solicitor, but was an unadmitted managing clerk. It appears to me impossible to say that it is misconduct on the part of a solicitor to leave to an unadmitted managing clerk of ability and long experience the conduct of all the interlocutory business in an action in which the solicitor is on the record as solicitor for a defendant. In my judgment, a judge is entitled to exercise the punitive powers of the court in relation to a solicitor who is an officer of the court only if it be established that the solicitor himself has been guilty of conduct which would reasonably be regarded by solicitors of good repute as disgraceful and dishonourable. In this case, it was not established that there was any such conduct on the part of Mr. Elman himself. An order to pay part of the costs is just as much a punitive order as an order inflicting a fine would be. That this is so seems to follow from

the decision of the Court of Appeal in *Brendon v. Spiro* (1). A further question arose in that case which also arises in the present case—namely, whether the jurisdiction can be exercised against a solicitor if he ceases to be a solicitor before the date of the application. In dealing with this question, SCOTT, L.J., uses these words, at p. 185 :

- A Does the jurisdiction of the judge who hears a case to exercise control over the conduct of solicitors in the case, as officers of the court, come to an end if they cease to be the solicitors on the record before an application is made to him to exercise that jurisdiction ? It was argued, I understand, before GREAVES-LORD, J., and it was certainly argued before this court, that if in the course of an action a solicitor is guilty of such conduct as would entitle the court in the exercise of its summary jurisdiction to take disciplinary measures against him, if still on the record, by either striking him off the roll, or fining him, or ordering him to pay the costs of the party who has suffered by his misconduct, the judge has no longer jurisdiction to take that disciplinary action, if, although the solicitor was on the record and was in the opinion of the judge guilty of that misconduct, he ceases to be a solicitor on the record before the application to take that disciplinary action is made. To my mind it would be lamentable if the disciplinary power of the court over solicitors, who have been on the record and have acted as officials of the court, were limited in any such way. No foundation has been shown for the submission that it is so limited, and in my opinion it is not so limited.

- It was contended, however, that there are decisions which appear to show that the punitive powers of the court may be exercised against a solicitor for acts which he has not done himself, but which have been done on his behalf by a clerk. There are no doubt cases in which solicitors have been ordered to pay the costs, not because they have been guilty of misconduct, but because the action they have instituted is an action which has been brought without authority. In such cases, it does not matter whether the solicitor or his clerk caused the writ to be issued, because the ground of decision in such cases is that there is a warranty by the solicitor that he has the authority of his client to act for him in the litigation. If he has in fact no such authority, he can be ordered to pay the costs. This liability does not depend upon the jurisdiction of the court to punish its officers. It depends upon the fact that by entering appearance for a defendant the solicitor warrants to the plaintiff that he has the authority of the defendant so to appear and conduct the defence. This appears to be the reason stated by the Court of Appeal in *Simmons v. Liberal Opinion, Ltd., Re Dunn* (2), but I should prefer to put it on the ground that in cases of this kind, there being no authority to act for the person or company made defendant to the action, the solicitor himself can be treated as if he were a party to the action, and made liable for the costs that have been incurred at the time when there was no defendant.

- One of the cases relied upon by the respondent was *Re Eyre, Palmer v. Evans* (3). In that case, it was alleged that a solicitor obtained from the defendant an excessive sum for costs upon an untrue assertion that judgment had been signed and execution issued. The court found that they were not satisfied that the alleged extortion had been practised, but that they were satisfied that the respondent was not himself personally cognisant of the matter. The court discharged a rule which

had been obtained calling on the solicitor to answer the charge that he had recovered from a defendant an excessive sum for costs upon a false statement that judgment had been signed and execution issued, when in fact no judgment had been signed. In that case, the rule *nisi* was discharged because the improper conduct alleged against the solicitor had not been proved, but the court said that, as there had been improper conduct on the part of someone in the solicitor's office in extorting an excessive sum for costs under the false pretext that something had been done which in fact had not been done, the rule would be discharged on the solicitor refunding the amount received by him in excess, and paying the costs of the rule. I do not regard this case as a decision that the solicitor was responsible for the misconduct of his clerk, but only as a decision that, inasmuch as he had in fact received money through the fault of his clerk, it was money which he was bound to return. In *Dunkley v. Farris* (4), another case of this sort, JERVIS, C.J., said at p. 458 :

Although, therefore, we acquit Mr. Lewis of participation in the fraud—which we have reason to suspect to have been of frequent occurrence—we think he must personally bear the costs.

CRESSWELL, J., said at p. 458 :

Lewis is the only person upon whom we can impose the costs : and, however hard it may be upon him, there is no help for it.

TALFOURD, J., said at p. 458 :

By making Mr. Lewis pay the costs of setting aside the proceedings, we are not to be understood as imputing any blame to him. But we have no alternative.

Dunkley v. Farris (4) was a case in which Mr. Lewis's clerk had issued a writ of summons which was a nullity because it had not been sealed by the court, the seal having been put down in circumstances which made it a forgery. It follows that it was a case in which the proceedings had been carried on by the solicitor as if there were an action proceeding, when there was in fact no action proceeding. It seems to me that the court was not exercising its disciplinary powers against a solicitor for misconduct, but was making the solicitor pay because there was no one else upon whom the costs could have been imposed.

In my judgment, the punitive powers of the court can only be exercised when the court is informed of facts which show that a solicitor has himself been guilty of some disgraceful conduct, and he cannot be made liable because it is proved that a clerk whom he was entitled to trust has been guilty of the conduct of which complaint is made. The appeal will therefore be allowed.

SLESSER, L.J. : I agree with GREER, L.J., that the judge was mistaken in thinking that the complaint against Mr. Elman fell to be dealt with under the punitive jurisdiction of the court by reason of misconduct committed by his clerk, who was not a solicitor, and that such findings as there are against Mr. Elman personally, if any, are not

based upon any evidence sufficient to justify the order made against him upon any personal grounds. At the end of his review of the evidence, the judge says :

A I am unable to draw any distinction between Mr. Elman and his managing clerk, for whom he is responsible. Many of the matters were no doubt left to the managing clerk, but both, I think, knew a good deal about the matters in question, and I say this having heard the evidence of both.

B The deliberate obstruction to complete discovery, which was proved, seems to me, on the evidence, capable of being brought home to the clerk Osborn only, and, in the absence of any proof of combination between him and the appellant, I think that the judge was not entitled to refuse to draw a distinction between Mr. Elman and his managing clerk.

C The matter is very free from authority, and those authorities which are relied upon to show that the solicitor may be liable for the acts of his clerk appear to have been founded, not upon misconduct, but rather upon the basis that the action was brought without authority. As GREER, L.J., points out in his judgment, at p. 501, *ante* :

D In such cases, it does not matter whether the solicitor or his clerk caused the writ to be issued, because the ground of decision in such cases is that there is a warranty by the solicitor that he has the authority of his client to act for him in the litigation.

Re Eyre, Palmer v. Evans (3) is no more than a decision that, in so far as a solicitor was enriched by the misconduct of his clerk, he must account for the money so received. *Dunkley v. Farris* (4), also is not a case, I think, based upon misconduct by the solicitor.

E It is essential, in my view, as a matter of general principle, that the misconduct of a solicitor must be brought home personally to him. It extends to all cases where the solicitor's conduct is such as to render him unfit to be an officer of the court (*R. v. Southerton* (5)), and such a case must carefully be distinguished from one of negligence (*per* LORD F G Esher, M.R., in *Re Cooke* (6)), in which action, of course, the solicitor, under the general doctrine of *respondeat superior*, may be liable for the negligence of an agent or servant. The cases which deal with striking attorneys or solicitors off the Roll and those ordering them, in the inherent jurisdiction of the court, personally to pay costs rest G alike on the ground of personal misconduct, and it is a necessary condition of the exercise of the power in both cases that the misconduct should be brought home to the solicitor himself. I agree, therefore, that this appeal succeeds.

H MACKINNON, L.J. : The plaintiff in the action was swindled out of more than £9,000 by the defendants. I do not know whether the wickedness of the swindlers or the credulity of their dupe ranks higher. When the dupe started her action, the plan of action of the swindlers was clear. They intended by the abuse of every step in the procedure of the courts, a lying defence, and false and insufficient affidavits of

discovery, to postpone as long as possible the day of reckoning—namely, the hearing of the action. If the plaintiff's advisers were sufficiently astute and pertinacious to overcome this form of obstruction, and the day of trial eventually arrived, the game would be up, and the defendants would not appear, though they would have gained valuable time. When the trial arrived, one Rothfield, a defendant, did not appear, having been sent to penal servitude a month or two earlier, and another did not appear because he had fled abroad, and, incidentally, got a final postponement of the trial by a lying affidavit from his mother. A

As it appeared that the plaintiff's judgment was likely to be fruitless, though she had incurred greatly increased costs owing to the obstructive and improper conduct of the litigation by the defendants, she applied for an order that Mr. Elman, the solicitor for those defendants, should pay some of the costs she had thus incurred. SINGLETON, J., having fully investigated the matter at a lengthy hearing, was satisfied that the course of conduct pursued in regard to discovery by the defendants' solicitor was misconduct in a professional sense. He was also satisfied that, but for such misconduct, the action would, in all probability, have been brought to trial much more speedily, and might well have been more fruitful in its results. He therefore ordered that the solicitor should pay one-third of the plaintiff's taxed costs of the action and two-thirds of the costs of the application made against himself and other solicitors for some of the defendants. B C D

The application was made against Mr. Elman as an officer of the court and the solicitor on the record. If Mr. Elman had personally done the work of his office in regard to these matters, there can be no doubt that the conclusion of SINGLETON, J., was amply justified, except that there might possibly be a doubt whether the amount ordered to be paid was sufficient. Mr. Elman, however, had the assistance of a clerk named Osborn. Osborn was not a solicitor, and is not, therefore, subject to any disciplinary action of the court. According to Mr. Elman's evidence, he left the conduct of the Rothfields' case, as to discovery, to be attended to by Osborn, with very little supervision by himself. As the evidence was left, it would appear that the major part of the misconduct found by SINGLETON, J., was committed by Osborn. I am satisfied that no point was taken before SINGLETON, J., that Elman was not responsible for Osborn's doings. He does say in the course of his judgment: E F G

I am unable to draw any distinction between Mr. Elman and his managing clerk, for whom he is responsible. H

That it had not been argued before him that in respect of this matter he was not responsible I infer from the fact that the point was not taken before us by Mr. Elman's counsel. It was first suggested to him by GREER, L.J., and, when he understood the point, he adopted it with grateful alacrity.

The point having been raised, however, we must decide it. There is very little authority upon it, but what there is seems to me to be in favour of the respondent. In *Dunkley v. Farris* (4), there was a rule on behalf of the defendant calling on the plaintiff and his solicitor to show cause why the writ should not be set aside and the solicitor ordered
A to pay the costs of the application. The seal on the writ had been forged by the solicitor's clerk. Counsel for the plaintiff admitted that the proceedings must be set aside, but said that, as the master had reported that the solicitor was not personally responsible, he ought not to be visited with costs. JERVIS, C.J., said that the defendant ought
B not to bear his own costs, nor should the plaintiff, as a result of the solicitor employing a dishonest clerk, and said, at p. 458 :

Although, therefore, we acquit Mr. Lewis of participation in the fraud—which we have reason to suspect to have been of frequent occurrence—we think he must personally bear the costs.

C CRESSWELL, J., said at p. 458 :

Lewis is the only person on whom we can impose the costs : and, however hard it may be upon him, there is no help for it.

TALFOURD, J., said at p. 458 :

D The service of the writ was an act done in the prosecution of the attorney's duty ; it was therefore his act. By making Mr. Lewis pay the costs of setting aside the proceedings, we are not to be understood as imputing any blame to him. But we have no alternative.

Applying the words of TALFOURD, J., to the present case, clearly the business of attending to the defendants' affidavits of discovery was in
E pursuance of Mr. Elman's duty as solicitor, and was therefore his act. Nor can he be said to be so free from blame as Dunkley's solicitor was, for clearly he failed to exercise proper supervision over Osborn in dealing with the business.

In *Re Eyre, Palmer v. Evans* (3), there was a rule calling on Mr. Eyre, an attorney, to answer an allegation that he had obtained excessive costs from the defendant on an untrue allegation that judgment had been signed and execution issued. The court was satisfied that the extortion had been practised, but that Mr. Eyre was not personally cognisant of it. JERVIS, C.J., said that there had been very improper conduct on
G the part of someone in Mr. Eyre's office, and said at p. 152 :

But, inasmuch as it was done in his office, and by a person for whose acts he is responsible, and as he received the money, I think he is so far implicated as to make him responsible.

It was therefore ordered that Mr. Eyre should refund the money received
H and pay the costs of the application.

In this case, there was improper conduct in Mr. Elman's office by Osborn, for whom Mr. Elman was responsible. Moreover, that conduct, involving, as it did, frequent appearances before a master on applications by the plaintiff for further and better discovery, must have inflated Mr. Elman's bill of costs. Further, we may assume, I think, that Mr.

Elman was in a better position than was the unfortunate plaintiff to get money owing to him out of his disreputable clients.

On principle, I think that Mr. Elman ought to be held responsible for the misconduct of Osborn. Those two cases are, in my view, precedents for that principle. In the result, I have the misfortune to differ from my brethren, and think that this appeal should be dismissed. A

Appeal allowed with costs in the Court of Appeal. Leave to appeal to the House of Lords.

Solicitors: *Burnett L. Elman* (for the appellant); *Peacock & Goddard*, agents for *Edge & Ellison*, Birmingham (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.] B

COLERIDGE-TAYLOR v. NOVELLO & CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.), July 7, 8, 11, 1938.] C

Copyright—Musical work—Assignment of the copyright by the composer on Mar. 11, 1912, subsequent to the passing of the Copyright Act, 1911, but prior to the time when the Act came into operation—Whether copyright passed for the whole term of its existence—Copyright Act, 1911 (c. 46), ss. 5 (2), 24.

The author and composer of the music for a musical work entitled A TALE OF OLD JAPAN, and the first owner of the copyright therein, assigned the copyright and rights of publication, representation and performance to the defendant company, in consideration of a royalty of one-eighth of the published price of the work. The assignment was made on Mar. 11, 1912, a date subsequent to Dec. 16, 1911, when the Copyright Act, 1911, was passed, but prior to July 1, 1912, when the Act came into operation. The plaintiffs, the beneficiaries under the intestacy of the composer, claimed that, by reason of the proviso to the Copyright Act, 1911, s. 5 (2), the copyright in the work in question, as from Sept. 1, 1937—that being the expiration of 25 years from the death of the author—became their property. The defendant company maintained that, notwithstanding the proviso to sect. 5 (2) of the Act, the assignment of Mar. 11, 1912, operated to vest in them the copyright in the work for the whole term for which the copyright subsists:— D

HELD: sect. 24 is a comprehensive section dealing with works existing at the date of the commencement of the Act of 1911, and the proviso to sect. 5 (2) does not operate to extend or qualify it. These provisions are inconsistent, and sect. 24 prevails in the case of works existing at the date of the commencement of the Act. The defendant company were, as from the date of the commencement of the Act, the owners of the copyright within the meaning of sect. 5 (2), and the proviso did not apply, because at that date they, and not the author, were the owners of the copyright. In the result, the defendant company were owners of the copyright subject only to this, that by sect. 24 (1) (a) upon the expiration of the term for which copyright could exist before the passing of the 1911 Act, i.e., in Sept., 1953, it would revert to the representatives of the author until the expiration of the terms for which it would exist under that Act, i.e., until Sept., 1962. E F

Decision of MORTON, J., ([1938] 2 All E.R. 318) reversed. G

[EDITORIAL NOTE. The proviso to sect. 5 (2) limits the operation of an assignment of a copyright by the author to a period of 25 years from the author's death, and from the expiration of that time it is to vest in his personal representatives. H

This provision is to become operative from the passing of the Act, and in the court below the question was raised whether the word "passing" refers to the date on which the Royal Assent was given or the later date on which the statute came into operation. The Court of Appeal have, however, found it unnecessary to consider this matter, as they are of opinion that, so far as works existing at the date of the commencement of the Act are concerned, sect. 24 is a comprehensive section dealing with those works, and sect. 5 (2) does not apply thereto. The proviso to sect. 5 (2) does not apply to an existing work that had been assigned at the date of the commencement of the Act, because, under the assignment, the author is not then the owner, as the proviso to sect. 5 (2) requires. The owner at the material time in such a case is the assignee. It must be remembered that, by the Act of 1911, the term of the copyright in a work was extended, so far as the present case is concerned, from a period of 42 years from the date of first publication to a period of the life of the author and 50 years after his death, and that, by sect. 24 (1) (a) of the Act, the extra period thus given in the case of existing works was made to revert to the author, and not allowed to stand for the benefit of his assignees.

AS TO ASSIGNMENT OF COPYRIGHT, see HALSBURY, Hailsham Edn., Vol. 7, p. 561, para. 875; and FOR THE COPYRIGHT ACT, 1911, s. 5 (2), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 3, p. 727.]

APPEAL by the defendants from an order of MORTON, J., dated Apr. 1, 1938, and reported [1938] 2 All E.R. 318, where the facts are fully set out.

K. E. Shelley, K.C., and *E. J. Macgillivray* for the appellants, the defendants.

F. R. Evershed, K.C., and *F. E. Skone James* for the respondents, the plaintiffs.

SIR WILFRID GREENE, M.R. [delivering the judgment of the court]:

The plaintiffs in the action out of which this appeal arises claim, as the representatives of the late Samuel Coleridge-Taylor, to be entitled to the copyright in a musical work entitled *A TALE OF OLD JAPAN* composed by Mr. Coleridge-Taylor, and first published in England during 1911. They say that, notwithstanding an agreement of Mar. 11, 1912, made between Mr. Coleridge-Taylor and the defendants, they became entitled, by virtue of the proviso to the Copyright Act, 1911, s. 5 (2), to a reversionary interest in the copyright in that work. The reversionary interest to which that proviso refers would be an interest which, on the facts of this case, would begin in Sept., 1937. The writ was issued on Aug. 20, 1937. The reversionary interest, if it exists for the benefit of the plaintiffs as representing Mr. Coleridge-Taylor, would be in respect of the period beginning on Sept. 1, 1937, and would extend for the remainder of the statutory period of copyright—that is to say, a further 25 years.

Mr. Coleridge-Taylor died on Sept. 1, 1912. On Dec. 16, 1911, the Royal Assent was given to the Copyright Act, 1911, and, by sect. 37 (2) (a) of that Act, the Act was to come into operation in the United Kingdom on July 1, 1912, or such earlier date as might be fixed by order in council. No such earlier date was fixed, and accordingly the date of commencement of the Act was July 1, 1912. It will be seen, therefore, that the agreement to which I have referred was dated between the date of the

passing of the Act and that of its commencement, and that is a circumstance relied upon by the plaintiffs in the action to bring them within the proviso to sect. 5 (2), which deals with the reversionary interest.

One or two more dates may be given before I come to examine more closely the questions that arise. If the Act of 1911 had not in fact been passed, the copyright under the old law would have expired in Sept., 1953—that is, 42 years from the date of publication of the work. Under the Act of 1911, which extends the period of copyright, the copyright would expire in 1962. The question depends upon the construction of two provisions of the Copyright Act read in relation to one another. One is the provision in sect. 5 to which I have referred, and the other is sect. 24, and I shall have to examine both those provisions with some care. It will be convenient, before I come to look at the Act, to refer to the terms of the agreement of Mar. 11, 1912, which was made between Mr. Coleridge-Taylor (called the vendor), of the one part, and the defendants, Novello & Co. (called the purchasers), of the other part. It provides that, in consideration of the specified royalty, the purchasers should receive in absolute purchase the copyright, and right of publication, representation and performance, and all other the rights, property and interests intended to be thereby assigned. Then Mr. Coleridge-Taylor as beneficial owner assigned all the copyright and rights of publication, representation and performance of him, the vendor, of and in the work in question, and all other the property, rights and interests whether at law or in equity of him, the vendor, therein or thereto to the purchaser absolutely. Of course, when that document was executed, since the Act had not come into force, Mr. Coleridge-Taylor's only rights under the law in respect of artistic property in this work were rights under the then-existing law. That document, at the time it was executed, was only effective to vest those rights in the purchaser.

I now turn to a consideration of the Act, and, before coming to the particular examination of the two sections in question, there are one or two general observations to be made. The Act was a consolidating and amending Act, and it modified the previous law in very many substantial particulars. I need mention, because they are relevant to the present inquiry, only three matters in respect of which alterations were made: (i) an alteration in the period of copyright, (ii) the inclusion within the scope of copyright of what had been dealt with by separate legislation—namely, performing rights, and (iii) the inclusion within the scope of copyright of what had previously been the common law rights in respect of unpublished works. The Act contains a comprehensive definition of "copyright" as it is to subsist for the future, and within that definition are included, not merely other matters, but also the two last-mentioned matters—the performing rights and the common law rights—and one other which I should have mentioned—namely, the right of making records or other mechanical contrivances for reproduction. That right is now to be included within the

bundle of rights covered by the statutory definition of "copyright." It will be convenient for the purposes of phraseology in the course of this judgment to refer to copyright as it existed under the previous legislation as "old copyright" (remembering that copyright did not include performing rights, they being the subject-matter of separate legislation),
 A and to describe as "new copyright" the bundle of rights included under the statutory definition of copyright in the Act of 1911.

The general scheme of the Act is to provide in Part I for Imperial copyright, and that part is divided by cross-headings into separate *fasciculi* of sections. Broadly speaking, it is, I think, correct to say
 B that the scheme upon which the Act is drawn up is to deal with copyright law as it is to be under the Act when it comes into force, leaving for special treatment a subject which required special treatment—namely, the grafting into the new and comprehensive code of law of all works in respect of which copyright, performing rights, and common
 C law rights existed under the old law. The Act, with one or two exceptions, the reasons for which are obvious on their face, deals, down to sect. 16, with copyright on the basis that I have described. When we come to sect. 16, we find that it is the first of a group of sections headed "Special provisions as to certain works." That cross-heading includes
 D sects. 16-24 inclusive, and among the works in respect of which special provisions are made are existing works, which are dealt with in sect. 24.

Before coming to examine that section, I must make a reference to another section included under the same subheading—namely, sect. 19. That was a section which dealt in detail with the new position introduced
 E consequent upon the inclusion in the scope of the protection of copyright of the right to make records and mechanical methods of reproduction. Under sect. 19 (7) (c), a provision is made whereby the benefit of this new right—namely, the exclusive right of making records—is reserved to the author of the work notwithstanding any assignment of copyright
 F made before the passing of the Act. That, of course, was an obvious piece of justice, because, when an author before this Act had assigned copyright, the assignee acquired no rights with regard to the making of records, because the author had not got such rights. Accordingly, that particular new right was reserved to the author, and, in passing, I must
 G just mention subsect. (8). That provides for the term during which the copyright in the matter of making records, etc., is to subsist in the case of contrivances made before the commencement of the Act.

The two last general observations that I wish to make before I come to sect. 24 are (i) that, under sect. 31, copyright and similar rights in works,
 H whether published or unpublished, otherwise than under and in accordance with the provisions of the Act, are abrogated, of course, as from the date of the commencement of the Act, the scheme being to substitute for pre-existing rights the new statutory provisions, and (ii) that throughout this Act we are told by Mr. Macgillivray, and it is not disputed, that, with the exception of four cases where the context makes the matter

perfectly clear, the word "copyright" is used, as one would expect it to be used, in the sense of the statutory definition. I say four cases, but it is said that the proviso which is now in controversy is another case where the word "copyright" is not to be confined to copyright as defined by the statute in sect. 1 (2).

I now turn to sect. 24. That section deals, as I have said, with exist- A
ing works, and it is in that section that one would expect to find the relevant provisions with regard to the duration of copyright and the nature of the right of copyright which is to be given by the law in respect of such works. I propose to read first subsect. (3), which provides as follows : B

Subject to the provisions of sect. 19 (7), (8)—

to both of which I have referred, the only relevant paragraph in sub-
sect. (7) being para. (c)—

and of sect. 33 of this Act, copyright shall not subsist in any work made before the com- C
mencement of this Act, otherwise than under, and in accordance with the provisions of this section.

The work in question was a work made before the commencement of this Act, and Parliament in this subsection is indicating with perfect clarity and complete decisiveness that in such a work copyright is not to subsist D
otherwise than under and in accordance with the provisions of this section. No clearer way could have been found by Parliament, I venture to think, of informing those interested that, if they wish to find what are the rights of copyright which are to subsist in such a work as the present, they are to look within the four corners of this section, and not E
outside it, save in so far as subsect. (3) itself tells them that they are to look outside it, by looking, where necessary, to sect. 19 (7), (8), and sect. 33.

There are two further points to be observed bearing on the same matter of this subsection. The subsection does not say "subject to the F
provisions of this Act," or anything of that kind; nor does it contain any reference whatsoever to the particular proviso in sect. 5 which is said to operate upon copyright in an existing work in the present case. It would be very inconvenient and misleading drafting if, having used that clear and emphatic language in subsect. (3), the legislature *sub* G
silentio had put into another section of the Act a provision affecting copyright in existing works in a way not provided for in sect. 24. However, if the legislature had used sufficiently clear language to produce that result, effect would have to be given to it.

I now turn back to the earlier subsections of sect. 24. Subsect. (1) H
provides :

Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column of the first schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this

Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder.

A That is drafting mechanism for getting the existing works into the scheme of the Act and for putting them on the same basis *mutatis mutandis* as new works made after the coming into force of the Act. The first schedule, to which reference is made, is a schedule setting out in two columns the existing and the substituted right. In the case with which we have to deal—that of a musical work—the existing right is both copyright and performing right, and the substituted right is copyright as defined by this Act. For the purpose of the schedule, copyright and performing right in relation to the pre-existing law are to include the common law rights in respect of unpublished works.

B Applying the language of subsect. (1) to the facts of the present case, it seems to me quite clear, in the first place, that Messrs. Novello & Co., the defendants, were, immediately before the commencement of this Act—namely, immediately before July 1, 1912—entitled to copyright and performing right, the existing rights as defined in the first schedule, their title to those rights being, of course, derived from the author, who was the first proprietor of them, under the agreement in question. As they, quite clearly as a matter of language, satisfy that definition, we have to see what it is that the subsection gives them. It gives them the substituted right specified in the schedule—namely, copyright under the Act—and it gives that copyright to them for a period which, upon the facts of this case, will expire in Sept., 1962. Just to be sure that I have stated it correctly in point of duration, the right which sect. 24 (1) gives to Messrs. Novello & Co., assuming that the subsection applies to them, is a right which will expire in 1962, whereas the right which they had obtained under the agreement—that is to say, the assignment of the old copyright—was one which would have expired in Sept., 1953.

F The term of the copyright having been extended, the amount of the extension being greater or less according to the circumstances of the individual case, the legislature, of course, had to make provision for the added term of copyright. Obviously, there would have been some ground for complaint—indeed, some substantial ground for complaint—on the part of authors and their representatives if this statutory windfall in the shape of an extended term of copyright had fallen into the pockets of purchasers of the old copyright, and the moral claim of the authors to have that windfall themselves was one which Parliament recognised, subject to a qualification conferring certain rights on the purchasers, into which I need not go. The windfall itself, however, is preserved for the authors under sect. 24 (1) (a). Omitting the special rights given to the purchaser of the old copyright, that proviso says this :

If the author of any work in which any such right as is specified in the first column of the first schedule to this Act subsists at the commencement of this Act has, before that date, assigned the right or granted any interest therein for the whole term of the right, then at the date when, but for the passing of this Act, the right

would have expired the substituted right conferred by this section shall, in the absence of express agreement, pass to the author of the work, and any interest therein created before the commencement of this act and then subsisting shall determine. . . .

Applying the language of that proviso to the facts of this case, it will be seen that it fits the facts precisely. Before the date of the commencement of the Act, Mr. Samuel Coleridge-Taylor, the author of the work in question, in whom the existing rights specified in the first column of the first schedule subsisted at the commencement of the Act, assigned that right for the whole term. He had assigned it by the agreement. The substituted right, which, by virtue of that assignment, is obtained by Messrs. Novello & Co. immediately the Act comes into force, is to inure for the benefit of the author to the extent that, during the period from Sept., 1953, when the old copyright would have expired, until Sept., 1962, when the new copyright will expire, the copyright is preserved to the author under this proviso. It seems to me that, upon the mere language of that proviso, it is one which precisely covers the facts of this case, and it will be seen that it is impossible to give to the proviso to sect. 5 (2) the meaning for which the plaintiffs contend in a way which will give any consistent meaning to sect. 24 (1) (a). I will examine that a little further when I come to deal with sect. 5 itself.

It seems to me, therefore, that, looking at sect. 24 in the way in which the legislature itself directs me to look at it—namely, as being a special provision as to a certain class of works (that is to say, existing works)—I find in that section a clear statement of what the law is to be as affecting this particular case, and cases like it. On general principles, where a special matter is dealt with specially in a section or series of sections, it is legitimate to approach the question of construction with a strong assumption that the special section or sections dealing with that matter will be found to constitute a complete code, save in so far as the special sections themselves may point to something in the rest of the Act.

There is one further matter not without importance which I should mention in regard to sect. 24 before I come to sect. 5, and it is this. I go back for a moment to subsect. (3), the subsection with which I started my examination of sect. 24. It starts off by saying :

Subject to the provisions of sect. 19 (7), (8) and of sect. 33 of this Act, copyright shall not subsist. . . .

It is important to notice that that subsection, (sect. 24 (3)), although its enacting words are directed to the subsistence of copyright, treats as germane to that provision something which is a pure matter of title to copyright—namely, the provision in sect. 19 (7) (c), which deals with the question of title as between author and assignee, a subject-matter which, as will be seen when I come to sect. 5, is similar in general character to that dealt with in the proviso to sect. 5 (2). It would indeed be curious if sect. 24 (3), having in terms made its provisions subject to one subsection which governs the relations between author and assignee in respect of one matter of title, should have omitted to refer

to another provision in the Act which, if the plaintiffs are right, also deals with the question of title as between author and assignee.

Sect. 5 appears in the general part of the Act the sub-title of which is "Rights," and it starts off by providing :

A (1) Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein.

Then there are certain provisos. That language taken by itself is clearly directed, in my view, to the future. It is in accordance with what I venture to think is the broad scheme of the drafting of the Act that the general provisions should be drafted without reference to existing B works, and that the existing works should be introduced into, and grafted upon, the system by means of a special provision. Subsect. (2) proceeds to give the right to assign copyright. It says :

C The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations . . . and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence. . . .

Then it is provided that it must be a grant or assignment in writing. There again, treating that as dealing with new copyright, which is to come into existence upon the commencement of the Act, the language D is clear and precise, and presents no difficulties. Subsect. (2) gives the right to assign and to grant interests, and that subsection is qualified by a proviso, and, although, of course, it is not true to say that a proviso is always to be limited to the subject-matter upon which it is engrafted, nevertheless, when one finds a proviso dealing in terms with a subject-matter of that character, it ought to be construed *prima facie*, I should E have thought, as a qualification of what has gone before, and not as containing something new extending to a different matter.

The proviso echoes the language of the substantive part of the subsection. It deals with assignment and grant of interest, which is F precisely what was dealt with in subsect. (2), and precisely the matters in respect of which the statutory rights to make assignments or grant interests are conferred. The proviso is as follows :

G Provided that, where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this Act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of 25 years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void. . . .

H Then there is a qualification which I need not read. Reading that proviso in the light of the rest of sect. 5 which has preceded it, and in particular in the light of the express grant in subsect. (2) of the right to assign—a grant which, I may say, was of course not required in respect of old copyright—it seems to me that its natural and obvious meaning is to

be ascertained by reading the phrase "the copyright" in the sense of new copyright under the statutory definition. It is that subject-matter with which the substantive part of the subsection is dealing and in respect of which the requisite right of assignment is being conferred. It seems to be the natural interpretation of the proviso to treat it as dealing with the same subject-matter. Indeed, I cannot think that any difficulty could possibly have been raised with regard to the operation of this proviso had it not been for one phrase, and that is that the assignments to which the proviso is directed are assignments made by the author "after the passing of this Act." It is said that the use of that phrase is sufficient to bring the present assignment within the scope of the proviso, and accordingly to vest the reversionary interest in the copyright in the representatives of Mr. Coleridge-Taylor.

I will now look back, as I promised to do, to the provisions in sect. 24 (1) (a). That is dealing with assignments before the commencement of the Act. The proviso to sect. 5 (2) is dealing with assignments after the passing of the Act. The two provisions cannot stand together consistently, in relation to assignments made between the passing and the commencement of the Act. It is easy to see, and I do not take up time in showing, why that is so, and the only argument which was advanced on behalf of the defendants in order to get out of that difficulty was to the effect that sect. 24 (1) (a) is to be read as not applying to an assignment made between the date of the passing of the Act and the date of its commencement. In other words, it would be limited, according to that argument, to assignments made before the passing of the Act. That, however, is not what proviso (a) says. It says, and says quite explicitly, that its provisions are to apply to assignments made before the commencement of the Act; and I am not prepared, in order to effect the reconciliation between the two sections which it is desired to effect, to do such violence to the language of this proviso, having regard to the other matters germane to the construction of sect. 24 to which I have already referred. It seems to me that the proviso to sect. 5 (2) is one to which a perfectly clear and reasonable meaning can be given if it be confined to assignments—including, of course, in that term agreements to assign, which in equity operate as assignments—under the Act—that is to say, assignments of new copyright. It is, of course, very common for authors to enter into agreements with publishers in relation to future works, and an author, during the period between the passing and the commencement of the Act, might well enter into a contract with a publisher in relation to works which were going to be produced after the commencement of the Act. It appears to me that the proviso would cover a case of such an agreement, and would have the effect of restraining what I may call for convenience the improvidence of the author by placing a statutory prohibition on assignments by him extending beyond the first 25 years following his death. That seems to me to give a reasonable and clear and grammatical effect to the reference in this proviso to the

passing of the Act. Of course, with regard to works which come into existence after the commencement of the Act, the matter is quite clear. That construction has the further advantage of giving to the word "copyright" in this subsection—both the substantive part of it and the proviso—a consistent meaning, limited, as one would expect to find it

A limited, to copyright as defined by the Act, what I have described as "new copyright," a different matter with elements in it different from any copyright which existed before the Act, and including, as I have said, certain matters, performing rights and common law rights, which did not fall under old copyright.

B I think that I have subjected the relevant sections to a sufficient analysis to show that, in my opinion, sect. 24 is to be read as a comprehensive section dealing with existing works, and that the proviso to sect. 5 (2) does not operate to extend, or to qualify, anything that is found in sect. 24, and I find it impossible to read into sect. 24 (3) by

C implication what it would be necessary to read in by implication—namely, a reference to the proviso to sect. 5 (2).

There is one other aspect of this question of construction to which I can usefully refer. If the effect which I have given to the language of the Act as applied to this particular case is the true one, Messrs.

D Novello & Co., as from the date of the commencement of the Act, were the owners of the copyright within the meaning of sect. 5 (2). They became such owners by virtue of the operation of sect. 24, and sect. 5 (2) gives to them what they had not got before, and what it required a statutory provision to give to them—namely, the right to assign the new copy-

E right granted by the Act in their capacity as owners. The proviso, of course, does not operate, because, at the date when the Act commences, the copyright is vested in them, and not in the author. If Mr. Coleridge-Taylor had happily remained alive, and after the date of the commencement of the Act had assigned the new copyright to the publishers, of

F course that assignment would have been affected by the proviso, and limited in its operation by it. As the matter stands, however, the only right which the publishers get upon the Act coming into operation is the new copyright, and in respect of that they get the statutory right to assign.

G Judgment was given by MORTON, J., in favour of the plaintiffs, the judge being to a considerable extent influenced in his decision, I think, by a concession which was made, as appears from his judgment, with regard to the meaning of the word "copyright" in the proviso to sect. 5 (2). He proceeded on the footing that the word "copyright" in that

H proviso admittedly covered old copyright. In point of fact, the contrary had been argued before him, but he dealt with it as a conceded construction. I myself do not find it possible to take that view of the meaning of "copyright" in the proviso, for the reasons I have given, but the judge was undoubtedly affected in his judgment by that meaning so given to the word. The judge also thought that, of the two inconsistent

provisions—because, as I have shown, they are inconsistent—the proviso to sect. 5 (2) and sect. 24 (1) (a), and, indeed, sect. 24 itself, the provisions in sect. 5 should be preferred to those in sect. 24, on the ground that sect. 5 was a more special subject-matter. I do not, of course, wish to throw any doubt upon the principles of construction on which the judge relied in taking that view, but it seems to me that the comparative weight to be given to the language of the two sections is to be determined by the considerations which I have ventured to express in the course of this judgment, rather than by a more formal rule such as that which he applied. After all, the construction of this Act of Parliament, like the construction of all Acts of Parliament, is a matter of the language used by the legislature in the whole Act, giving to each portion of it such force as may be dictated by the particular position in which it finds itself, or the particular collocation of sections, and so forth, of which it forms part. On this principle, I have endeavoured to approach the construction of this matter, and, in the judgment of the court, the appeal must be allowed, and the action must be dismissed with costs here and below.

The other matter arising in the action, based upon an alleged agreement to assign made before the passing of the Act, was not opened before us. That alleged agreement, or, at any rate, any effective operation of it, was negatived by the judge, and it has not been necessary to discuss that question, in view of the decision to which we have come upon the actual document of Mar., 1912. If the House of Lords decides that our view is wrong on the question that has been argued, the matter might have to come back to this court to hear the other one. However, it would be lamentable if a question with no substance in it should be litigated perhaps a second time in the House of Lords. We do not, of course, know anything about it, and do not know whether or not there is any substance in it, but, if it were a matter in which there was no substance, perhaps it would be desirable to lighten the ship by throwing it overboard. I express no opinion, as it is not for us to do so, and I know nothing about the merits of the case.

Action dismissed with costs in both Courts.

Solicitors: *Field, Roscoe & Co.* (for the appellants, the defendants); *Syrett & Sons* (for the respondents, the plaintiffs).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

RYAN v. FILDES AND OTHERS.

[LIVERPOOL SUMMER ASSIZES (Tucker, J.), June 22, 23, 1938.]

Education—Corporal punishment—By assistant mistress—Box on the ear—Course of employment—Liability of managers of non-provided school—Contribution—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1) (2).

A The plaintiff, a schoolboy of 10 years of age attending a non-provided school, was by reason of his lack of discipline boxed on the ear by his schoolmistress. As a result of the blow, which was found not to have been a violent one, the boy became deaf in one ear. The class in which the boy was working at the time of the accident was a large one consisting of 46 boys. In an action for damages to which the managers of the school were made defendants with the schoolmistress, it was proved that there was an agreement between the schoolmistress and the managers, which was not proved to have been brought to the notice of parents, whereby she agreed to teach and conduct the school "in accordance with the requirements of the Board of Education and in accordance with the directions given from time to time by the managers."

B The only regulations dealing with corporal punishment proved in evidence were certain regulations of the borough education committee, made without the consent of the managers and not adopted by them. As between the defendants, the managers claimed contribution from the mistress in respect of any damages awarded. It was contended that, as between employed and employer this was a claim for an indemnity, and, therefore, not within the Law Reform (Married Women & Tortfeasors) Act, 1935, s. 6 (1) (2) :—

D

HELD : (i) the blow, though a moderate one, exceeded reasonable and lawful correction.

(ii) the schoolmistress was the servant of the managers, and the latter were jointly liable to the plaintiff with her.

(iii) the act of punishing the boy was one within the general scope of the employment of the mistress, and, as against third parties, the managers could not plead a limitation of her powers of punishment not known to the parents. On the facts, no such limitation was proved.

(iv) the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (2), although it speaks of contribution and excludes the case of a person entitled to be indemnified in respect of the liability in respect of which contribution is sought, contemplates a contribution amounting to 100 per cent. of the damages, which is in effect an indemnity.

(v) the section applies where an employer claims to be indemnified by his employee.

(vi) the fact that the class was a large one was not material in considering the question of contribution, which should be a contribution of 100 per cent., amounting to a complete indemnity by the mistress of the managers.

G [EDITORIAL NOTE. This case raises questions of great importance to school authorities. Apart from the question of what is lawful correction, there is an interesting discussion of the proper form of incorporation of any regulations affecting this question whereby improper correction may be rendered outside the general scope of the teacher's authority. In considering this question, it must not be lost sight of that this was a non-provided school. As against the parents and pupils suing by their parents as next friends, any restriction of the scope of employment must be brought to the notice of the parents if the managers' liability is to be excluded. The last point raised is whether there is power under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, by which the court can award a contribution of 100 per cent., which, of course, is in effect an indemnity. As the court can make an order that one party shall not make any contribution to the

H

damages, it seems that an order for a contribution of 100 per cent. can equally be made, and that some other meaning must be found for the words in the statute excluding an indemnity. As parties will often have an express indemnity against liability, one alternative meaning is easily found; but contribution, or even indemnity, under the section is not excluded by reason of the fact that one tortfeasor might have at common law an action for an indemnity. Such a case may arise between employer and employed, but it is here held that this case is within the section and that the employer is entitled to 100 per cent. contribution—that is to say, a complete indemnity—from his employee.

AS TO CORRECTION BY SCHOOLMASTERS, see HALSBURY, Hailsham Edn., Vol. 12, p. 140, para. 300; and FOR CASES, see DIGEST, Vol. 19, pp. 599, 600, Nos. 271-277.]

Cases referred to :

- (1) *Mansell v. Griffin*, [1908] 1 K.B. 947; 19 Digest 600, 273; 77 L.J.K.B. 676; 99 L.T. 132.
- (2) *R. v. Hopley* (1860), 2 F. & F. 202; 19 Digest 599, 271.

ACTION for damages for injuries due to a blow given in alleged lawful correction of a schoolboy. The facts are fully set out in the judgment.

G. J. Lynskey, K.C., and *H. I. Nelson* for the plaintiff.

F. E. Pritchard, K.C., and *J. C. Jolly* for the defendant Fildes.

Wilfrid Clothier, K.C., and *S. Scholefield Allen* for the defendant managers.

Pritchard, K.C. : The St. Helens Education Committee's regulations, dated 1904, were not incorporated in the teacher's contract. The teacher was the servant of the managers at common law. They must answer notwithstanding any prohibition.

Clothier, K.C. : The employers should not be held responsible for unauthorised actions. The education committee of the local authority and the managers did all they could to limit the teacher's authority by the regulations. They were not in a position themselves to authorise the type of punishment which Miss Fildes inflicted upon the plaintiff.

Lynskey, K.C. : In these days, to chastise by a box on the ear is to exceed the limit of reasonable and proper correction.

TUCKER, J. : This is an action brought by Patrick Ryan, an infant, suing by his father and next friend, Edmund Ryan, against Ellen Fildes and six other defendants, the six other defendants being the managers of St. Austin's Boys' School, Thatto Heath, St. Helens. The claim is brought for damages in respect of an alleged blow struck by the first defendant, Ellen Fildes, on the infant plaintiff, Patrick Ryan, and, though I do not think that the word "assault" is actually used in the statement of claim, that is in fact what the complaint amounts to—that the teacher assaulted the infant plaintiff by doing something which was in excess of anything that could properly amount to lawful and proper correction.

The first defendant, Ellen Fildes, was an assistant mistress at this school on the day in question, which was Dec. 4, 1936. She had been in that school and held the position of teacher from 1906 onwards. She had

been a certificated teacher from 1906, and had borne a very good character and reputation as a schoolmistress. The head master, Mr. Harrison, with whom she had served for a great number of years, spoke of her as a mistress in whom he put implicit trust and confidence.

A At the time in question, the infant plaintiff, Patrick Ryan, was a boy of 10 years of age, and he was in the class at this school which was presided over by the defendant, Miss Fildes. During that afternoon, there was a break. There was some controversy as to the precise time when it took place, but it took place somewhere about 3 p.m. or 3.30 p.m. Before the break, the children had had some story read to them, and after the
B break they were required to write down the story to the best of their recollection.

When the children were coming back into class after the break, there was some playing about and lack of attention to work which called for some action by the schoolmistress, Miss Fildes. Some of the boys were
C playing what, I understand, is called "tig," which means touching one another one after the other all down the row, and Miss Fildes was under a duty to preserve discipline and to secure their attention to their work.

Three or four of the boys—amongst them the infant plaintiff, Patrick Ryan—were apparently behaving rather worse than the others, and Miss
D Fildes herself described the infant plaintiff, Patrick Ryan, as having been the ringleader. What she did, as I find on the evidence, is this. I am not concerned with what she did to the other boys—Murphy, McCormick and Samuels—but I am satisfied on the evidence as a whole that she called the boy Ryan out in front of the class for the purpose of giving him some
E moderate and well-deserved punishment for his conduct. When I say "well-deserved," I am not suggesting that he deserved the punishment which he in fact got, but that he deserved some punishment and correction is, I think, beyond doubt. She called him out, and I am satisfied that she struck him on the head with the palm of her hand. I am not satisfied
F that she gave him more than one blow, but I am satisfied that she gave him one blow on his head by way of punishment or reprimand for what he had been doing, and that, in striking him that blow on the head, she did perhaps inadvertently hit him on the left ear. After that he went on with his work in the class. There is a controversy as to whether he
G was crying or not, but he says that shortly afterwards he felt a buzzing in his ear. I think he said that he felt a thump first in his ear, and then some buzzing, but he says that he felt pain in his ear during the rest of that class. However, he stayed out the time in the class, and went home, I think, somewhere about 4.15 p.m.

H I am satisfied that, despite the pain which he says he suffered, and the discomfort, he took about half-an-hour to get home. Whether or not he played about with some other boys on the way back is doubtful. He was with the other boys when they were throwing bits of wood and stones into some water, and the relevance of that is that he could have gone home a great deal more quickly. It is suggested that he would have

gone home a great deal more quickly if there had been anything serious the matter with him. He could have got home in about a quarter-of-an-hour, whereas in fact he took about half-an-hour. However, I am satisfied that when he got home he complained at once to his mother with regard to the condition of his ear, which had by then—or, at any rate, shortly afterwards—become exceedingly painful. She took him that night to a lady doctor, Dr. Wilson. The next day the husband went to the head master to complain about what had happened, and some time afterwards a complaint was also made by one or other of the parents to the local education officer. A

I am satisfied on the whole that the proper inference that I ought to draw from all the facts of the case and from the medical evidence is that this blow which Miss Fildes gave this boy on Dec. 4 was the cause of the condition in the ear, and that the blow created concussion or vibration, with resulting rupture of the drum-head. I think that the blow was the cause of the condition, and that this was one of those unfortunate occurrences which do not often happen, but which are liable to happen, where quite a moderate box of the ear has had this lamentable result. B C

Fortunately, although the boy was troubled with it for some considerable time, and although he had a good deal of pain, and had to be away from school until the following August, the ear eventually got better. By June 6, 1937, it was dry and healed, but there is a considerable degree of deafness in the left ear, which appears to be permanent, though he is receiving treatment with a view to improving that condition. Of course, there is always some risk of re-infection in an ear of that kind. He has been left with a considerable degree of deafness in that one ear, which does not interfere with his hearing at present at all, as he could hear quite well in the witness-box, but still it is an undoubted disadvantage to have an appreciable degree of deafness, even in one ear. There has also been some delay in his studies and education. D E F

On those facts, has he established his right to recover damages from Miss Fildes, and/or the other defendants? With regard to Miss Fildes, I think that it is quite clear that he must succeed against her. What she did, in my view, undoubtedly exceeded reasonable and proper punishment. In the words of the headnote in *Mansell v. Griffin* (1), I think that this was not punishment which could be described as moderate or such as is usual in a school, and such as the parent of the child might expect that the child would receive if it did wrong. The blow struck was moderate in the sense that it was not a very violent blow, but, as punishment, it was not moderate punishment, because I do not think that the proper way of punishing a child is to strike it on the head or the ear. Nor do I think that it was, on the evidence, punishment which can be described as usual in this or in any other school. Nor is it such as the parent of a child might expect that the child would receive at a school in these days. I think that punishment of that kind cannot really be G H

justified. No one can help having a considerable degree of sympathy with Miss Fildes in the fact that, dealing with a lot of unruly boys, she may have done something which was a natural thing to do, and something which in nine hundred and ninety-nine cases out of a thousand, probably would have produced no ill consequences. Unfortunately, however, I think that she did do something which she was not really entitled to do by way of punishment, and that, as it cannot be justified in law, and as it has had these unfortunate consequences, she has rendered herself liable to pay damages to the plaintiff.

- The other defendants are the managers of this non-provided school.
- B The managers in non-provided schools appoint the teachers, who are the servants of the managers, and, as such, they, like other servants or agents, render their masters liable for the acts which they do, even if the acts are wrongful, if they are done within the scope of their employment—not within the scope of their authority, but within the scope of their employment as teachers. I think that it is right to say—as is shown by *Mansell v. Griffin* (1), to which I have already referred, and as stated in the summing up to the jury in *R. v. Hopley* (2), referred to by Mr. Pritchard—that it appears from those cases that, by the law of England, when a parent sends his child to school, he delegates to teachers at the school the power to inflict reasonable and moderate corporal punishment when required, in the same way as he, as a parent, would have power to inflict moderate and reasonable corporal punishment in a proper case, and that he delegates to the teacher the taking of such steps as are necessary to maintain discipline with regard to the child committed to the teacher's care. I think that that is the general position with regard to parents and schoolteachers.

- Accordingly, when a parent sends his child to school, I think that the performance of reasonable and moderate punishment is, *prima facie*, part of the teacher's duties which he may be called upon to perform from time to time, and I think that, *prima facie*, when a schoolteacher inflicts corporal punishment, he is doing something as a schoolteacher. He is not going outside his position or duties as schoolteacher, but he is acting within the scope of his employment as a teacher, and, if so, and if he inflicts greater corporal punishment than the facts require, or if he inflicts corporal punishment in circumstances where it is not permissible, then he renders his masters liable for the consequences of his act, just in the same way as any other servant, such as a bus-driver, who, if he drives his bus at a prohibited speed, or in a manner which he is forbidden to do, is none the less acting within the scope of his employment as a bus-driver, and thereby renders his employers liable. I think that that is the general position with regard to a teacher, and that, unless there is anything to modify that, I should be entitled to draw the inference that, when Miss Fildes was inflicting this punishment on this boy, she was acting within the reasonable scope of her employment.

It is said by Mr. Clothier, however, for the managers, that, by reason

of the express terms of her agreement in writing, which is dated Oct. 5, 1911, that is not the correct position as between herself and the managers. He relies upon cl. 1 of that agreement, which is in these words :

The teacher shall, until this agreement is terminated in the manner hereinafter mentioned, serve as assistant teacher in the said school from Sept. 15, 1911, and shall teach the scholars and train student-teachers and conduct the said school in accordance with the requirements of the Board of Education and in accordance with the directions given from time to time by the managers. A

No evidence has been given before me with regard to any directions given from time to time by the managers which had any reference to corporal punishment, nor has any requirement of the Board of Education been put in evidence before me with regard to corporal punishment, and therefore I am quite uninformed as to whether or not there are, or were at the material time, any requirements of the Board of Education relating to this matter, or any direction from time to time given by the managers with regard to this matter. B

There was handed to me a document which, Mr. Clothier argued, came within the words of this agreement : "requirements of the Board of Education." That is the document headed : "County Borough of St. Helens Education Committee, Elementary Schools. Regulations for the guidance of managers and teachers." It contains apparently, as it states, certain regulations which were drawn up by the St. Helens Education Committee for the guidance of managers and teachers. Whatever may be the force of those regulations, and whatever may be the authority under which they were made and issued, I am satisfied that they do not come within the meaning of the words "requirements of the Board of Education." It is sufficient to say that everybody knows what the Board of Education and the Ministry of Education are, and these regulations do not purport to be made by the Board of Education or by the Ministry of Education at all. They purport to be made by the Education Committee, and it is interesting to note, when one looks at these regulations, that, at p. 10, part of the second paragraph of the very regulation which is relied upon in this case is in these words : C D E F

All regulations by the Board of Education with regard to corporal punishment must be rigorously adhered to.

Thus, the people who made these regulations knew quite well what the Board of Education was, and knew that the Board of Education had apparently issued regulations with regard to corporal punishment. I can see no reason why I should hold that these regulations, which were made in 1904, formed part of the contract between Miss Fildes and the managers. G

I have had my attention drawn to cl. 7 of that agreement, which shows that the person responsible for drafting this agreement knew quite well how to incorporate regulations, and to make them part of the contract, when it was so desired. Clause 7 provides as follows : H

The regulations made by the local education authority relating to teachers absent from duty for the time being in force shall, notwithstanding anything herein con-

tained, be deemed to be incorporated therein, and this agreement shall be construed as if such regulations were therein particularly set out.

It is interesting to see that the regulations in question, which are described as being regulations made by the local education authority, as distinct from the Board of Education, with regard to teachers absenting themselves from duty, are apparently some regulations which occur in reg. 17 of these regulations of 1904, and appear to be one of the regulations referred to in cl. 7 of the contract. It seems to me that this contract was expressly including reg. 17 of these regulations in the contract, and that, if it had been desired specially to include reg. 14, the parties to the agreement would have known very well how to do so.

If the regulations do not form part of the contract between the parties, then I do not see what force they had as between Miss Fildes and the managers. Nothing has been brought to my attention which would give the local education committee authority to make regulations of this kind binding on the head master and teachers of a non-provided school without the consent of the managers of the school. However, that matter does not really arise, because, in my view, even if this reg. 14 did form part of the contract, or if it is in some way binding on the teachers at the school, none the less, I still think that it would be only a regulation limiting the authority of the servant of the managers, and I still think that, as regards third parties, the managers would still be liable for the acts of the teachers, done within the general scope of their employment, even though they had, without the knowledge of the parents, put some limitation on the common law powers of a teacher with regard to the infliction of corporal punishment. For these reasons, I hold that the plaintiff is entitled to recover against Miss Fildes and against the managers of the school £211 9s. 6d., with costs.

The basis of my decision is that Ellen Fildes was the servant or agent of the other defendants, and that the wrongful act which she did, which entitled the plaintiff to recover, was done within the scope of her employment by the other defendants, and that therefore they are vicariously liable for the acts of their servant. On that, Mr. Clothier, for the managers, the employers of Miss Fildes, asks me to make an order under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (2). The material parts of that section provide as follow :

(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage ; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

Mr. Pritchard, for Miss Fildes, the party against whom the contribution

is asked, argues that this section is not applicable to a case of indemnity. He says that Mr. Clothier is in fact asking for an indemnity against him, and he agrees that, if Mr. Clothier were to bring a straight action against him, he might be liable in that action, but he says that that would be an action for an indemnity, a type of action that existed before this Act was passed, and that this section is intended to deal with contributions, and not with actions by principals against their agents for damages incurred by principals as a result of the negligence of the agents, which are in fact actions for an indemnity. He further says that, if I decide that his client is liable to make a full contribution up to 100 per cent., whether it be called a contribution or whether it be called indemnity, it will be a decision of far-reaching consequences, because it means that, in every action in which a master and servant are joined as defendants and it is held that there has been negligence by the servant, the master will be entitled to get indemnity from the servant. He says that such a decision would be novel and of far-reaching consequences.

In my view, the words of the section are clear :

Where damage is suffered by any person as a result of a tort [this is a case where damage has been suffered by Patrick Ryan as a result of the tort] . . . (c) any tortfeasor liable in respect of that damage. . . .

I say that the managers, the six last defendants, are tortfeasors liable in respect of that damage, within the meaning of para. (c). Then that subsection proceeds :

. . . may recover a contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise. . . .

It seems to me clear that Miss Fildes is another tortfeasor who is liable in respect of the same damage, whether as a joint tortfeasor or otherwise, and that, accordingly, the managers and Miss Fildes come within the precise words used in sect. 6 (1) (c).

The remaining words of that clause in that subsection have no application to a case of this kind, and then follows subsect. (2), which I have already read. That subsection makes it clear that, although the section is dealing with contribution, and the word "contribution" finally indicates the payment of some smaller sum towards a larger sum, payable by some other person, none the less the section contemplates cases in which either or both of two defendants have been found liable to pay damages in law, and none the less one of them may be exempted by the order of the court from making any contribution whatever. That is to say, two persons having been found legally liable to pay, *prima facie*, the whole of the damage, one of them, for reasons which may appear sufficient to the court, may be exempted altogether from his liability. On the other hand, although the section is dealing with contribution, it is said in terms that the court may direct that a contribution to be recovered from any person shall amount to a complete indemnity. It is clearly contemplated in that case that a contribution may amount to 100 per cent. contribution,

and may become in effect an indemnity. Whether or not that is precisely the correct way to describe a contribution is immaterial, because the meaning is clear.

- A It seems to me that, in a case of this kind, if Miss Fildes and the managers are clearly within the words of this section, it is quite im-
- B material that, apart from the section, the managers might have had a right to bring a separate action at common law to recover damages in respect of the damages which they have in fact been ordered, in this action, to pay to the plaintiff. This section makes it clear that the order as to contribution and the extent of the contribution is within the
- C discretion of the court, because the language is: "may recover contribution." I think that, although in some cases the word "may" means "shall," this is a case in which the court has got a discretion. I can imagine cases as between master and servant in which the court might not exercise that discretion.
- D In this particular case, I have asked Mr. Pritchard to indicate, first of all assuming I have the right to make this order, on what grounds he would suggest that the order should not amount to a complete indemnity. His answer to that was that the class in question was a very large class containing 46 boys, that it was really three classes, that that was a very
- E much bigger class than any mistress could reasonably be expected to handle, and that the managers were really inviting trouble of this kind by putting Miss Fildes over such a large class. That does not appeal to me as a ground for refusing to make an order, or for making an order for a very small proportion, because Miss Fildes had been in this school
- F as a teacher for a great number of years, and there was no evidence that she ever had any difficulty or made any complaint. In any event, I think that it is really rather stretching the matter to say that, because a teacher has a large class, it must be contemplated that she will inflict corporal punishment on the boys in a manner which is not permissible or
- G reasonable. Therefore I see no reason, if I have got power under this section, for making any order other than what would, *prima facie*, appear to be the proper order—namely, that the person actually responsible for the commission of the tort should contribute the full amount of the damages recovered against the master.
- H The other question I asked Mr. Pritchard was whether he could indicate, on the facts as they appear at present, what defence he would have if an action were brought against him by the managers to recover these damages, on the basis, of course, that my judgment that the managers were liable stood. Mr. Pritchard very fairly agreed that, on the material at present before him, he was unable to suggest what the defence would be, but none the less he said that, on obtaining discovery of the minutes of the managers, and on further investigation, it might be that some defence would be found, and that he ought to have an opportunity of seeing whether there might not be some answer to such an action. As I say, those answers of Mr. Pritchard do not seem to me to

show that there is any reason why, in this case, I should not exercise this discretion. There may be other cases, in which, the facts being different, the court would not think it right to make an order, either for contribution or indemnity, as between a master and his servant. I cannot help thinking that the cases where this is likely to arise are not going to be so numerous as Mr. Pritchard says, for two reasons. One is that it is not often that the servant is in fact joined in an action where there is at any rate a substantial master from whom damages can be claimed. The other is that the circumstances are not often such that the master would be likely to reap much benefit from an order for indemnity against his servant. Of course, that is quite immaterial to what is the correct decision under this section. I think, therefore, that Mr. Clothier has made out a case under this section, and that it was intended to do away with duplicity of actions, and to leave the matter within the discretion of the judge who has dealt with all the facts of the case.

Although in some ways I regret having to do it, it seems to me that the proper order to make is that the managers, whose names have been included as defendants, are entitled to a contribution amounting to a complete indemnity against the defendant Fildes in respect of the damages awarded in this action against the last six defendants in favour of the plaintiff.

Solicitors: *G. J. Lynskey & Sons* (for the plaintiff); *E. G. Floyd* (for the defendant Fildes); *Weightman, Pedder & Co.* (for the defendant managers).

[*Reported by M. D. CHORLTON, Barrister-at-Law.*]

EASTERN NATIONAL OMNIBUS CO., LTD. v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), **June 23, 24, July 8, 1938.**]

Revenue—Stamp duty—Conditional agreement—Agreement to pay a sum of money upon the transfer of licences relating to a motor coach business—Goodwill—Restrictive covenants—Stamp Act, 1891 (c. 39), s. 59 (1).

Upon the taking over of a business of operating stage carriage public vehicles, an agreement was entered into in the following terms. Clause 1 provided for the new company applying for the necessary licences, and the backing thereof, in which they were to receive all proper assistance from the old company. Clause 2 provided that, as consideration for the covenants by the old company therein contained, the new company would pay £17,250 within 7 days of their commencing to operate the services. Clause 3 contained restrictions upon the old company and the directors thereof preventing them from operating in competition with the new company. The period of the restrictions was to be calculated from the payment of the said sum of £17,250. Clause 4 provided for payment in respect of certificates of fitness and road fund licences. Clause 5 provided for the transfer of vehicles and stocks used in the business, and cl. 6 provided for the sale of certain freehold land and buildings for the sum of £1,750. By cl. 7 the whole agreement was made conditional upon the grant of the necessary licences by the commissioners, and, if these were not obtained, the new company was given

an option to cancel the agreement. The Inland Revenue Commissioners assessed the document to stamp duty as an agreement for the sale of goodwill or other property not falling within the exceptions in the Stamp Act, 1891, s. 59 (1), and therefore liable to *ad valorem* duty, and, in addition, to a deed stamp of 10s. :—

A HELD : (i) although the continuation of the business was subject to the grant of the necessary licences by the Traffic Commissioners, the business had goodwill, and, by virtue of the above document, the new company possessed that goodwill.

(ii) the document attracted stamp duty upon the value of the goodwill. This was not necessarily the sum of £17,250 less the specific items in respect of the land and stock, but there had also to be deducted the value of the covenant restraining competition.

B [EDITORIAL NOTE. The main argument in this case was whether a business of which the operation and continuance were solely dependent upon the grant from time to time of licences by commissioners can have any goodwill, and whether there is any property in the advantage that a party secures from the execution of a restrictive covenant. It is decided that there is such goodwill, but that the advantage of the restrictive covenant is not property which attracts stamp duty under the Stamp Act, 1891, s. 59 (1). It will be noticed that the document is purely a conditional one. It had been thought by some that an agreement to pay a sum of money upon a contingency did not attract *ad valorem* duty.

AS TO STAMP DUTY ON AGREEMENTS FOR SALE, see HALSBURY, Hailsham Edn., Vol. 28, p. 460, para. 973 ; and FOR CASES, see DIGEST, Vol. 39, p. 278, Nos. 621-627.]

D Cases referred to :

(1) *Limmer Asphalte Paving Co. v. Inland Revenue Comrs.* (1872), L.R. 7 Exch. 211 ; 39 Digest 259, 433 ; 41 L.J.Ex. 106 ; 26 L.T. 633.

(2) *Inland Revenue Comrs. v. Westminster (Duke)*, [1936] A.C. 1 ; Digest Supp. ; 104 L.J.K.B. 383 ; 153 L.T. 223 ; 19 Tax Cas. 490.

E (3) *Trego v. Hunt*, [1896] A.C. 7 ; 43 Digest 9, 44 ; 65 L.J.Ch. 1 ; 73 L.T. 514 ; *revsg.*, [1895] 1 Ch. 462.

(4) *Inland Revenue Comrs. v. Angus, Same v. Lewis* (1889), 23 Q.B.D. 579 ; 39 Digest 254, 378 ; 61 L.T. 832 ; *affg.* S.C. *sub nom. Lewis v. Inland Revenue Comrs.*, *Angus v. Inland Revenue Comrs.*, 53 J.P. 453.

F CASE STATED by the Inland Revenue Commissioners pursuant to the Stamp Act, 1891, s. 13.

The material parts of the case stated are as follow :

G The agreement in this case is dated Jan. 8, 1937, and expressed to be made between A. W. Berry and Sons, Ltd., of the first part, and the appellant company of the second part. After reciting, *inter alia*, that Berrys had for some time past carried on, and were still engaged in, the operation of public service vehicles which provided services of stage carriage public service vehicles in and about the towns of Colchester, Brightlingsea, Mersea and Fingringhoe, and groups of excursions and tours originating respectively at the towns of Colchester, West Mersea and Brightlingsea, and in particular that Berrys were operating the services of stage carriage public vehicles and the stated groups of excursions and tours under the provisions of road service licences granted to them by the Traffic Commissioners for the Eastern Traffic Area and backed by the Traffic Commissioners for the Metropolitan and South-Eastern Traffic Areas, the numbers and dates of expiry of the licences and backings being set out in the first schedule thereto, it was agreed (cl. 1) that the appellant company should forthwith apply to the Traffic Commissioners for the Eastern Traffic Area for road service licences and to the Traffic Commissioners for the Metropolitan and South-Eastern Traffic Areas for backing of the said road service licences to provide services of stage carriage public service vehicles and groups of excursions and tours as set out in the second schedule thereto, to the intent that all of such services of stage carriage public service vehicles and all of

such groups of excursions and tours as aforesaid should operate in substitution for the stage carriage services of public service vehicles and groups of excursions and tours then operated or licensed to be operated by Berrys under licences and backings granted to them as aforesaid, and Berrys should assist the company to obtain the said licences and backings, and for that purpose should do all such acts and things in that behalf as the company should reasonably require, and should upon the grant of the licences and backings to the company (to be applied for by the company as aforesaid) surrender the road service licences and backings of the same held by them as aforesaid and should cause the same to be revoked or cancelled; (cl. 2) as consideration for the covenants on the part of Berrys thereafter contained, the appellant company should pay to Berrys £17,250 within 7 days of the date upon which the appellant company should commence to operate stage carriage services and groups of excursions and tours in substitution as aforesaid for the stage carriage services of public service vehicles and the groups of excursions and tours at the date of the agreement operated by or authorised to Berrys to be operated by them, and (subject as thereafter set out) under the provisions of road service licences granted to the appellant company by the Traffic Commissioners for the Eastern Traffic Area and backed by the Traffic Commissioners for the Metropolitan Traffic Area and the South-Eastern Traffic Area respectively; (cl. 3 (A)) Berrys should not, on or at any time within 8 years from the date upon which the said £17,250 should be paid to them by the appellant company under the provisions of cl. 2, be concerned or in any manner and whether directly or indirectly interested in the operation of any service of public service vehicles of any nature (whether express, stage or excursion and tour) or any group of excursions and tours or any private hire service of cars or vehicles of any nature whatsoever operating upon or over any road or way upon which services of public service vehicles operated by the appellant company should at the date of the agreement run, and Berrys undertook to enter at any time within 8 years from the date of the agreement into any agreement which the appellant company might require in order to effectuate the terms of that subclause; and (cl. 3 (B)), in consideration of the payment of the respective sums of £1 each paid by the appellant company to Arthur William Berry, Arthur Stanley Berry and Herbert George Berry at the date of the agreement, the said Arthur William Berry, Arthur Stanley Berry and Herbert George Berry jointly and severally undertook with the appellant company that they would not, at any time within 8 years from the date thereof, be concerned or in any manner either directly or indirectly be interested in the operation of any service of public service vehicles (of any category whatsoever as aforesaid) or any excursions and tours operating upon a road or roads upon which services of public service vehicles or excursions and tours were operated by the appellant company at the date of the agreement, and the said Arthur William Berry, Arthur Stanley Berry and Herbert George Berry jointly and severally undertook to enter into any agreement which the appellant company might require at any time within 8 years from the date thereof in order to effectuate the terms of this subclause.

By cl. 4 the agreement provided for payment by the appellant company to Berrys of the value unexpired of fees paid in respect of certificates of fitness and road fund licences held by or granted to Berrys in respect of the 12 public service vehicles thereafter referred to. Clause 5 provided that Berrys should transfer to the appellant company 12 public service vehicles as therein mentioned, and that Berrys should make over to the appellant company all stocks of petrol and oil at the Brightlingsea depot of Berrys, and by cl. 6 it was provided that Berrys should sell to the appellant company for £1,750 certain freehold land and buildings set out in the fourth schedule to the agreement.

By cl. 7 of the agreement it was provided that the agreement was to be conditional upon the grant by the Traffic Commissioners for the various traffic areas in which the stage carriage services of public service vehicles and groups of excursions and tours of Berrys operated or were empowered to operate of road service licences and backings of the same in such form as should enable the appellant company to operate each and every one of such stage carriage services of public service vehicles and groups of excursions and tours in a manner exactly similar to that in which the same were operated by Berrys at the date of the agreement and as set out in the application of the appellant company for the road service licences and backings, and it was further provided that such grants of road service licences and backings thereof to the company as aforesaid should be made in such form as should be acceptable to the general manager of the appellant company, and that public service vehicles licences, as are set out in the third schedule thereto, should be granted to the appellant company in respect of all the 12 public service vehicles thereinbefore referred to, and, failing such necessary grant or grants of road service licences or backings thereof in the form asked for by the appellant company or to the satis-

faction of the general manager as aforesaid, or failing the grant to the appellant company of public service vehicles licences as aforesaid, then in any of the said events the agreement should at the option of the appellant company be cancelled and of no effect whatsoever, and all money paid by the appellant company to Berrys as aforesaid should be returned to the appellant company by Berrys. The agreement was executed under the common seal of Berrys, and was signed by the general manager and duly authorised agent of the appellant company and by Arthur William Berry, Arthur Stanley Berry and Herbert George Berry. Of the £17,250 referred to in the agreement, £3,650 represented the value of vehicles, tyres, petrol, oil and other goods agreed to be transferred.

The commissioners contended that the agreement was chargeable as an agreement for sale of goodwill or other property not falling within any of the exemptions referred to in the Stamp Act, 1891, s. 59 (1), or otherwise with *ad valorem* duty under or by reference to the head of charge "conveyance or transfer on sale," etc., in the Stamp Act, 1891, Sched. I, at the rate of 10s. for every £50 or fractional part of £50 of £13,603 (being £17,253, the consideration payable under cl. 2 and 3 of the agreement, less £3,650, the value of the goods)—namely, with the *ad valorem* duty of £136 10s. and with a deed stamp of 10s. No objection was raised by the appellant company to the 10s. deed stamp, but they contended that the agreement was an agreement for sale neither of goodwill nor of property other than land and goods, wares or merchandise, and was liable to a stamp of 10s. only.

A. M. Latter, K.C., and H. E. Francis for the appellants.

The Solicitor-General (Sir Terence O'Connor, K.C.) and J. H. Stamp for the respondents.

LAWRENCE, J. : In this case, the commissioners have decided that an agreement dated Jan. 8, 1937, is liable to stamp duty on £13,603 under the Stamp Act, 1891, s. 59 (1), as an agreement for sale of goodwill or other property within that section. The appellants contend that it is not an agreement for the sale of goodwill or of any property other than the land and chattels dealt with in the agreement, and that it cannot be charged with stamp duty on the sum of £13,603, that sum being the consideration, not for the sale of anything that is property within the meaning of sect. 59, but merely for certain covenants entered into by Messrs. Berry with the appellants.

The agreement recites as follows :

Whereas Berrys have for some time past carried on and are still engaged in the operation of public service vehicles in or about the towns of Colchester Brightlingsea Mersea and Fingringhoe and groups of excursions and tours originating respectively at the towns of Colchester West Mersea and Brightlingsea and in particular Berrys are operating the said services of stage carriage public service vehicles and the said groups of excursions and tours (hereinafter in certain instances respectively referred to as "the said services" and "the said excursions") under the provisions of road service licences granted to them by the Traffic Commissioners for the Eastern Traffic Area and backed by the Traffic Commissioners for the Metropolitan and South-Eastern Traffic Areas the numbers and date of expiry of the said licences and backings being set out in the first schedule hereto and the general operating particulars and description of the said services and excursions being set out in the second schedule hereto and whereas Berrys are possessed of certain licensed public service vehicles as the same are specified and set out in the third schedule hereto and whereas Berrys are the owners in fee simple free from incumbrances of certain properties as the same are specified in the fourth schedule hereto and have agreed to sell the same to the company for a like estate for the sum of £1,750. . . .

Then the agreement goes on to provide by cl. 1 that the appellants should apply for road service licences to operate services in substitution for those then operated by Berrys, and, by cl. 2, that Berrys should assist them in that application and surrender their existing licences. It also provides

that the appellants should pay to Berrys' £17,250 as consideration for the covenants thereafter contained within 7 days of the date upon which the appellants commence to operate services in substitution for Berrys' services, and, by cl. 3, that Berrys should not compete with any services operated by the appellants at the date of the agreement. Clause 7 provides that the agreement should be conditional upon the grant of A licences to the appellants satisfactory to them.

The question is as to the true legal effect of this instrument: *Limmer Asphalt Paving Co. v. Inland Revenue Comrs.* (1) and *Inland Revenue Comrs. v. Westminster (Duke)* (2). Does it include a sale of Berrys' goodwill, or does it contain merely certain affirmative and restrictive B covenants by Berrys? Mr. Latter, for the appellants, argues that, although Berrys were selling a fleet of buses, and land which they had for some time past used in connection therewith in the operation of stage carriage services and excursions, there is nothing to show whether these services were the whole or a part of their business, or whether any good- C will attached to them; that, as the Traffic Commissioners have an absolute discretion as to the granting of licences (the Road Traffic Act, 1930, s. 92), there is, and can be, no goodwill attaching to any such business; that covenants such as those contained in paras. 2 and 3 of the agreement do not constitute property; that a covenant not to carry on D a similar business to one sold is no part of goodwill (*Trego v. Hunt* (3)); and that *Limmer Asphalt Paving Co. v. Inland Revenue Comrs.* (1) and *Inland Revenue Comrs. v. Angus* (4), show that such a covenant is not property within sect. 59 of the Stamp Act. The Solicitor-General, on the other hand, argued that the business of a person who holds and E operates a road traffic licence is one which must necessarily possess goodwill—namely, the probability that the public will patronise the service and the probability that the commissioners will renew the licence—that before this agreement Berrys enjoyed this goodwill, that after it the appellants did, and that therefore the true legal effect of the instrument F was to transfer this goodwill to the appellants. I have come to the conclusion that the Crown is entitled to stamp duty on some part of the £13,603. In my opinion, the bus service operated by Berrys had goodwill, and it was the intention and the effect of the agreement that that goodwill should be vested in the appellants. The agreement does not G take effect unless the Traffic Commissioners allow the appellants to be substituted for Berrys. Once the commissioners have allowed that substitution, the appellants possess, by virtue of the instrument, all the goodwill which Berrys enjoyed.

I have considered whether it could be said that they possess it, not by H virtue of the instrument alone, but by virtue of the licence and the instrument (see *per* LORD ESHER, M.R., in *Inland Revenue Comrs. v. Angus* (4)), but I do not think it can, because the consideration was conditional upon the grant of the licence to the appellants, and therefore was wholly attributable to what the appellants got from Berrys, and not from

the Traffic Commissioners. It is true, of course, that the powers of the Traffic Commissioners render the position of licence-holders to some extent precarious, but not, in my opinion, to the extent of destroying all value in the goodwill which a licence-holder acquires from the nature of his position. I do not, however, consider that the whole sum of £13,603
 A is necessarily applicable to goodwill. It may be that the covenant contained in cl. 3 of the agreement relates to services carried on by the appellants outside the area of the business transferred by Berrys, and the case must go back to the commissioners to apportion the consideration of £17,250 as between (i) land, (ii) vehicles, (iii) goodwill, and (iv) the
 B value of this covenant in so far as it does not relate to the goodwill of Berrys' business.

The agreement attributes out of the total consideration the sum of £1,750 to the land sold, and the appellants have attributed the sum of £3,650 to the buses sold, but, apart from the substitution of the appellants
 C in the business carried on by Berrys, there is no evidence to show that the land and buses would have been sold for these or any other figures. In my opinion, there is no reason why the remainder of the consideration should be attributed solely to the covenant not to compete, and not at all to the goodwill of the business of Berrys, in which the appellants were
 D to be substituted. *Limmer Asphalte Paving Co. v. Inland Revenue Comrs.* (1) appears to me to be distinguishable, for there what it was suggested was property sold was not any part of a business previously carried on by Limmer Asphalte in Cheshire and Lancashire, but merely a covenant that they would not sell asphalte for resale in those counties.
 E Limmer Asphalte had no business or property in Cheshire or Lancashire. They had merely the right to carry on their business there if they wished to do so. They parted with rights, not property. I do not think that the facts are sufficiently before me to express an opinion on the argument that the covenant in cl. 3 is void in whole or in part as being in restraint
 F of trade. For the reasons I have stated, I am of opinion that the case must go back to the commissioners to ascertain the value of the goodwill of the business of Berrys, excluding therefrom the value of the covenant not to compete with the appellants' business elsewhere.

Solicitors : *Arthur G. Dennis* (for the appellants) ; *Solicitor of Inland*
 G *Revenue* (for the respondents).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

Re NICHOLSON'S SETTLEMENT, MOLONY *v.* NICHOLSON.[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
June 22, 23, July 18, 1938.]*Powers—Fraudulent exercise—Power in favour of one object only—Necessity for proof of antecedent agreement with appointee to benefit stranger.*

In 1933, a lady over 80 years of age, and then unmarried, who had a power of appointment of the income derived from settled funds in favour of any husband who should survive her, but no other property of which she could dispose by will, was anxious to benefit some friends who had been kind to her. She got into touch with the solicitors acting for the trustees of the settlement, and through them tried to induce the other beneficiaries under the settlement to come to some family arrangement whereby some part of the capital of the settled funds might be made disposable by her upon her releasing her power of appointment. The beneficiaries being unwilling to come to any such arrangement, she suggested that she might marry and appoint the income of the settlement to a husband, but this did not alter the decision of the beneficiaries not to come to any arrangement. In 1934, she married a gentleman not quite 50 years of age, and, though they saw each other frequently, the lady continued to live with her friends until her death in 1936. Before her death, she exercised the power of appointment in favour of her husband. There was no evidence that the husband was under any legal or moral obligation to use the money otherwise than as he should think fit. It was contended that this was a fraudulent exercise of the power:—

HELD: as there was no evidence of any arrangement or bargain between the appointor and the appointee, and as the power was a power to appoint in favour of one object only, and not a power to select from a class of persons, the power was validly exercised, and no fraudulent exercise of the power was established.

Decision of FARWELL, J., ([1938] 1 All E.R. 109) affirmed.

[EDITORIAL NOTE.] A distinction is made in this case between appointments which can be made in favour of one object only and appointments which can be made by way of selection from a class of persons. In the latter case, it may be sufficient to prove an improper motive, but, in the former case, an antecedent agreement with the appointee must be clearly proved if the exercise of the power is to be impeached.

AS TO FRAUDULENT APPOINTMENTS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 581-586, paras. 1033-1037; and FOR CASES, see DIGEST, Vol. 37, pp. 504-515, Nos. 972-1066.]

Cases referred to:

- (1) *Saunders v. Shafte*, [1905] 1 Ch. 126; 40 Digest 593, 1274; 74 L.J.Ch. 110; 91 L.T. 789.
- (2) *Re Marsden's Trust* (1859), 4 Drew. 594; 37 Digest 513, 1048; 28 L.J.Ch. 906; 33 L.T.O.S. 217.
- (3) *Topham v. Portland (Duke)* (1869), 5 Ch. App. 40; 37 Digest 503, 965; 39 L.J.Ch. 259; 22 L.T. 847.
- (4) *Re Wright, Hegan v. Bloor*, [1920] 1 Ch. 108; 37 Digest 453, 555; 88 L.J.Ch. 452; 121 L.T. 549.
- (5) *Vatcher v. Paull*, [1915] A.C. 372; 37 Digest 492, 865; 84 L.J.P.C. 86; 112 L.T. 737.
- (6) *Portland (Duke) v. Topham (Lady)* (1864), 11 H.L.Cas. 32; 37 Digest 503, 963; 34 L.J.Ch. 113; 10 L.T. 355; *revsg.* (1862), 31 Beav. 525.
- (7) *Daubeny v. Cockburn* (1816), 1 Mer. 626; 37 Digest 510, 1026.
- (8) *Aleyn v. Belchier* (1758), 1 Eden, 132; 37 Digest 503, 962.

- (9) *Pryor v. Pryor* (1864), 2 De G.J. & Sm. 205 ; 37 Digest 511, 1031 ; 33 L.J.Ch. 441 ; 10 L.T. 360.
- (10) *Re Crawshay, Crawshay v. Crawshay* (1890), 43 Ch. D. 615 ; 37 Digest 514, 1056 ; 59 L.J.Ch. 395 ; 62 L.T. 489.
- (11) *Wellesley (Lady) v. Mornington (Earl)* (1855), 2 K. & J. 143 ; 37 Digest 505, 983.

A

APPEAL by the defendants from an order of FARWELL, J., dated Dec. 3, 1937, and reported [1938] 1 All E.R. 109, where the facts are fully set out.

R. F. Roxburgh, K.C., and Hon. B. L. Bathurst for the appellants.

B

Cyril J. Radcliffe, K.C., and A. G. N. Cross for the respondents.

John Forster for the trustees.

Roxburgh, K.C. : It is necessary to show that the lady had an intention to benefit someone not an object of the power. There must be intention, as distinct from mere expectation. A special power is always fiduciary.

C

The primary trust is for the persons who take in default of exercise of the power, and this primary trust can be modified only in accordance with the express authority of the creating instrument : *Vatcher v. Paull* (5). To acquire a husband, therefore, for the purpose of making an appointment to him solely in order to benefit a person not the object

D

of the power discloses a purpose not justified by the instrument : *Portland (Duke) v. Topham (Lady)* (6). The obligation is fiduciary, not only towards the objects of appointment, but also towards the donor of the power. Here there was a deliberate plan to defeat and defraud the power of appointment, and the onus of proof has been therefore shifted.

E

The husband must show that a part at least of the appointment to him is good, otherwise he loses the whole : [Counsel referred to *Daubeney v. Cockburn* (7), *Aleyn v. Belchier* (8), *Re Wright, Hegan v. Bloor* (4), and *Topham v. Portland (Duke)* (3).]

F

Radcliffe, K.C. : The onus is on the appellants to show that the transaction was not what it is said to be. [Counsel referred to *Portland (Duke) v. Topham (Lady)* (6), *Pryor v. Pryor* (9), *Re Crawshay, Crawshay v. Crawshay* (10), *Wellesley (Lady) v. Mornington (Earl)* (11), and *Re Wright, Hegan v. Bloor* (4).]

Bathurst, in reply.

G

CLAUSON, L.J. [delivering the judgment of the court] : For the purposes of this judgment, the material facts may be summarised in a few sentences. Miss Nicholson, who was living in Oregon, was tenant for life of a fund which, in default of her issue, was to pass to relations of hers in England.

H

She had for some years lived with friends in Oregon whose future welfare was her serious concern. She had power to appoint a life interest in the fund to a husband. When she was a spinster over 80 years of age, she had endeavoured to arrange with her relations that she should have a portion of the capital placed at her free disposal, on the terms of her releasing her power of appointment in favour of a husband, and she

mentioned the possibility of her marrying and exercising the power in favour of the husband. No arrangement was made. In May, 1934, she married Norris Quatermas, and on July 5, 1934, she exercised the power of appointment in favour of her husband. She died in 1936. The husband claims the income of the fund, and those to whom the property passes in default of appointment contest the validity of the appointment. A

There is no question but that the marriage was valid. On the evidence, it appears that there was no bargain, arrangement or understanding between the lady and her husband in any way fettering his complete control over the income appointed to him. There is no question but that, when the lady was seeking to obtain the consent of her relations to a release to her of some free property, she desired to obtain free property in order to make provision thereout for her friends with whom she was living at Oregon. Her husband was a near relation of those friends. It is easy to infer that, when she appointed in her husband's favour, she had it in mind that some of the income would find its way to the friends whose future welfare was her serious concern. On those facts, the judge refused to find any invalidity in the exercise of the power of appointment. The question is whether this refusal on his part was correct. B C D

For the present purpose, it is to be noted that there are two types of powers of appointment which have to be distinguished. Of the first type are powers for an appointor to alienate in favour of a person filling a particular qualification (for example, husband or wife, to take the common case) a part of, or an interest in, the property, with the result of diminishing *pro tanto* the interest passing to persons to whom (subject to the exercise of the power of appointment) the property is given. Of the second type are powers for an appointor to select and define the beneficial interests *inter se* of the several members of a class of beneficiaries or their issue in a fund which (subject to the exercise of the power of appointment) is to pass in defined proportions to some or all of the members of the class. E F

In the case of either type of power, the appointment will, or may be, vitiated, either wholly or *pro tanto*, if it is shown to have been made upon a bargain, or even arrangement or understanding, which fetters the appointed interest in the appointee's hands in favour of either the appointor himself or some outside party, or is directed to providing some advantage for the appointor or some outside party. The principle is that such an appointment amounts in substance to an appointment *pro tanto* in favour of someone outside the qualification stipulated for, or the class of beneficiary defined by, the donor of the power. The execution of the power is in reality, though possibly not in form, alien to the power conferred. The application of the principle is complicated by the fact that certain arrangements in respect of jointures, in circumstances considered in this court in *Saunders v. Shafte* (1), have been treated as good, though G H

on the face of them obnoxious to the principle. Further difficulties are occasioned by the authorities which have dealt with the question how far appointments which are in part obnoxious to the principle can be treated as severable and supported in part though held to be bad in part. As, however, in the present case, the evidence fails to disclose any

A bargain, arrangement or understanding between the appointor and appointee, and as there is no suggestion of any dishonesty, or of any fraud in the ordinary sense of the term, it is unnecessary to examine the principle or to discuss the limitation to which its application is subject.

There are cases in the books, however, in which there has been no

B fraud in the sense of dishonesty, and no bargain or arrangement between appointor and appointee such as above-mentioned, but in which nevertheless the appointment has been treated as invalid by reason of the existence, though unknown to the appointee, of an intention that the purpose for which the power was created should be defeated (to use the

C language of KINDERSLEY, V.-C., in *Re Marsden's Trust* (2)), and that an object foreign to the power should be achieved. Such cases were those of *Topham v. Portland (Duke)* (3) and others to be found referred to in FARWELL ON POWERS, 3rd Edn., pp. 477-480.

It would seem that, in all the reported cases in which appointments

D have been invalidated on this ground, the power in question has been one which falls within the description of the second type above-stated. It is not easy to see how this ground of invalidity can be applicable to the case of a power which is not one of selection and definition among members of a class, but merely a power to carve out an interest from the property

E for the benefit of a person filling a particular qualification, where it is found, as in the present case, that such a power has been exercised so as to create the interest in favour of the qualified person without placing any fetter upon the enjoyment by him of that interest. In particular, it is not easy to see why that person's position should be

F affected by the hope, or even expectation, on the part of the appointor that the appointee will use or apply the interest so given to him for some particular end. The position is different where the appointor has allowed himself, in exercising a duty, imposed on him by the donor of the power, of choosing among members of a class, to be swayed, not by

G a consideration of the needs or merits of the appointee, but by collateral considerations. The donor of the power, it may be said, gave the appointor the power of selection in order that his bounty might be fairly distributed among the possible beneficiaries, and not in order that a collateral purpose should be achieved. Where the power can be exercised

H in favour of a particular person only, and where there is no question of selecting among a class, there is no room for any complaint of unfairness if the appointment results in fact in the appointee taking the appointed interest without any fetter. The appointee, and no one else, is benefited, as the donor of the power intended should be the case if the appointor chose to exercise the power, and there is no detriment to any one else.

Where, however, there is a power to select among a class, and where a particular beneficiary is selected in order to achieve a collateral purpose, the result is *pro tanto* to diminish the interest of the other beneficiaries, a diminution which the appointor is no doubt authorised to effect in a *bona fide* attempt to achieve what he considers justice and fairness as between the beneficiaries, but which he is not authorised to effect in order to achieve a collateral purpose. While, therefore, it may well be that, in the case of powers of the second type defined above, the court may inquire into the ultimate object which the appointor hopes to achieve, and, where that object is collateral, may invalidate the appointment, there is no authority for the proposition that such an inquiry is appropriate or permissible in the case of a power of the first type defined above. We can discern no principle which would justify such an inquiry. On the contrary, the very nature of the power, containing, as it does, no element of selection among competing objects of bounty, would seem to negative the appropriateness of any such inquiry.

Reference was made by counsel for the appellants to certain language used by P. O. LAWRENCE, J., in *Re Wright, Hegan v. Bloor* (4). That was a case of a power of the second type defined above. The question whether the principles applicable to such a case would apply to the case of a power of the first type was not under the consideration of the judge, and the general language used in some passages in his judgment cannot be read as intended to deal with cases of a character different from that of the case which he was considering.

In the result, there appears to be complete justification for the distinction which the judge below drew between the case before him and the cases where the power is one of selection among a class, and for his view that neither on principle nor on authority is there to be found any justification for the contention that the appointment in the present case in favour of the appointor's husband, being an honest appointment, unfettered by any bargain, arrangement or understanding, is vitiated merely because the appointor had a hope or an expectation that the appointee would use his increased income for the benefit of his near relations, whose welfare was admittedly a matter of concern to the appointor. The appeal will accordingly be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Frere, Cholmeley & Co.* (for the appellants and for the trustees); *Freshfields, Leese & Munns* (for the respondents).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

GRIFFITHS AND OTHERS v. MANAGERS OF ST. CLEMENT'S SCHOOL, LIVERPOOL, AND TRUSTEES OF CHURCH OF ENGLAND SCHOOLS SOCIETY.

[LIVERPOOL SUMMER ASSIZES (Tucker, J.), July 1, 1938.]

A *Education—Non-provided school—Repair—Liability—Managers—Public authority—Public Authorities Protection Act, 1893 (c. 61), s. 1—Education Act, 1902 (c. 42), ss. 5, 6 (2), 7, 11—Education Act, 1921 (c. 51) ss. 29-35.*

The plaintiff's son was at the material time a pupil of a non-provided school. The plaintiff was invited to attend an exhibition of the pupils' work. The invitation was signed by the headmaster, and was issued with the authority of the managers of the school. The plaintiff attended, and was injured through the collapse of a floor due to want of repair. It was alleged that the managers of the school were in occupation only as the servants or agents of the general committee of the Church of England Schools Society. The defendants also relied upon the Public Authorities Protection Act, it being admitted that the action was not commenced within 6 months of the act complained of:—

B
C HELD: (i) the plaintiff was an invitee, and not a mere licensee.
(ii) the managers of the school were in occupation thereof, and not the general committee of the Church of England Schools Society.
(iii) the duty to repair was imposed upon them by the Education Act, 1902, s. 7.
(iv) the managers were a public authority within the meaning of the Public Authorities Protection Act, and the action was therefore barred.

D [EDITORIAL NOTE. This case very fully considers the position of the managers of non-provided schools in relation to their liability to parties invited to come upon the premises. This liability in the present case arises out of a want of repair of the school buildings. A further question arises as to whether the managers are a public authority within the meaning of that term in the Public Authorities Protection Act, 1893, and they are held to be so, following on this point the recent decision of
E LEWIS, J., in *Greenwood v. Atherton* (5).

AS TO REPAIR OF SCHOOL BUILDINGS, see HALSBURY, Hailsham Edn., Vol. 12, p. 46, para. 92; and FOR CASES, see DIGEST, Vol. 19, pp. 558-560, Nos. 28-32.]

Cases referred to:

- F (1) *Abbott v. Isham* (1920), 90 L.J.K.B. 309; 19 Digest 563, 52; 124 L.T. 734.
(2) *Tierney v. Smith* (1936), Unreported, Feb. 20.
(3) *Gillow v. Durham County Council*, [1913] A.C. 54; 19 Digest 560, 32; 82 L.J.K.B. 206; 107 L.T. 689.
(4) *Blencowe v. Northamptonshire County Council*, [1907] 1 Ch. 504; 19 Digest 560, 35; 76 L.J.Ch. 276; 96 L.T. 385.
G (5) *Greenwood v. Atherton*, [1938] 2 All E.R. 475; Digest Supp.

H ACTION for damages for personal injuries sustained through the collapse of the floor of a room in a non-provided school. The action was brought by 29 plaintiffs, but by agreement the case of one plaintiff was taken as a test case. The facts and the arguments are fully set out in the judgment. The case was heard upon several days in June, 1938, when judgment was reserved. The reserved judgment was given on July 1, 1938.

Wilfrid Clothier, K.C., and B. R. Rice-Jones for the plaintiff.

Basil Nield for the first defendants.

A. T. Miller, K.C., F. E. Pritchard, K.C., and Selwyn Lloyd for the second defendants.

TUCKER, J. : St. Clement's School is a non-provided school under the Education Acts of 1902 and 1921. The plaintiff's son was, at the material date, a pupil at the school, and the plaintiff was invited by a card and letter to attend a display of work at the school on Dec. 12, 1934, between 7 p.m. and 8.30 p.m. The occasion was called an "open evening," and the invitation stated that there would be exhibits of handcraft, drawing, handwork, and the like, and that during the evening songs would be given by a party of boys. The invitation ended with the following words :

We welcome your co-operation and ask you to show your interest in the work by your attendance to-morrow.

This invitation was signed by the head master, and was issued with the authority of the managers of the school. Pursuant to this invitation, the plaintiff attended at the school on Dec. 12, 1934. In my view, the managers had a material interest in inviting the plaintiff to the premises, in the sense that it was in the interests of the prosperity and success of the school to enlist the support and co-operation of the parents of the pupils in the work done at the school. The display in question consisted entirely of an exhibition of the work done by the pupils and of the singing of songs which they had learnt at the school. I accordingly hold that the plaintiff was an invitee, and not a mere licensee. I am further of opinion that on the occasion in question the school was being used as a public elementary school, and not for some extraneous purposes unconnected with its functions as a school.

The display took place on the first floor of the building, and during the evening the floor collapsed, with the result that many persons, including the plaintiff, suffered serious injuries, while two persons were killed.

The uncontradicted evidence for the plaintiff clearly established that the floor was in a dangerous condition. The building was nearly 100 years old. The floor was supported by four cast-iron beams in three sections, bolted together in arched form. This kind of beam is quite obsolete, and the beams would now be constructed of rolled-steel joists. One of these beams had given way. It rested on soft brickwork, and there was no padstone. There was a tie-rod running under the beam, and this had been tightened at some time, with the result that the centre part of the truss had been raised in height, so that the floor was 2 ins. higher in the centre, and the brickwork had bulged at the ends of the beam. The joists from beam to beam were six by three, whereas they should have been eight by two. The floor was springy, and the partitions dividing the classrooms creaked, indicating general weakness. The lower part of the beam where it entered the wall was in view at both ends. Any person of experience in such matters would have seen at once that the

member was of cast iron and of small size, that the brickwork was out of place beneath the ends of the beam, and that there was no padstone. The springy condition of the floor would also have indicated weakness to an expert. The expert called by the plaintiff further stated that the main walls were slightly out of plumb. He said that, if the building

- A had been surveyed, the condition would have been discovered, and he expressed the view that a building of this age should be surveyed every 10 years. In his opinion, the construction was defective from the commencement, and the building had been in the condition in which he found it for 30 or 40 years. The first floor was quite unsuitable for use
- B as a school or for a congregation of people. It was admitted that the building had not been surveyed for 30 years prior to the accident. On this uncontradicted evidence, I think that it is clearly proved that someone had been guilty of negligence. That is to say, those persons, whoever they may be, charged with the duty of keeping the premises
- C in repair had not taken reasonable care to see that the premises were in good repair or safe for the use to which they would naturally be put. I think that those responsible for this building nearly 100 years old and used as a school were negligent in not having had a survey made for 30 years.
- D I proceed, therefore, to consider whether any, and, if so, which, of the defendants were in law responsible for the repair of this school, and whether the plaintiff is included amongst those persons to whom the duty was owed. In the event of some or all of the defendants being found to be liable, the further question will arise as to whether they are
- E protected by the Public Authorities Protection Act, which is relied upon by all the defendants.

- The evidence in this case has included numerous documents going back to 1837 showing the origin of St. Clement's School and the position of the Church of England Schools Society and its general committee
- F and trustees. The effect of the Education Acts from 1902 onwards on the then-existing management of the school, and on the status of the managers of non-provided schools under the Acts of 1902 and 1921, has been discussed at some length during the trial. These matters arise in this way. The plaintiff alleges that the managers are the occupiers
- G of the school, but that they occupy the school merely as the representatives or servants or agents of the general committee of the Church of England Schools Society, who are alleged to have been in occupation down to 1902, and to have remained in occupation notwithstanding the Acts of 1902 and 1921. At the trial, Mr. Clothier, for the plaintiff, stated
- H that, notwithstanding the form of the pleadings, the trustees were joined only by virtue of the fact that the property of the society is vested in them, and that no relief was sought against them personally.

Mr. Miller, for the Bishop of Liverpool and Archdeacon Twitchett (hereinafter referred to for convenience as "the general committee"), contended that on the facts the general committee were not in occupation

of the school in 1902, and had not been in such occupation for a great many years prior to that date, and that, even if they were in occupation at that date, the effect of the Education Acts was to place a new statutory body—namely, the managers appointed in the manner provided by those Acts—in control and occupation of the school in their place, and that the managers so appointed derived all their powers and authority A from those Acts, and were in no sense representatives or servants or agents of the general committee. Mr. Nield, for the managers, in the end relied solely on the Public Authorities Protection Act. In the course of his argument, he propounded four questions which he submitted involved the essential issues in the case against his clients. To these B four questions he gave four answers, which he contended were the correct answers thereto. These questions and answers were as follow :

1. What caused the accident ?—A defect in the floor.
2. What caused this defect ?—A failure on the part of the managers to fulfil their duty to repair.
3. Whence does this duty arise ?—Under the Education Act, 1921, s. 29, and C in no other manner.
4. To whom is that duty owed ?—To the community.

As I understood him, I think that he finally agreed that, if he had correctly answered these questions, it followed that the managers would have no answer to the plaintiff's claim in this action, apart from the Public Authorities Protection Act, and that their liability would have arisen D under the statute irrespective of whether the plaintiff was an invitee or a licensee, or whether the managers were the occupiers of the premises.

To complete in outline the arguments of counsel, I ought to add that Mr. Miller also relied on the Public Authorities Protection Act if I should E hold that the managers were, on Dec. 12, 1934, the representatives or servants or agents of the general committee. Mr. Clothier, for the plaintiff, on the other hand, contended that the duty of the managers and of the general committee arose, not from the statute, but solely F from their position as occupiers of the premises, and, therefore, that the Public Authorities Protection Act has no application to the facts of this case.

To deal with these contentions, I think that it will be convenient to trace the position of the society and the general committee from 1837 and then to consider the effect of the Education Acts. In so doing, G I think that I shall avoid repetition if I do not attempt to keep the point under the Public Protection Act for separate consideration. When one comes to examine the Education Acts, of necessity it entails consideration of the same sections as those which are material to a decision with regard to the defence under the Public Authorities Protection Act. H

In 1837, at a public meeting in Liverpool, it was resolved to form a fund to build and maintain schools to be placed under the direction of a committee of management to be formed for that purpose. These schools were to be built and maintained under the direction and superintendence of the clergy of the Established Church of England and Ireland.

At this meeting, certain rules were adopted for the management of such schools. The fund having been raised and the land purchased, it was conveyed to trustees by a deed dated Sept. 26, 1837, upon trust to permit and suffer the said schools and buildings to be erected for the education of children of the poor in suitable learning, works of industry and

A scriptural knowledge in the principles of the Protestant Trinitarian faith, according to the doctrine of the Reformed Church then established in England and Ireland, in such manner, and subject to such rules and regulations in all respects, as the general committee for the time being of the Church of England Schools Society should from time to time

B direct, and so that such buildings, schools and premises should at all times be considered to be, and actually be, in the possession and under the control of the said committee for the time being of the said society, and upon trust to permit and suffer the said schools and buildings to be from time to time repaired at the discretion of the committee at the

C expense of the said society, and upon trust, if necessary, at the like expense to permit and suffer the same schools and buildings to be altered, enlarged, taken down and rebuilt in such manner as the committee for the time being should think necessary.

The land upon which St. Clement's School was subsequently built

D was not conveyed by this deed, but, by a deed of May 5, 1841, the site of the St. Clement's School was conveyed to trustees upon the same trusts as were contained in the deed of Sept., 1837. The rules of the general committee were set out in the deed of 1837, and these rules were from time to time amended and added to, as provided by the deed.

E A number of the minutes of the general committee and of the managers of St. Clement's School were produced in evidence. No minutes of the general committee have been preserved prior to 1875, and the minutes of the managers given in evidence begin in July, 1918.

Assuming, as I think I should, that soon after 1841 the general committee of the society, in accordance with rr. 17, 18, 19, as appearing

F in the deed of 1837, duly appointed a sub-committee for the visitation and order, *inter alia*, of St. Clement's School, and duly appointed teachers for that school, it appears from the report of the society for the year 1874-75, at p. 2, that at some previous date St. Clement's School had

G been "adopted by the congregation," so that the society no longer regarded itself as liable for its support. The report goes on to state that about 18 years previously the system of making grants to the poorer schools of the town was introduced, and that the society had ever since been practically a school aid society.

H By 1877, the society appear to have become somewhat apprehensive about their position with regard to the St. Clement's School. Accordingly, they consulted their solicitors, and correspondence subsequently took place with the incumbent of St. Clement's. The relevant correspondence and minutes of the general committee were put in in evidence. It is not necessary for me to read these documents for the purpose

of this judgment, but, in my opinion, they show that for many years before 1877 the general committee had not exercised any control over St. Clement's School, and had not taken any part in its management. There is no evidence that they had appointed any managers or sub-committee or any teachers at any time during the previous 20 years in respect of St. Clement's School. I think that they had in fact handed A it over to the congregation and the incumbent to such an extent that by 1877 the incumbent was claiming the ownership of the schools and refusing to recognise the society or the general committee. In 1877, the legal position was investigated. The society successfully asserted its ownership of the schools, and the incumbent had to give way, but, B in his letter of Feb. 28, 1878, he expressed the hope that the management might be left in the hands of the congregation. The society do not appear to have refused this request, and there is no evidence that from 1878 to 1902 they ever appointed a manager or teacher to this school, or exercised any interference with its management and control by the C incumbent or the congregation. The society continued to make a grant of £50 a year to the expenses of the school, as they did in the cases of many schools which they did not own. On two occasions they also made extra grants towards extraordinary repairs. It being a question of fact whether in 1902 the general committee were in occupation of D this school by its members or by its authorised agents or representatives, I think that the evidence falls short of what is required to establish such occupation.

This being the position down to 1902, it is necessary to consider the effect of the Education Act of that year and the later Act of 1921. In E passing, I should mention that in 1870 an Education Act had been passed, and sect. 7 of that Act preserved the position of the managers of non-provided schools.

The material sections of the Act of 1902 are sects. 5, 6 (2), 7 and 11. F The material parts of these sections are as follow :

5. The local education authority shall, throughout their area, have the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870 to 1900, and any other Acts, including local Acts, and shall also be responsible for and have the control of all secular instruction in public elementary schools not provided by them ; and school boards and school attendance committees shall be abolished.

6 (2) All public elementary schools not provided by the local education authority shall, in place of the existing managers, have a body of managers consisting of a number of foundation managers not exceeding 4, appointed as provided by this Act, together with a number of managers not exceeding 2, appointed (a) where the local education authority are the council of a county, one by that council and one by the minor local authority ; and (b) where the local education authority are the council of a borough or urban district, both by that authority. G

7 (1) The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers ; but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with : (a) the managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any H

teacher on educational grounds ; and, if the managers fail to carry out any such direction, the local education authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers ; but no direction given under this provision shall be such as to interfere with reasonable facilities for religious instruction during school hours. . . . (d) the managers of the school shall provide the school house free of any charge, except for the teacher's dwelling-house (if any), to the local education authority for use as a public elementary school, and shall, out of funds provided by them, keep the school house in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority : Provided that such damage as the local authority consider to be due to fair wear and tear in the use of any room in the school house for the purpose of a public elementary school shall be made good by the local education authority. . . .

11 (1) The foundation managers of a school shall be managers appointed under the provisions of the trust deed of the school ; but, if it is shown to the satisfaction of the Board of Education that the provisions of the trust deed as to the appointment of managers are in any respect inconsistent with the provisions of this Act, or insufficient or inapplicable for the purpose, or that there is no such trust deed available, the Board of Education shall make an order under this section for the purpose of meeting the case. . . . (6) The body of managers appointed under this Act for a public elementary school not provided by the local education authority shall be the managers of that school both for the purposes of the Elementary Education Acts, 1870 to 1900, and this Act, and, so far as respects the management of the school as a public elementary school, for the purpose of the trust deed.

Then came the Act of 1921, the material sections of which are sects. 29 (2) (a), (d), (6), 30 (2), 31 (1) (b), 32 (1) (b), 35 (2), (3). Those sections in substance repeat the provisions of the Act of 1902. Sect. 29 corresponds with sect. 7 of the Act of 1902. The precise wording of sect. 29 applicable to this case is subsect. (2) :

A local education authority shall maintain and keep efficient under this Act a public elementary school not provided by them only so long as the school is necessary and the following conditions and provisions are complied with. . . . (d) the managers of the school shall provide the schoolhouse free of any charge, except for the teacher's dwelling-house (if any), to the local education authority for use as a public elementary school, and shall, out of funds provided by them, keep the schoolhouse in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority : Provided that such damage as the local education authority consider to be due to fair wear and tear in the use of any room in the schoolhouse for the purpose of a public elementary school shall be made good by the local education authority.

Those are the same words as in the Act of 1902. Subsect. (6) provides :

The managers of a school maintained but not provided by the local education authority shall have all powers of management required for the purpose of carrying out this Act and shall, subject to the powers of the local education authority under this section, have the exclusive power of appointing and dismissing teachers.

Sect. 30 (2) provides :

All public elementary schools not provided by the local education authority shall have a body of managers consisting of a number of foundation managers not exceeding 4 appointed as provided by this Act, together with a number of managers not exceeding 2 appointed. . . .

Then there follow the provisions with regard to the appointment in the case of the council of a county and in the case of a borough. Sect. 31 (1) provides :

The foundation managers of a school shall be managers appointed under the provisions of the trust deed of the school, or under an order made in pursuance of this Act or the Education Act, 1902, s. 11, or under the trust deed of the school as modified by any such order.

Sect. 32 (1) provides :

If it is shown to the satisfaction of the Board of Education that the provisions of the trust deed of a school not provided by the local education authority as to

the appointment of managers are in any respect inconsistent with the provisions of this Act, or insufficient or inapplicable for the purpose, or that there is no such trust deed available, the Board of Education shall, on the application of the local education authority or any other person interested in the management of the school, make an order under this section for the purpose of meeting the case.

Then sect. 32 (6) provides :

Any order made under this section, where it modifies the trust deed of a school, shall have effect as part of the trust deed, and, where there is no trust deed, shall have effect as if it were contained in a trust deed. A

Sect. 35 provides :

(2) The managers of an elementary school shall have power to fulfil the conditions required to be fulfilled in order to obtain a parliamentary grant, and to fulfil any other conditions, perform any duties, and exercise any powers under this Act, notwithstanding any provision contained in any trust deed of the school. B
(3) The body of managers appointed under this Act for a public elementary school not provided by the local education authority shall be the managers of the school both for the purposes of this Act and, so far as respects the management of the school as a public elementary school, for the purposes of the trust deed.

I think that those sections of the Act of 1921 are, in substance, merely repeating the sections of the Act of 1902. C

Without the guidance to be obtained from the authorities, I should have come to the conclusion that the effect of these statutes was to create a new body of persons—not, of course, a legal entity—to take the place of such persons as had previously had the control and management of non-provided schools. This newly-created body was charged with the duty of management of such schools both for the purposes of the Acts and for the purposes of any trust deed as respects the management of the schools as public elementary schools. In my view, it derived all its powers and obligations for the above purposes from the Acts. D

In this case, the managers appointed under the Acts for the aforesaid purposes owed no allegiance to, and derived no authority from, the Church of England Schools Society or its general committee, notwithstanding that 4 out of 6 of their number were nominated by the general committee under the provisions of an order of Dec. 19, 1903, made in pursuance of sect. 11 of the Act of 1902. In my view, sect. 7 of the Act of 1902 and sect. 29 of the Act of 1921 imposed an obligation on the managers to repair so long as the school was being used as a public elementary school, and such obligation was not merely a condition of the maintenance of the school by the local education authority. In carrying out the necessary repairs, the managers would be performing a duty imposed upon them by statute, such duty being one which was owed to the public. Whether the duty arises solely from the provisions of sect. 29 or whether it results from their occupation of the premises is, I think, immaterial, since they were placed in occupation by the statute. In either case, their failure to repair was, in my view, a neglect or default in pursuance, or execution, or intended execution, of an Act of Parliament or public duty within the meaning of the Public Authorities Protection Act, 1893. E F G H

It remains to consider whether there is any authority binding on me which decides that my views as expressed above are not in accordance

with the law. Dealing first of all with the question whether the duty to repair is conditional only or absolute, the case of *Abbott v. Isham* (1) shows, I think, that HORRIDGE, J., took the view that sect. 7 of the Act of 1902 imposed a duty for the breach of which an injured party could sue, although it is true that it does not appear from the report that the point that the obligation was only conditional was argued.

As to the position of the managers, the matter has quite recently received consideration by SINGLETON, J., in an action brought by a pupil of this school against the managers and others in respect of injuries received on the occasion of the collapse of the floor on Dec. 12, 1934, such action having been brought within six months of that date. The case is *Tierney v. Smith* (2). In this judgment, SINGLETON, J., uses these words :

As to the managers, I just read a passage from the speech of LORD MERSEY in *Gillow v. Durham County Council* (3). Furthermore, by sect. 29 (6) they have powers of management required for the purposes of carrying out this Act. They provide the schoolhouse, they appoint teachers, cleaners, caretakers, etc. The appointment of teachers is subject to approval. They are responsible for repairs, they are responsible for doing any alterations and improvement if they are called upon to do it. I have referred already to sect. 35 (3). I think that the duty of providing a schoolhouse which is in order and the duty of repairing that schoolhouse was in the managers under the statute. I think that for all the purposes of the statute they ought to be treated as the occupiers. I regard them as in occupation for the purposes of the statute, and in my view they must be so treated. Mr. Sellers referred to *Blencowe v. Northamptonshire County Council* (4), and it is true that WARRINGTON, J., took the view, in the circumstances of that case, that the managers were not in occupation of the school so as to enable them to found any action for trespass. I think that I am right in saying that he pointed out that in certain circumstances they might be, but, so far as I have heard, everything in the way of management of the schools was left to the managers in this case. No one has ever heard of any interference by the trustees or owners at all. When the head master desired to do something in the evening in the school, he approached the managers. I am satisfied that the whole matter was left to the managers, and I think that, in the circumstances of this case, they ought to be regarded as in occupation. I think that that was the object of the statute—to set up persons who were responsible for the control and management of the school, to give those persons full powers of management. I think that it was intended that they should have all the responsibilities which the occupiers would have.

Later, he said :

School managers who are responsible for certain things under the Act are engaged on public work, performing public duties, but they also have responsibilities, and I hope at least that the result of this case will be that, whether or not a local authority is responsible, there will be a complete examination, and periodical examination, of all old buildings which are used as schools.

In the recent case of *Greenwood v. Atherton* (5), LEWIS, J., has held that the managers of a non-provided school are protected by the Public Authorities Protection Act in respect of a breach of duty by a teacher during school hours.

As against these cases, Mr. Clothier relies upon *Blencowe v. Northamptonshire County Council* (4). This case decided, *inter alia*, that the managers of a non-provided school, by virtue of their appointment under the Act of 1902, had not, in the absence of a special arrangement with the owner, such possession of the school premises as would enable them to support an action for trespass. I do not, however, think that this case is an

authority for the proposition that such managers cannot in law ever be regarded as having such occupation and control of the premises as to impose upon them the duty to take reasonable care that such premises are reasonably safe for persons invited thereto with their authority. It certainly does not decide that the owners of such schools must always be regarded as being in occupation. Nor does it, of course, deal with the statutory liability of the managers to repair. A

Finally, both the plaintiffs and the defendants rely on passages in the opinions in *Gillow v. Durham County Council* (3) as tending to support their respective contentions. In their opinions in this case, the VISCOUNT HALDANE, L.C., and LORD ATKINSON trace the history of many of the sections of the Education Act, 1902, and explain their origin and purpose in order to arrive at a decision as to the power of appointment and the obligation to pay the salary of a caretaker in a non-provided school. Both the learned Lords, it is true, in the course of their opinions use words which may be construed as tending to indicate that the managers appointed under the Act were not a newly-created body, but the local education authority were given a statutory power of interference. On the other hand, LORD MERSEY said, at p. 73 : B C

Stopping at this point, the effect of the legislation appears to me to be to make the new statutory body of managers the successors of the trustees under the old school deed and to vest in them many of the rights and powers which those trustees previously had, including the right and power to appoint a caretaker. D

It was not necessary in that case to decide whether the managers appointed under the Act were a new statutory body appointed as successors to the old managers or whether they were the same previously existing body, subjected to certain restrictions, and with certain new duties imposed upon them. I do not think, therefore, that words used in the course of a historical survey should be taken as indicating their Lordships' considered views on a matter which was not necessary for their decision, and I think that, had their Lordships' minds been directed to the question involved in the present case, they would have approved the language of LORD MERSEY when he described the effect of the legislature as being (at p. 73) : E F

to make a new statutory body of managers the successors of the trustees under the old school deed and to vest in them many of the rights and powers which those trustees previously had. . . . G

Accordingly, I think that, on the whole, the authorities support the view at which I have arrived, as indicated above. In my view, on the facts of this case, the general committee were not in occupation of these premises in 1902, and the effect of the Acts of 1902 and 1921 has been to create a new statutory body—namely, the managers appointed under those Acts—who have ever since been in occupation by themselves or their agent, the head master. If, contrary to my finding, the general committee were in occupation in 1902, then I think that they were displaced by this new statutory body, and that since 1902 this body has had a public duty imposed upon it to repair the school premises, H

for breach of which duty its members would have been liable in an action brought within six months of the accident. I think, however, that, this period having elapsed before the issue of the writ, they are now protected by the Public Authorities Protection Act. The general committee were not, in my opinion, in occupation of these premises
 A by themselves or by the managers as their servants or representatives on Dec. 12, 1934, and are accordingly entitled to judgment. The action against the trustees, against whom no relief was sought personally, also fails.

In the result, there will be judgment for all the defendants with costs.
 B In case of appeal, I assess the damages of the plaintiff Margaret Elizabeth Griffiths at £600 and those of her husband John Griffiths at £160.

Judgment for the defendants.

Solicitors: *Silverman & Livermore* (for the plaintiffs); *Gamon, Arden & Co.* (for the first defendants); *Buckley, Pidgeon, Watson &*
 C *Blackwood* (for the second defendants).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

D RACECOURSE BETTING CONTROL BOARD v. MOUNT;

[COURT OF APPEAL (Greer, Slessor and MacKinnon, L.JJ.), July 18, 19, 1938.]

Mistake—Mistake of fact—Recovery of money paid under a mistake—Totalisator bet—Winnings paid partly in five-pound notes in mistake for one-pound notes—Whether excess recoverable—Racecourse Betting Act, 1928 (c. 41), ss. 2 (8), 3 (3) (4).
 E

The defendant made a bet on the totalisator and won £42 10s. Intending to pay him 40 one-pound notes, a clerk, employed by the plaintiffs, paid him 40 five-pound notes. When this was discovered, the defendant offered to pay back any sum the plaintiffs could prove he had been overpaid. Seventeen of the five-pound notes in his possession were proved by the serial numbers to have been paid to him by the plaintiffs, and this £85 was returned to them. Rule 4 of the Totalisator Rules made by the plaintiffs under the provisions of the Racecourse Betting Act, 1928, s. 2 (8), contains the following provision: "Dividends should be examined before leaving these windows, as mistakes cannot be rectified later." Upon an action being brought to recover the balance of the amount by which the defendant had been overpaid, the defendant counterclaimed for the sum of £85 he had repaid, and it was contended on his behalf that r. 4 was bilateral, and applied equally whether the
 F plaintiffs had paid a backer too much or too little:—
 G

HELD: the rules were not any part of the contract between the parties, and did not affect the plaintiffs' common law rights to recover money paid under a mistake of fact.
 H

[EDITORIAL NOTE. This decision is clearly of importance to all persons dealing with the plaintiff board in this case, and it would seem that the decision will apply generally to statutory bodies dealing with the public, provided they have statutory power to make rules regulating those dealings. It is certainly of the utmost importance to these bodies that a rule, purely procedural, and intended only to have a unilateral effect, shall not be construed in any wider sense.

AS TO RECOVERY OF MONEY PAID BY MISTAKE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 162-166, Nos. 234-242; and FOR CASES, see DIGEST, Vol. 35, pp. 147-154, Nos. 456-507.]

Case referred to :

- (1) *Thompson v. London, Midland & Scottish Ry. Co.*, [1930] 1 K.B. 41; Digest Supp.; 98 L.J.K.B. 615; 141 L.T. 382.

APPEAL from a decision of His Honour JUDGE HARGREAVES at the West London County Court, dated Feb. 11, 1938, and reported [1938] L.J.N.C.C.R. 113.

On June 16, 1937, the defendant made a £2 bet on the totalisator at Ascot, as a result of which he should have been repaid £42 10s. When he went to collect his winnings, a temporary clerk, employed by the plaintiffs, accidentally paid him 40 five-pound notes, 2 one-pound notes and a ten-shilling note. The defendant omitted to take the ten-shilling note, by mistake, but took the £202. When the mistake was discovered, the defendant offered to return to the plaintiffs any sum which they could prove that he had been overpaid. The plaintiffs identified 17 five-pound notes by means of the serial numbers, and these were returned to them. The plaintiffs brought the present action claiming £74 10s., being the balance of the amount of £202 paid to the defendant, less £42 10s. which he won, and less the £85 he had returned. The defendant counter-claimed for the sum of £85, relying upon r. 4 of the Totalisator Rules made by the plaintiffs under the provisions of the Racecourse Betting Act, 1928, s. 2 (8).

The rules relevant to the case read as follow :

4. Windows will be designated by the manager for the receipt of cash bets for win and place or forecast of 2s., 10s., £1 and £10, also for chit bets. Tickets and change should be examined before leaving the windows, as mistakes cannot be rectified later.

Windows will also be designated by the manager for the payment of dividends on presentation of tickets representing winning bets. Dividends should be examined before leaving these windows, as mistakes cannot be rectified later.

22. After the "all right" has been signalled, notices will be posted showing the dividends declared by the manager on winning and placed horses, and dividends will be at once paid out on presentation of tickets representing winning bets at the windows designated for that purpose, without reference to any objection that may be subsequently made. Backers should not destroy any totalisator tickets until after the dividends have been declared.

23. No dividends shall be declared or paid except on the order of the manager and when the manager has ordered the dividend to be paid on any horse or horses in any race no backer of any other horse in that race shall be entitled to receive a dividend on that race, notwithstanding that by a decision of the stewards, or the racing authority or otherwise, any other horse shall be declared to be the winner or to have been placed in that particular race instead of the horses declared when the "all right" signal was hoisted to be the winner or to have been placed or whatever afterwards may result, any rule of law or rule of racing of any nature or kind to the contrary notwithstanding.

C. M. Picciotto, K.C., and *D. M. Rosenberg* for the appellant.

Sir Robert Aske, K.C., and *A. Aiken Watson* for the respondents.

Picciotto, K.C.: The rules made under the 1928 Act constitute a contract. The defendant never agreed to waive r. 4 because he never knew of it. Rule 4 is partly directory on the officials of the board and partly contractual. It is bilateral. The word "mistake" is quite

general, and does not mean merely those mistakes where a bettor is underpaid. [Counsel referred to *Thompson v. London, Midland & Scottish Ry. Co.* (1).]

Rosenberg followed on the same side.

Aske, K.C., was not called upon.

A

GREER, L.J. : The difficulty in this case arises from the fact that there are so many points which are good and which may be urged by the respondents against this dishonest bettor who desires to retain the money which he now knows does not belong to him, even though he did not know
B it at the time when he received it. I call him a dishonest man because in this action he is saying that he is entitled to withhold moneys that he knows he did not win by his bet with the totalisator, and he desires to retain those moneys because, as he says, there is a contract which entitles him not only to retain those moneys but also to recover the £85 which he
C has already paid. I have no sympathy whatever with an appellant of that sort. In my judgment, he is disentitled by reason of the express words of rr. 22, 23. I think that nothing can be plainer than that, when r. 4 refers to the inability to correct mistakes, it refers to the inability to correct mistakes which have been made by the ticket-holder. It does not
D refer in any way to mistakes such as overpayments which have been made by the trustee or stakeholder. It would have been so easy to say, if it had been intended, that all mistakes should not be capable of rectification, and neither r. 22 nor r. 23, in my judgment, says that.

I also agree with what has been indicated by SLESSER, L.J., in the
E course of the argument, that this rule, if it means something different from what I think it means, cannot be held to control the provisions of the statute in sect. 3 (3), which put an obligation upon the stakeholder to "distribute or cause to be distributed the whole of the moneys staked by means of a totalisator on any race among the persons" putting on
F bets, and it does expressly forbid a gift to those who have not won a dividend by means of their betting, which the Racecourse Control Board are under an obligation to pay.

Then I also agree with the county court judge's view, taking the whole correspondence together, and especially the last letter, which was written
G by the solicitor on behalf of his client, who had in fact undertaken that he would not raise the question if it could be proved at the trial that money had in fact been overpaid. For these reasons, I think that this appeal fails.

H SLESSER, L.J. : In my view, this case raises a question of considerable importance to that very large portion of the public who go to racecourses and use the instruments known as totalisators. There is a defence here which, in my opinion, was totally misconceived at the outset.

I think that the county court judge was wrong when he came to the conclusion in his judgment, apart from the particular question of waiver,

that in any circumstances there existed under the rules made under the Racecourse Betting Act, 1928, and in particular under r. 4, a right in a person who had received moneys paid by mistake through the windows of the office designed for the payment of dividends on presentation of tickets to retain those moneys so paid by mistake. In my view, the obligations of the Racecourse Betting Control Board are clearly stated in the Racecourse Betting Act, 1928, s. 3 (3), (4). By sect. 3 (3) the Racecourse Betting Control Board :

shall distribute or cause to be distributed the whole of the moneys staked by means of a totalisator on any race among the persons winning bets made by means of the totalisator on that race, after deducting or causing to be deducted such percentage of those moneys as the board may from time to time determine either generally or with respect to any particular racecourse.

Thus, primarily there is an obligation on the board to distribute the moneys staked, which they hold as stakeholder, among the persons who are successful in the particular race, with the right to deduct a percentage. Then there is provided in sub-sect. (4) a specific power to set up a fund known as the totalisator fund :

into which shall be paid the percentage deducted as aforesaid of moneys staked by means of the totalisator, and any other moneys received by the board.

Those two subsections control the method by which the Betting Control Board may deal with the moneys in their possession. No power whatever is there given to the board to agree that moneys which they have paid out inadvertently, and which are not dividends—and are therefore to be regarded, in my opinion, as in the nature of gifts—shall remain in the possession of the donee without recourse by the board to their ordinary common law rights to recover money paid under a mistake of fact.

Reliance is placed in this case on the rules which are made under sect. 2 (8), which is to the following effect :

The board may regulate their own procedure. . . .

It goes on to deal with standing orders governing the conduct of their business, which seem to me to have nothing to do with this case. The board undoubtedly have made rules which they say have been made under that subsection, and it appears that those rules, as is required by one of them, have been displayed outside the totalisator building. Rule 4, which is the one here relied upon, states, among other matters, that dividends :

. . . should be examined before leaving the windows, as mistakes cannot be rectified later.

If that rule is no more than a rule of procedure, a rule dealing, as rules are entitled to deal, with the regulation of procedure, or, at most, an intimation to the public of an advisory character, then I think that, from the point of view of the statute, it would be unobjectionable. However, I cannot construe it to mean what is contended for by Mr. Picciotto—namely, that it is requiring the board in certain circumstances to part with moneys which they have no legal right or obligation to part with,

which would, I think, do violence to their powers and duties under sect. 3 unless there is compelling language to that effect. If that were so, I think that it would be very arguable that the rule would be *ultra vires* the statute. I think that the more natural and proper meaning to give it is that this is, as GREER, L.J., has said, merely a unilateral intimation

A that the board will not return moneys to the client. I think that it does not have the effect contended for, but it is not necessary to consider that matter in this case. If a client had received moneys which they wished to recover, it is not necessary to express an opinion as to whether or not this could be relied upon. It is sufficient here to say that I think these are not in

B the nature of terms of the contract at all. Nor is there any evidence, in my opinion, that these rules were ever by intention of the parties meant to be terms of any contract. I contrast these rules—and the only thing which can be said to bind the parties is that they are to be exhibited on the buildings—with the kind of rule with which one is familiar in the

C railway excursion and workmen's ticket cases, where, as a rule, it is stated specifically that the ticket is issued under the regulations and conditions of the company. I look in vain here for any intimation in these rules to that effect. It may well be that certain of the regulations were within the powers of the board. Regulations 22, 23, which would

D deal with the distribution of moneys, amplifying what is left general in the section, may be within the powers of the board, and may be taken to be part of the terms of the contract—such, for example, as the provision in reg. 22 that :

E After the "all right" has been signalled, notices will be posted showing the dividends declared by the manager on winning and placed horses, and dividends will be at once paid out on presentation of tickets representing winning bets at the windows designated for that purpose, without reference to any objection that may be subsequently made.

Such a provision may some day be held to be within the general power of the board to make a distribution. In my opinion, however, a common

F law right to recover money paid under a mistake of fact under r. 4 does not fall within any such power. Therefore, the board, quite apart from any specific question of waiver in this case, have here their full common law rights to recover money which they say has been paid under a mistake of fact.

G

MACKINNON, L.J. : Out of the various grounds upon which this appeal fails, the one I favour is that this r. 4—or, at any rate, most of it—is clearly a matter of advice or statement of fact. The last sentence in it might also be of that character. It is in most cases difficult or impossible

H to find out the true facts. It is suggested that the last words of this rule must be construed as creating a contract to this effect : " If the customer is, by mistake, paid too much or too little, it is agreed that neither party shall be entitled to claim the excess paid by mistake unless the claim be put forward before a customer leaves the window." I do not think that that is the true construction. The sentence says that

something cannot be done. That is, I think, a statement of practicability, and not an agreement as to liability. Suppose, for instance, that the board paid the dividend due to a customer by cheque (as, by r. 25, they are entitled to do), and suppose that by that cheque they paid him too little. It would then not be impracticable, but perfectly easy, to prove the mistake. In such a case, I do not think that the board could rely A upon this rule so as to achieve a manifest injustice. Similarly, if the cheque were too much, I am sure that the board could stop the cheque so as to prevent the customer from retaining more than the proper amount. As in this case the facts were abundantly clear, and as there was no impracticability in proving them, I am glad to think that we are B not called upon to help the defendant in the successful achievement of so gross an injustice.

Appeal dismissed with costs.

Solicitors: *L. G. Coleman* (for the appellant); *Simmons & Simmons* (for the respondents). C

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

Re LEICESTER'S SETTLED ESTATES, COKE v. LEICESTER.

[CHANCERY DIVISION (Morton, J.), July 15, 1938.]

Settlements—Tenant for life and remainderman—Apportionment as between capital and income—Tithe redemption annuities—Tithe Act, 1925 (c. 87)—Tithe Act, 1936 (c. 43).

- A Under the Tithe Act, 1936, all tithe rentcharge will be compulsorily redeemed, the tithe-owner in effect being paid by the government and the government being repaid by the landowner in annual instalments called redemption annuities. These annuities are payable for a period of 60 years. It was contended that, in the case of settled land, these annuities are apportionable between capital and income :—
- B HELD : redemption annuities are not apportionable, and are wholly payable out of income.

- [EDITORIAL NOTE. Tithes were originally collected in kind, but from very early days this method of collection proved so inconvenient to both sides that some kind of money payment in place of payment in kind became more and more prevalent. Eventually in place of tithes in kind there was substituted tithe rentcharge.
- C From the middle of last century, every effort has been made to induce the voluntary redemption of the tithe rentcharge. The Act of 1925 provided for the compulsory redemption of tithe rentcharge attached to a benefice or to an ecclesiastical corporation ; but not that of lay tithe rentcharge. The Act of 1936 provided for the compulsory redemption of all tithe rentcharge, the government making themselves responsible for the payment to the tithe-owner and recouping their expense in this regard by the collection of annual payments—redemption annuities—from the landowner. The question in the present case is whether these annual payments in the case of settled land are apportionable as between capital and income.
- D

- AS TO APPORTIONMENT BETWEEN TENANT FOR LIFE AND REMAINDERMAN, see HALSBURY, 1st Edn., Vol. 25, Settlements, pp. 615-621, paras. 1085-1092 ; and FOR CASES, see DIGEST, Vol. 40, pp. 677-680, Nos. 2132-2157.]
- E

Cases referred to :

- (1) *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444 ; 40 Digest 694, 2297 ; 79 L.J.Ch. 748 ; 103 L.T. 134.
- (2) *Re Hotchkys, Freke v. Calmady* (1886), 32 Ch.D. 408 ; 40 Digest 647, 1869 ; 55 L.J.Ch. 546 ; 55 L.T. 110.
- F

- ADJOURNED SUMMONS for the determination of the question whether, upon the true construction of the Tithe Act, 1936, s. 13, or otherwise, the tenant for life for the time being of the settled estates or his assignees (if any) is or are and will be entitled to be recouped out of capital moneys
- G any, and, if so, what, part of all payments made by such tenant for life or such assignees respectively on account of the redemption annuity created and charged upon the estates by the Tithe Act, 1936, s. 3.

- G. M. Parbury for the plaintiffs, the trustees for the purposes of the Settled Land Act, 1925, of the several settlements affecting the estate.
- H Reginald W. Goff for the first four defendants, all of whom were interested in income.

Roger Turnbull for the fifth defendant, who was interested in capital.

Goff : The redemption annuity ought to be apportioned between capital and income. How the apportionment should be effected is a matter within the discretion of the court. The right to an apportion-

ment is based upon the general law that *corpus* must bear capital charges and income must bear interest on capital charges. In the alternative, the right is based upon the general jurisdiction of the court to apportion liabilities between capital and income. The annuity is a capital charge. By the Tithe Act, 1936, s. 2, the state has provided stock for the purpose of making compensation for the extinguishment of the tithe rentcharge. A If this had not been done, the compensation would have had to be charged upon the land in the form either of an annuity or of a lump sum. If the court is satisfied that the charge is of a capital nature, *Re Poyser, Landon v. Poyser* (1) is applicable, although it may be that the court may feel that some lesser charge on the *corpus* would be appropriate. B Tithe rentcharge has been abolished by the Tithe Act, 1936. The state provided the money to compensate the owners, and the state recouped itself by a charge upon the land. This is a new charge. The payments which are made by the tenant for life inure for the benefit of his successors. After 60 years, the owner will have the land free from any C annuity. The charge should be apportioned on some equitable principle, so that the tenant for life would receive some benefit from the Act, and thus its operation should not inure entirely for the benefit of the remainderman. *Re Hotchkys, Freke v. Calmady* (2) is a case which is of general application. In the present case, the court should apportion D one-sixth to capital and five-sixths to income. This is based upon the Tithe Act, 1936, s. 13 (6), but the method of apportionment is a matter within the discretion of the court.

Turnbull: The burden imposed by the Tithe Act, 1936, has to be borne entirely out of income. Before 1925, the amount payable in respect E of tithe rentcharge fluctuated with the price of corn, and one of the purposes of the Act was to stabilise the amount of tithe rentcharge payable. That Act also provided for the redemption of the ecclesiastical tithe rentcharge after a period of 85 years, and for that purpose a sinking fund was formed. No question could arise between tenant for F life and remainderman under the 1925 Act, as the legislature took the view that the charge was to be a capital charge. The Tithe Act, 1936, contemplates that the whole of the annuity payable under that Act shall be discharged by the owner of the land, and, in the case of settled land, it would be discharged by the tenant for life. Under the 1925 G Act, a total of £109 10s. had to be paid in respect of each £100 of tithe rentcharge, and it was commonly accepted that of this sum £4 10s., called the sinking fund payment, was a capital charge. By the proviso to sect. 4 (2) of the 1925 Act, this sum of £4 10s. was to be treated as an instalment of the capital payment, but no such words are to be H found in the 1936 Act. The Tithe Act, 1936, did not throw a burden upon the owner of land, but it gave him a benefit in respect of three matters. It lessened the income burden because, instead of £105, a considerably lesser sum became payable. It benefited the *corpus* of the estate, in that the sinking fund was abolished. It reduced the

- period over which payments have to be made from 85 years to 60 years. It is not correct to contemplate the Act of 1936 as though it imposed a burden upon the tenant for life, because it has clearly conferred a benefit upon him. It was really a gift to him from the legislature in all three respects. The tenant for life is the estate owner, and the
- A annual payment is due from him, and, if part of the payment was to be recovered from anybody else, the Act would have said so. The Act of 1936 does not contemplate the annuity being paid by anybody but the owner of the land. The sinking fund payment under the 1925 Act is a capital charge, although there is no authority to support that
- B view. There are, however, stronger reasons for throwing that payment on to capital than there are for throwing on to capital the one-sixth mentioned in sect. 13 (6) of the 1936 Act, as this is restricted to income tax purposes. *Re Poyser, Landon v. Poyser* (1) is not applicable to the present case, and can only apply in cases where the whole of the income
- C can be treated as something that capital should wholly bear.
Goff, in reply.

- MORTON, J.: The settled estate with which I have to deal was, prior to the coming into force of the Tithe Act, 1936, subject to certain
- D tithe rentcharges aggregating a very substantial sum in each year. With a trifling exception, the Tithe Redemption Commission have agreed that all the parts of the settled estate subject to these tithe rentcharges are agricultural land, and, accordingly, by virtue of the Tithe Act, 1936, s. 3, to which I shall shortly refer, the settled estates have become, and
- E are now, charged with redemption annuities at the rate of £91 11s. 2d. per annum for every £100 per annum of tithe rentcharge. This summons has been taken out by the present trustees for the purposes of the Settled Land Act, 1925, of the settlement affecting the estate, and the defendants are, as to all except the last defendant, persons interested in income.
- F The last defendant represents, for the purposes of this summons, persons interested in the capital of the settled estate.

The questions which I have to determine are, first :

- Whether upon the true construction of the Tithe Act, 1936, s. 13, or otherwise the tenant for life for the time being of the settled estates or his assignees (if any) is or are and will be entitled to be recouped out of capital moneys and if so what
- G part of all payments made by such tenant for life or such assignees respectively on account of the redemption annuity created and charged upon the settled estates by sect. 3 of the said Act.

The second question which I have to determine is as follows :

- If the answer to question 1 is in the affirmative, then whether any sums which ought to be recouped as aforesaid will until raised and paid to the tenant for life or his assignees be charged upon the capital of the settled estates.

- H The third question is as follows :

If the answer to question 2 is in the affirmative, then (a) whether such charge will carry interest at any and what rate and (b) whether such charge will have priority over or be subject to (i) all annual or periodic sums and (ii) all capital sums charged (by the settlement or settlements for the time being affecting the settled estates) upon the settled estates in priority to the estate of the tenant for life by whom or in right of whom such recoupment is claimed.

If I had come to the conclusion that the tenant for life is entitled to any recoupment out of capital moneys of any part of the redemption annuity created and charged upon the estates by the Tithe Act, 1936, s. 3, I should have desired time to consider my judgment in order to work out the exact form which that recoupment should take, but, as I have arrived at the contrary conclusion (though with some hesitation), I do not think it necessary to reserve my judgment. A

Prior to the coming into force of the Tithe Act, 1925, there is, I apprehend, no doubt that the sums payable by way of tithe had to be borne, as between tenant for life and remaindermen of settled estates, by the tenant for life. The Tithe Act, 1925, s. 1, is in the following terms : B

(1) The sums becoming payable on or after the appointed day in respect of a tithe rentcharge in lieu of being computed in manner prescribed by the Tithe Acts shall be computed on the basis of £105 for every £100 of tithe rentcharge.

I do not think that I need read subsect. (2) of that section. Then sect. 2 deals with the synchronising of the dates for payment of the tithe rentcharge, and sect. 3 provides : C

(1) Any tithe rentcharge which immediately before the appointed day is attached to a benefice shall on that day be transferred to, and by virtue of this Act become vested in, Queen Anne's Bounty for all the interest therein so attached, subject to any charge or liability affecting that interest, but without prejudice to the powers of the person in whom the tithe rentcharge was vested to recover and enforce the recovery of any arrears payable before the appointed day. (2) Any tithe rentcharge so vested in Queen Anne's Bounty shall while so vested be held in trust for the incumbent of the benefice to which it was previously attached, or other the person for the time being entitled to receive the emoluments of the benefice. D

Sect. 4 is, I think, of some importance for the present purpose. Subsect. (1) is in the following terms : E

For the purpose of the redemption before the expiration of a period of 85 years from the appointed day of the tithe rentcharge so vested in Queen Anne's Bounty there shall be payable to Queen Anne's Bounty by way of sinking fund payment in respect of every £100 of tithe rentcharge so vested the annual sum of £4 10s., and such annual sum as aforesaid shall continue payable until the half-yearly date of payment which precedes the expiration of the said period of 85 years.

Then subsect. (2) provides as follows : F

The annual sum so payable shall for all purposes (including those of the Tithe Act, 1891, s. 8) be treated as an addition to and as part of the sums payable in respect of the tithe rentcharge in respect of which it is payable, and all the enactments relating to tithe rentcharge shall apply thereto accordingly : Provided that such additional sum as aforesaid shall not, for the purposes of the enactments relating to income tax, land tax, or rating, be treated as part of the sums payable in respect of the tithe rentcharge, but shall for those purposes be treated as an instalment of a capital payment. G

Sect. 5 (1) provides as follows :

Out of the annual sums received in respect of every £100 of tithe rentcharge so vested in them, Queen Anne's Bounty shall in each year, subject to the provisions hereinafter contained, (a) carry £4 10s. subject to any deduction on account of remission of tithe rentcharge to the sinking fund ; and (b) pay the sum of £5 to the Commissioners of Inland Revenue to be applied by them towards the payment of the sums hereinafter directed to be paid by them on account of rates. H

I do not think that I need read the rest of that section. Sect. 6 (1) provides as follows :

The sums carried to the sinking fund under this Part of this Act in respect of

any tithe rentcharge shall be accumulated by Queen Anne's Bounty during the accumulation period, or until the redemption or merger of the tithe rentcharge if it is redeemed or merged before the expiration of that period, by the investment in authorised securities of such sums and of the income received or accrued during the accumulation period in respect of such investments.

- A Counsel concerned in the case have informed me that they are not aware of any authority which decides whether the £4. 10s. per annum payable by way of sinking fund payment ought to be treated as being payable by the tenant for life of settled land or by the remainderman, and I do not propose to express any opinion on the point, which has ceased to be of any materiality. However, it is, I think, helpful, when
- B one comes to consider the provisions of the 1936 Act, to observe that the 1925 Act expressly provided for a sinking fund payment in contemplation of the tithe rentcharge coming to an end at the expiration of a period of 85 years.

The Tithe Act, 1936, is described as :

- C An Act to extinguish tithe rentcharge and extraordinary tithe rentcharge, and to make provision with respect to the compensation of the owners thereof and rating authorities and to the liabilities of the owners of land charged therewith in respect of the extinguishment thereof; to reduce the rate at which tithe rentcharge is to be payable pending its extinguishment and to make provision with respect to the recovery of arrears thereof; to make provision for the redemption and extinguishment of corn rents and similar payments; and for purposes connected
- D with the matters aforesaid.

By sect. 1 it was provided :

Subject to the provisions of this Act, all tithe rentcharge shall be extinguished on Oct. 2, 1936 (in this Act referred to as "the appointed day"), and accordingly as from that day the land out of which any tithe rentcharge issued immediately before that day shall be absolutely discharged and freed therefrom.

- E That section, therefore, puts an end, subject to any subsequent provision of the Act, to all tithe rentcharge on the appointed day. Then follow, in sect. 2, provisions for the compensation of the persons interested in the tithe rentcharge in respect of the extinguishment thereof. It is
- F provided as follows :

(1) Subject to the provisions of this Act, stock (to be called "redemption stock"), charged by way of guarantee on the Consolidated Fund and the growing produce thereof, shall be issued for the compensation of the persons interested in a tithe rentcharge in respect of the extinguishment thereof by this Act.

- Then follow provisions as to the amount of stock to be issued. Sect. 3
- G creates the redemption annuity as to which a question has arisen in the present case. It is in the following terms :

- (1) Subject to the provisions of this Act, an annuity (to be called a "redemption annuity") shall be charged in respect of the land out of which a tithe rentcharge extinguished by this Act issued immediately before the appointed day, for the use of His Majesty, for the period commencing on the appointed day and ending on the day preceding the sixtieth anniversary thereof.
- H

Then subsect. (2) provides as follows :

The amount of an annuity charged by this section in respect of the land out of which a rentcharge issued shall be the amount which bears to the amount of the rentcharge the same proportion as the following sum bears to the sum of £100, that is to say (a) if any of the said land was on Apr. 1, 1936, agricultural land, £91 11s. 2d.

That is the provision which applies to the land in question in these proceedings.

It is to be observed that the effect of the 1936 Act was to benefit the payer of tithe in three respects. In the first place, the annual payment was to be £91 11s. 2d., instead of £105, if one disregards for the moment the sinking fund payment; in the second place, it abolishes a sinking fund payment; and, in the third place, it shortens the period of 85 years to a period of 60 years. The Act, however, contains no statement in terms as to how the redemption annuity is to be borne as between capital and income. Certain provisions have, however, been referred to as bearing upon that matter, and in particular the provisions of sect. 13. Sect. 13 (1) provides as follows:

An annuity shall be payable half-yearly on each payment date.

I do not think that subsects. (2) and (3) are material, but Mr. Turnbull (who appears for the persons interested in the capital) has relied strongly upon subsect. (4), which says:

An annuity shall be deemed to be a periodical payment in the nature of income within the meaning of the Apportionment Act, 1870.

He relied upon that as an indication that the legislature intended the redemption annuity to be borne by the tenant for life. I do not find much, if any, assistance from that provision, because I think that Mr. Goff's comment that this subsection deals only with apportionment as to time, and does not deal at all with apportionment as between tenant for life and remainderman, is well-founded. Subsects. (5) and (6) provide as follow:

(5) No deduction in respect of income tax shall be made from any instalment of an annuity. (6) For all the purposes of the Income Tax Acts, five-sixths and no more of each instalment of an annuity shall be deemed to be a payment by way of interest, and the amount deemed to be so payable in any year of assessment shall be allowed as a deduction in respect of that year from the annual value, as assessed under Sched. A, of the lands in respect of which the annuity is charged.

Mr. Goff, for the tenant for life, says that, although he does not suggest that the court is bound as to the proportions of five-sixths and one-sixth, that subsection is some indication that the legislature contemplated that a part of the redemption annuity should be charged to capital. Mr. Turnbull, on the other hand, points out that it begins with the words "For all the purposes of the Income Tax Acts," and that, if the legislature had intended to throw any light upon the question of apportionment between tenant for life and remainderman, one would have expected a provision in express terms to be contained in the Act.

There is this further comment which I desire to make upon that subsection. I cannot see any logical basis whatever for throwing one-sixth of the annual payment upon capital, assuming that there should be any apportionment at all. I think that it is right to say that in no other section of the Act can one find any indication that a portion of this annual sum, described as a redemption annuity, ought to be charged

upon capital as between tenant for life and remainderman, and, whatever may be the reason for sect. 13 (6)—and I confess that I have not succeeded in fathoming the reason—I cannot find that it leads me to the conclusion that there ought to be any such apportionment.

- Three methods of apportionment have been suggested to me. The
- A first is that I should apply the principle which was applied in *Re Poyser, Landon v. Poyser* (1), and that each instalment of the annual sum ought to be apportioned as between capital and income by ascertaining what sum, if set aside—I suppose at the appointed day—and added to simple interest on that sum calculated as from that date to the date when each
- B instalment would become payable, would equal the amount of the instalment, and apportioning the burden between capital and income accordingly. I do not think that that form of apportionment would be appropriate. It would be appropriate only if this annual payment were in the nature of a capital charge, and I do not think that it is. It is
- C also suggested, as a second method, that I should apportion it by following the proportions adopted in sect. 13 (6)—namely, as to five-sixths of each instalment to income, and as to one-sixth to capital. For my part, I can see no logical basis for such an apportionment, and I think that it would cast too heavy a burden on capital, if there ought
- D to be any apportionment at all. The third method of apportionment is that in each year one must treat as a charge upon capital such a sum as, if accumulated at compound interest at—let us say—3 per cent. for 60 years, accumulating it year by year and setting it aside year by
- E year, would produce at the end of those years a fund sufficient to answer by its income the annual sum of £91 11s. 2d.—in other words, create notionally a sinking fund similar to that which was established by the 1925 Act, and give the tenant for life year by year a charge upon the capital of the estate equal to the amount of the sum in question. There is no doubt that such a method of apportionment would give rise
- F to very complicated calculations, especially in the case of small estates, where possibly a farm is settled upon trust for the farmer's widow for life and then on his daughter for life, and then on her children. In such a case, the complications might impose a rather severe burden upon the successive owners. I do not think, however, that the mere
- G fact that complications would result would of itself be sufficient reason for my arriving at the conclusion that there should be no apportionment. I prefer to base my conclusion upon the facts that, prior to the 1925 Act, tithe rentcharge was clearly a payment to be borne by the tenant for life, that the 1925 Act creates a sinking fund which, it may well be,
- H was intended to be a burden on capital, and that the 1936 Act, sweeping away tithe rentcharge altogether, makes provision for this annual payment, and makes provision for it alone, which is to go on for a period of 60 years, without providing for any sinking fund at all. The Act provides benefits both for a tenant for life and for remainderman, assuming that the tenant for life has to bear the whole of the redemption annuity.

In the case of the tenant for life, his annual liability is reduced, and the period during which it continues is also reduced. In the case of the remainderman, it is, of course, a detriment to the capital value of the property so long as an annual sum is payable, even if it is payable out of the income, and the remainderman gets the benefit that there is no sinking fund payment, assuming that such payment is payable by the remainderman under the 1925 Act and that the liability wholly ceases at the end of 60 years, instead of 85 years. On the whole, I do not think that this is a case in which there should be any apportionment of the annual payments between tenant for life and remainderman. I think that it is a case in which the court ought to treat the payment as being a liability or burden upon the tenant for life alone.

Solicitors: *Walters & Co.* (for all parties).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

COTTINGHAM'S EXECUTORS *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), **June 30, July 1, 5, 1938.**]

Income Tax—Avoidance of tax—Transfer of income of persons abroad—Operation part of transaction also necessary for protection of settlor—Burden of proof of avoidance—Death of taxpayer before passing of legislation—Liability of executors—Finance Act, 1936 (c. 34), s. 18.

The deceased, a Canadian by birth and domicile, which domicile he never abandoned, for some years prior to his death on Jan. 22, 1936, resided in the United Kingdom. Immediately before the events next referred to, the deceased was drinking heavily, and was often incapable of managing his own affairs. The following operations were designed to safeguard his estate from his extravagance, and admittedly they were at the same time so carried out that the deceased's income should not be liable to tax. On Dec. 27, 1933, the deceased formed a Canadian company to which was transferred the deceased's share in his father's estate in consideration of the allotment of shares and debentures in the company. By a settlement dated Feb. 16, 1934, the deceased covenanted to transfer to the trustees of the settlement 10,000 shares of the company, and by another settlement of the same date he covenanted to transfer 1,800 non-interest-bearing redeemable debentures. For the year ending Mar. 31, 1936, the net income of the company was £22,986 5s. 4d. During that year, there was paid to the trustees of the debenture settlement £23,033 14s. 2d. in redemption of the debentures. During the same year, no dividend was paid upon the shares of the company. The first question was whether the transfer of the property to the company was made for the purpose of avoiding liability to taxation, the Crown contending that by virtue of the provisions of the Finance Act, 1936, s. 18, income from such property was to be deemed the income of the deceased. The second question was whether an assessment could be made upon the executors of a person dying before the date of the passing of the Finance Act, 1936:—

HELD: (i) the transfer and the associated operations, in order to avoid liability to taxation, must be affirmatively shown to have been effected mainly for some purpose other than that of avoiding taxation, and this was not shown to be the case here.

(ii) the Finance Act, 1936, s. 18, is by subject. 7 thereof given retro-active effect for the year 1935-1936 for the imposition of sur-tax, and the assessment upon the executors of the deceased was valid.

[EDITORIAL NOTE. This case decides the burden of proof in cases where dispositions can be said to have been made for some other purpose than the avoidance of tax, though they are such that they would in their result relieve the party making them of liability to tax. The burden is placed upon the taxpayer. The second point is also of importance, as it establishes the retroactive effect of legislation, enabling an assessment to be made upon the executors of a person dying before the passing of the legislation.

A AS TO TRANSFER OF ASSETS ABROAD, see HALSBURY, Supp., Income Tax, para. 539B; and FOR THE FINANCE ACT, 1936, s. 18, see HALSBURY'S COMPLETE
B STATUTES OF ENGLAND, Vol. 29, pp. 230-232.]

SPECIAL CASE stated under the Finance Act, 1936, s. 18, the Finance Act, 1927, s. 42 (7), and the Income Tax, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court.

C For some years prior to his death on Jan. 22, 1936, the deceased had resided in the United Kingdom. On the death of his father in 1930, the deceased became entitled to a share of his father's estate, which was considerable and included both English and foreign property. By a deed of partition dated Sept. 19, 1934, the deceased took as his share of his
D father's property an estate called Woolley Hall, Maidenhead Thicket, Berkshire, and 205,000 fully-paid ordinary shares of £1 each in Lewis Berger and Sons, Ltd., a public company registered in England. Prior to that deed, the deceased's share of his father's estate had not been defined. The deceased was first married in 1921, but this marriage was
E dissolved in 1931. However, shortly afterwards the deceased married a second time, his wife being one of the present appellants. At about this time the deceased was drinking heavily, and, apart from occasional lucid intervals, was incapable of managing his own affairs. Evidence of his extravagance and financial losses was given before the commissioners.

F In or about Apr., 1933, the deceased consulted his solicitor, Mr. Ernest Simmons, with a view to protecting his property against himself. In Aug., 1933, counsel was instructed to draft a settlement under which the deceased would be unable to deal with his assets in any way. No question of taxation was considered or discussed at this time. On Dec. 1, 1933,
G the draft settlement was finally prepared. On Dec. 7, 1933, the deceased's wife showed the draft settlement to a chartered accountant, who suggested that a saving of income tax could be obtained by the formation of a foreign company, to which the deceased's assets should be transferred. A plan of creating non-redeemable debentures whereby a saving of estate
H duty could be effected was suggested, and it was later decided to form a Canadian company. The Orwell Investments, Ltd., a Canadian company, was accordingly registered on Dec. 27, 1933. In Jan., 1934, negotiations were proceeding between the deceased and Orwell Investments, Ltd., for the sale to Orwell Investments, Ltd., of the deceased's share in his father's estate for shares and debentures in Orwell Investments, Ltd.

When the deceased's share in his father's estate was settled by the deed of partition, 195,000 ordinary shares of Lewis Berger & Sons, Ltd., were sold by the deceased to Orwell Investments, Ltd., for (a) the issue and allotment to the deceased or his nominees of 10,000 Class B shares of \$5 each of Orwell Investments, Ltd., and (b) the issue and allotment to the deceased or his nominees of 1,800 non-interest-bearing redeemable debentures of \$1,000 each of Orwell Investments, Ltd. The 1,800 non-interest-bearing debentures were made redeemable to the extent of \$100,000 in any one year in the deceased's lifetime at a premium of 12½ per cent. A

By a settlement dated Feb. 16, 1934, the deceased had covenanted to transfer to trustees upon the trusts of the settlement all the said Class B shares of Orwell Investments, Ltd., when those shares were allotted to him. By another settlement of the same date, the deceased had covenanted to transfer to trustees upon the trusts of the settlement all those non-interest-bearing debentures of Orwell Investments, Ltd., when such debentures were allotted to him. The trustees of both settlements were persons residing in the United Kingdom. The balance sheet of Orwell Investments, Ltd., for the year ending Mar. 31, 1936, showed a balance of £22,986 5s. 4d. net income. During that year, the company paid £23,033 14s. 2d. to Mr. Simmons, one of the trustees of the debenture settlement of Feb. 16, 1934, in redemption of the company's debentures. Debentures to the amount of \$101,000 were redeemed at a premium of 12½ per cent. Of this sum of £23,033 14s. 2d., £23,030 was distributed by the trustees of the debenture settlement and paid to the joint account of the deceased and his wife. The company paid no dividend for the year ending Apr. 5, 1936, in respect of its Class B shares, and the trustees of the share settlement of Feb. 16, 1934, received no income during the year ending Apr. 5, 1936. B C D E

On behalf of the appellants, it was contended (a) that the deceased himself had no such rights as are posited by the Finance Act, 1936, s. 18 (1); (b) that, if Mrs. Cottingham had such rights, and if such rights could be attributed to her husband by virtue of subsect. (5) (a) of that section in respect to the period during which she was his wife, such attribution could not affect any period after the death of the deceased; (c) that neither the appellants nor the special commissioners have any right or power in law to obtain any such particulars of the income of Orwell Investments, Ltd., as could alone form the subject of assessment under the section, and that the assessment is incompetent; (d) that there is no provision in the law under which any assessment can be made upon the executors; (e) that the transfers of assets and the operations associated therewith were effected mainly for some purpose other than that of avoiding liability to taxation, and that the section does not apply to them; and (f) that the assessment should be reduced to £10,308 in accordance with the returns made by the appellants for sur-tax purposes. F G H

On behalf of the Crown, it was contended (a) that the transfer of the shares of Lewis Berger and Sons, Ltd., to Orwell Investments, Ltd., was made with the main purpose of avoiding taxation ; (b) that the transfer of assets to Orwell Investments, Ltd., afforded no protection to the deceased, and was unnecessary except for the purpose of avoiding taxation ; (c) that the assessment upon the executors of the deceased was good in law, in support of which contention reference was made to (i) the Income Tax Act, 1918, All Schedules Rules, r. 18 ; (ii) the Finance Act, 1936, Sched. II, para. 4 ; (iii) the Finance Act, 1927, s. 42 (7) ; (iv) the Finance Act, 1936, s. 18 (1), (7) ; and (d) that the assessment should be confirmed in principle and the amount thereof adjusted to the correct figure of liability.

The commissioners held that the transfer of shares was made to avoid taxation, and confirmed the assessment in principle.

Raymond Needham, K.C., and H. Talbot for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.), J. H. Stamp and R. P. Hills for the respondents.

LAWRENCE, J. : Mr. Cottingham was a domiciled Canadian, ordinarily resident in this country. The appeal relates to a sum of £40,000, which is an estimate, made under the Finance Act, 1936, Sched. II, para. 7, of the amount of income which the Inland Revenue Commissioners contend is, by virtue of the provisions of the Finance Act, 1936, s. 18, to be deemed to be the income of Mr. Cottingham for the period from Apr. 6, 1935, to Jan. 22, 1936, on which date Mr. Cottingham died.

The questions raised by the case are two main questions : (i) as to the true construction of the Finance Act, 1936, s. 18, and particularly the proviso to subsect. (1), and (ii) whether or not an assessment could be made on executors in the circumstances of this case.

It is common ground in this case that the transfer of assets made by Mr. Cottingham to a Canadian company was made for the sole purpose of avoiding taxation. It is equally common ground that the settlements which were made with reference to the assets so transferred were made for the sole purpose of preventing Mr. Cottingham from having the control over his estate. The question of construction which arises on the proviso to the Finance Act, 1936, s. 18 (1), is whether, under that proviso, it is necessary for the individual referred to to show that the transfer and any associated operations, regarded together as one transaction, was effected mainly for some purpose other than that of avoiding liability to taxation, or whether it is necessary for the individual to show that the transfer was effected mainly for some purpose other than the purpose of avoiding taxation, and that any associated operations were effected for some such purpose.

It was submitted by the Crown to the commissioners that it was necessary for the taxpayer to show that both the transfer of assets and

the associated operations were effected for purposes other than that of the avoidance of taxation. The commissioners adopted that view, and found against the taxpayer, on the admitted fact that the transfer of assets was not made for any purpose other than that of the avoidance of taxation.

It is contended, on behalf of the appellants, that that is not the true construction of the proviso, and that what the special commissioners ought to have considered was the main purpose of the transfer of assets and any associated operations, looked at together. It is further contended that, if they had had regard to that question, they ought to have come to a different conclusion, and to have come to the conclusion that the main purpose was some purpose other than that of the avoidance of taxation. At one part of the argument, it was contended that there was no evidence upon which they could have come to any conclusion other than that the main purpose was some purpose other than that of avoidance of taxation. However, that contention was, I think, abandoned, and it was agreed, on behalf of the appellants, that the case, if they are right on the construction of the proviso, ought to go back to the commissioners. I am of opinion, however, that the construction put upon the proviso by the commissioners and contended for by the Crown is the right construction. In its earlier part the section refers to the transfer of assets, either alone or in conjunction with associated operations, thus referring to the concept of the transfer and associated operations together. In the proviso, however, different words are used—namely, “the transfer and any associated operations.” Moreover, the proviso is expressed in the affirmative. The individual must show that the transfer and any associated operations were effected mainly for some purpose other than that of avoiding taxation. These words are, in my opinion, capable of meaning that both the transfer and the associated operations were effected mainly for some purpose other than that of avoiding taxation, and, in view of the avowed purpose of the section, of the contrast between the words of the proviso and the words earlier in the section, of the wide definition in subsect. (2) of associated operations, and of the difficulty of deciding what is the main purpose of such diverse transactions, I am of opinion that this is the true interpretation.

As to the second question—whether, in the circumstances of this case, an assessment can be made on the executors—it is necessary, first of all, to refer to the Finance Act, 1936, Sched. II, para. 4, which provides :

All the provisions of the Income Tax Acts relating to the charge, assessment, collection and recovery of income tax, to appeals against assessments made by the special commissioners and to cases to be stated for the opinion of the High Court shall apply to any income tax chargeable by virtue of the principal section, so far as they are applicable and subject to any necessary modifications.

That paragraph incorporates all the provisions of the Income Tax Act as to assessment. By the Finance Act, 1936, s. 18 (7), it is provided :

The provisions of this section [that is, the section in question] shall apply for the

purposes of assessment to income tax for the year 1935-36 and subsequent years, and shall apply in relation to transfers of assets and associated operations whether carried out before or after the commencement of this Act: Provided that, for the year 1935-36, no income shall be charged to tax at the standard rate by virtue of the provisions of this section, but sur-tax shall be assessed and charged as if any income which would, but for this proviso, have been charged as aforesaid had in fact been so charged.

- A Therefore, this Act, which came into force on July 16, 1936, was passed with retroactive effect for the year 1935-36, so as to impose sur-tax for that year.

By the Income Tax Act, 1918, All Schedules Rules, r. 18, it is provided :

- B Where any person dies without having delivered a statement of all his profits or gains chargeable to tax with a view to an assessment thereon in due course, an assessment in respect of the profits or gains which arose or accrued to him before his death may be made at any time within the year of assessment, or within 3 years after the expiration thereof, upon his executors or administrators, and the amount of the tax thereon shall be a debt due from and payable out of his estate.

- C Under that r. 18, the assessment in question has been made upon the executors of Mr. Cottingham for the period from Apr. 5, 1935, up to Jan. 22, 1936, the date of his death, in respect of sur-tax. The argument which is presented on behalf of the executors is that r. 18 is not applicable, because it is said that, when Mr. Cottingham died, he was not chargeable to tax, the Act of 1936 only having been passed on July 16, 1936, and
- D Mr. Cottingham having died on Jan. 22, 1936. In my opinion, that argument is unsound. I do not think that r. 18 has any reference to a default on the part of the person who has died, and it cannot be said, in my opinion, that Mr. Cottingham has delivered "a statement of all his profits or gains chargeable to tax." The Finance Act, 1936, by its
- E retroactive effect, has made the profits which accrued to Mr. Cottingham from Apr. 5, 1935, to Jan. 22, 1936, chargeable to sur-tax, and he died without having delivered a statement of such profits. Therefore, in my opinion, his executors are assessable in accordance with the provisions of r. 18.

- F Reliance was placed by the appellants upon the Finance Act, 1926, s. 31 (2), sect. 45 (6) of the Act of 1927, and sect. 15 (4) of the Act of 1930, where different words are used for the purpose of imposing a liability to assessment upon executors. In my opinion, the fact that different words were used in those sections was not meant to affect, and
- G does not affect, the true interpretation of the words of r. 18, which is, in my opinion, what I have stated. I therefore hold that the assessment was properly made in this case upon the executors of Mr. Cottingham, and the appeal will be dismissed with costs.

Appeal dismissed with costs.

- H Solicitors : *Herbert Smith & Co.* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[Reported by W. J. ALDERMAN, Esq., *Barrister-at-Law.*]

Re BERESFORD'S WILL TRUSTS, *STURGES v. BERESFORD*.

[CHANCERY DIVISION (Morton, J.), July 12, 13, 1938.]

Powers—Special power to appoint by will—Exercise—Residuary gift—Direction to pay debts out of residue—“Appoint”—“Estate and effects of which I shall have power to dispose at my decease.”

The testator had a special power of appointment among his children over the residue of his sister's estate exercisable by will. In two clauses of his will, one making a specific legacy and the other giving certain chattels to a trustee to hold upon certain trusts, he used the words “I give and appoint.” In these clauses the word “appoint” was clearly surplusage. The clause dealing with his residuary estate was, so far as material, as follows: “I give devise bequeath and appoint” the residue of the estate “to which I shall be entitled or of which I shall have any power to dispose at my decease” to the trustee upon trust for sale and conversion to apply the proceeds to the payment of debts, testamentary expenses and duties on legacies given free of duty, with directions for investment, followed by a life interest to his widow, who was not an object of the power, and, subject thereto, for his children, who were objects of the power:—

HELD: the testator had not by his will exercised the special power of appointment.

[EDITORIAL NOTE.] The cases upon the exercise of a special power of appointment by a residuary gift are not easily reconciled one with another, but it has been said that, if a composite fund is made subject to the testator's debts, then, if there is to be a good exercise of the power of appointment, the direction for the payment of debts must, under the maxim *reddendo singula singulis*, be applicable to the testator's own property only, and not to the appointed fund. In the present case, the testator has in his will used the word “appoint” in places where it can have no meaning, and no doubt this deprives the word of its ordinary meaning in the residuary clause. There are other features of the residuary clause, more particularly the gift of a life interest to a person not the object of the power, which aid the construction here adopted.

AS TO INTENTION TO EXERCISE POWER OF APPOINTMENT, see HALSBURY, *Hailsham Edn.*, Vol. 25, pp. 549-554, paras. 986-991; and FOR CASES, see DIGEST, Vol. 37, pp. 449-454, Nos. 522-555.]

Cases referred to:

- (1) *Von Brockdorff v. Malcolm* (1885), 30 Ch.D. 172; 37 Digest 480, 771; 55 L.J.Ch. 121; 53 L.T. 263.
- (2) *Re Cotton, Wood v. Cotton* (1888), 40 Ch.D. 41; 37 Digest 451, 539; 58 L.J.Ch. 174.
- (3) *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563; 37 Digest 453, 551: *sub nom. Re Milner, Milner v. Bray*, 68 L.J.Ch. 255; 80 L.T. 151.
- (4) *Re Weston's Settlement, Neeves v. Weston*, [1906] 2 Ch. 620; 37 Digest 451, 540; 76 L.J.Ch. 54; 95 L.T. 581.
- (5) *Re Sanderson, Sanderson v. Sanderson* (1912), 106 L.T. 26; 37 Digest 457, 585.
- (6) *Re Swinburne, Swinburne v. Pitt* (1884), 27 Ch.D. 696; 37 Digest 453, 550; 54 L.J.Ch. 229.
- (7) *Re Boyd, Nield v. Boyd* (1890), 63 L.T. 92; 37 Digest 451, 538.
- (8) *Re Ackerley, Chapman v. Andrew*, [1913] 1 Ch. 510; 37 Digest 454, 562; 82 L.J.Ch. 260; 108 L.T. 712.
- (9) *Re Blackburn, Smiles v. Blackburn* (1889), 43 Ch.D. 75; 37 Digest 424, 333; 59 L.J.Ch. 208.

ADJOURNED SUMMONS asking the court to determine whether, on the true construction of the will of the testator, he had exercised the power

of appointment given to him by the will of his sister Charlotte Harriett Beresford. The material portion of the testator's will and the facts are set out in the judgment.

Hon. Charles Russell for the plaintiffs, the executors and trustees of the will of Charlotte Harriett Beresford.

A *A. A. Baden Fuller* for the first defendant, who claimed to be interested in the fund in default of appointment.

F. Baden Fuller for the second defendant, who claimed to be beneficially interested under, and by virtue of the exercise of, the said power of appointment.

B *A. A. Baden Fuller* : For a special power to be exercised, there must be either a reference to the power, or to the property subject to the power, or an intention expressed in the will to exercise the power. In cl. 2 of the will, the testator says that he gives and appoints all pictures belonging to him, but he could not have had a power of appointment
C over chattels which belonged to him, and he was therefore using the word "appoint" improperly. In cl. 3, he says that he gives and appoints all articles of personal, household or garden use or ornament, and the same observation applies. In cl. 4, the testator gives and appoints all the remainder of the effects to which he was entitled, but
D it is clear that he was not referring to anything that was not his own. The testator then says, "any property of which I shall have power to dispose," but he does not say "dispose of by will." There is also a trust for conversion contained in his will. As regards the property over which he was given a power of appointment, however, the will creating the
E power commences with a trust for conversion. In the present case, the power was not exercised. [Counsel referred to *Re Weston's Settlement*, *Neeves v. Weston* (4), *Re Ackerley, Chapman v. Andrew* (8) and *Re Cotton, Wood v. Cotton* (2).]

F. Baden Fuller : An intention to exercise the power must appear in
F the will. In the present case, the testator refers to all property of which he has power to dispose. He does not say "all my property of which I have power to dispose." The reference was not to his own property, but to all the property of which he had power to dispose. The intention to exercise the power must be deduced from the words generally. The
G expression "all property of which I shall have power to dispose" is the strongest indication of an intention to exercise the power, and that conclusion is not to be prevented by reason of the fact that the testator also disposes of property which is his own. *Re Swinburne, Swinburne v. Pitt* (6) resembled the present case. Extraneous circumstances in the
H exercise of the power will not prevent the court from coming to the conclusion that the testator intended to exercise the power. In the present case, the power has been effectively exercised except so far as it fails through being applied to a non-object of the power. [Counsel referred to *Re Ackerley, Chapman v. Andrew* (8), *Re Boyd, Nield v. Boyd* (7) and *Re Milner, Bray v. Milner* (3).]

Russell, in reply : *Re Cotton, Wood v. Cotton* (2) was referred to by NORTH, J., in *Re Blackburn, Smiles v. Blackburn* (9), and, at p. 79, NORTH, J., states that *Cotton's* case (2) stands upon an entirely different footing because of the provisions of the will.

MORTON, J. : The question which I have to determine in this case A
is whether or not the will of Charles George de la Poer Beresford, dated
Feb. 26, 1936, operated as an exercise of the power of appointment of the
residuary estate of Charlotte Harriett Beresford given to him by the will,
dated Jan. 22, 1930, of the said Charlotte Harriett Beresford. The facts
are as follow. The will of Charlotte Harriett Beresford, dated Jan. 22, B
1930, is in the following terms. In the first place, she appoints executors
and trustees, and then follow specific gifts. She then gives the real and
personal estate upon trust for sale, with power to postpone the sale,
and directs the payment of her funeral and testamentary expenses and
debts. Then there is a direction to pay the income of the trust fund to C
her brother Charles George de la Poer Beresford during his life, with a
provision for forfeiture which is immaterial, and by cl. 7 of the will it is
provided :

After the death of my said brother my trustees shall stand possessed of the
capital and future income of the trust fund in trust for the issue of my said brother in D
such shares and in such manner as my said brother shall by will appoint and in
default of and subject to any appointment and so far as any such appointment
shall not extend in trust for all or any the children or child of my said brother (other
than his daughter who at the date of this my will has been adopted by an Irish
family) who being male shall attain the age of 21 years or being female attain
that age or marry if more than one in equal shares.

There is no dispute that the daughter of Mr. de la Poer Beresford, who E
had been adopted by an Irish family, is the defendant Beatrice Norah
Beresford. Miss Charlotte Harriett Beresford died on July 10, 1931.

Mr. Charles George de la Poer Beresford made his will on Feb. 26,
1936, and the first clause contains the appointment of Barclays Bank,
Ltd. as executors and trustees and gives the usual powers to the bank. F
Clause 2 begins as follows :

I give and appoint (free of all duties) all pictures and photographs [to a named
son].

It is quite clear that the word "appoint" there is pure surplusage, and G
that there is no reason for its use at all. In cl. 3, he says :

I give and appoint (free of all duties) to the bank all articles of personal domestic
household or garden use ornament or consumption belonging to me at my decease
and not hereby or by any codicil hereto specifically bequeathed.

Then follows a trust of those articles. Again, the word "appoint" has H
no meaning at all and is mere surplusage. Clauses 4 and 5 provide :

4. I give devise bequeath and appoint all the rest residue and remainder of the estate
and effects whatsoever and wheresoever both real and personal to which I shall be
entitled or of which I shall have power to dispose at my decease and including any
entailed property and lapsed gifts unto the bank upon trust for sale and conversion
(with full power to postpone such sale and conversion for so long as the bank shall
in its absolute and uncontrolled discretion think proper without being liable for any

loss arising thereby) and I direct that the bank shall stand possessed of the proceeds thereof after payment thereof or out of my ready money of my just debts and funeral and testamentary expenses and the duties on any legacies or bequests hereby or by any codicil hereto given free of duty upon trust to invest the same in or upon any investments for the time being authorised by law or in or upon the purchase of or the investment upon mortgage of real or leasehold property of any description situate in England (any such leasehold property having an unexpired term of not less than 60 years at the date of investment) and to pay the income of such property proceeds and investments (hereinafter called "my residue")

- A to my said wife during so much of her life as she shall remain my widow unmarried.
5. From and after the death or remarriage of my said wife the bank shall hold my residue in trust for all or any of my children or child who being male shall have attained or shall attain the age of 21 years or being female shall have attained or shall attain that age or shall have married or shall marry under that age and if more than one in equal shares.

- B Then follows a proviso which I need not read. It is said that, so far as the trustees of the will are aware, Mr. Charles George de la Poer Beresford had no power of appointment exercisable by will, otherwise than by the will of Miss Charlotte Harriett Beresford. I shall now have to consider whether or not the clauses in the will of the testator, as I shall call him,
C exercised the power of appointment conferred upon him by his sister's will. In considering this question, I propose to adopt, and to endeavour to apply, the rule stated by PEARSON, J., in *Von Brockdorff v. Malcolm* (1), a rule which has been quoted with approval in the subsequent cases of *Re Cotton, Wood v. Cotton* (2) and *Re Milner, Bray v. Milner* (3). The rule
D is stated in the following terms, at p. 179 :

The simple question is, whether I can find in the will itself such an indication of an intention to exercise the power as that I ought to hold that the power has been exercised. It is a question of intention, and a question of intention only. There being various indications in the will, some one way and some the other, the question I have to decide as well as I can is, on which side does the balance weigh most strongly?

- E When you have put the one against the other, to which side ought you rather to incline in order to determine what is the real truth of the case with regard to the intention of a man of whose intention you know nothing except what you find in his will?

I also desire to quote the words of STIRLING, J., which immediately follow in *Re Milner, Bray v. Milner* (3), at p. 566 :

- F In applying a rule of this kind, little assistance is to be got from decisions on wills differing in form and expression.

Clause 4 of the will begins with the words : " I give devise bequeath and appoint . . . " I am not disposed to attach great importance to the use of the word " appoint " in this particular clause, as it is used in
G other places without any significance at all. The clause proceeds :

. . . all the remainder of the estate and effects whatsoever and wheresoever both real and personal to which I shall be entitled or of which I shall have power to dispose at my decease and including any entailed property and lapsed gifts.

- H I think that it is right to say that the words " have power to dispose " are susceptible of meaning " have power to dispose of as I think fit," or of including also power to dispose of in favour of a limited class of objects. It is therefore necessary to look at the remainder of the clause. The clause proceeds to give all this property to the bank upon trust for sale and conversion, with full power to postpone the sale, and so on. It must be borne in mind that the funds over which the testator had this

special power of appointment were already subject to a trust for sale and conversion, and these words do not seem very apt to apply to such a power. He then says :

... the bank shall stand possessed of the proceeds thereof after payment thereof or out of my ready money of my just debts and funeral and testamentary expenses and the duties on any legacies or bequests hereby or by any codicil hereto given free of duty. . . .

It is, of course, perfectly plain that the testator had no power to direct the payment of his debts or of his funeral and testamentary expenses out of the fund. Then follow the trusts for investment, again wholly unnecessary in the case of this particular fund. Then follows a direction :

... and to pay the income of such property proceeds and investments (hereinafter called my residue) to my said wife during so much of her life as she shall remain my widow unmarried.

It is to be observed that not only is the testator giving a life interest to his wife, who is not an object of the power at all, but he is also dealing with the residue of the fund after payment of his debts and funeral and testamentary expenses and the duties. That seems to be as inappropriate as anything can be, if he meant to exercise the special power. He proceeds :

From and after the death or remarriage of my said wife the bank shall hold my residue in trust for all or any of my children or child who being male shall have attained or shall attain the age of 21 years or being female shall have attained or shall attain that age or shall have married or shall marry under that age and if more than one in equal shares.

At last we get to words which refer to objects of the power. If the will operated in exercise of a special power at all, it is quite plain that it could only operate as a power to appoint the fund upon the death of the testator's widow, and, for a power so exercised, it would have this result. There would be no appointment of the income during the life of the widow, with the result that the named child would be excluded from sharing throughout the widow's life. On the death of the widow, however, there would be an appointment so that the child excepted from the class to take would come in, by virtue of the appointment, on her death. That is a strange result. Apart from authority, I should arrive at the conclusion that there was not sufficient evidence shown to exercise this special power. If the testator intended to exercise it, he must have said : " I have a special power over the residuary estate of my sister, but I have only power to appoint this money to my issue, but I shall give it to my trustees on trust for sale and conversion. I shall direct them at my death, after payment of my debts and funeral and testamentary expenses, to hold the whole of that fund, and I shall direct investment of the fund, and I shall give a life interest in it to my wife, who is not an object of the power." I should be most reluctant to attribute any such intention to the testator. In the course of the argument, I have been referred to several cases. On one hand, the cases of *Re Cotton*, *Wood v. Cotton* (2), *Re Weston's Settlement*, *Neeves v. Weston* (4) and *Re Sanderson*, *Sanderson v. Sanderson* (5), in all of which it was

- held that the special power was not exercised. I have also been referred to the cases of *Re Swinburne*, *Swinburne v. Pitt* (6), *Re Boyd*, *Nield v. Boyd* (7), *Re Milner*, *Bray v. Milner* (3) and *Re Ackerley*, *Chapman v. Andrew* (8). The language in any of these wills is not precisely the same as the language in the will which I have to construe, and I do not feel
- A compelled by any of these decisions to come to the conclusion that the power has been exercised in the present case. I confess that it is not easy to reconcile the reasoning in all these cases, but, if there is any difficulty in reconciling the reasoning in the two groups of cases, I should prefer to follow that in *Re Cotton*, *Wood v. Cotton* (2), *Re Weston's Settlement*, *Neeves v. Weston* (4) and *Re Sanderson*, *Sanderson v. Sanderson* (5). I therefore propose to hold that the will of Charles George de la Poer Beresford did not operate as the exercise by him of the power of appointment of the residuary estate given to him by the will of Charlotte Harriett Beresford.
- C Solicitors : *William Sturges & Co.* (for the plaintiffs) ; *E. Sabine Read* (for both defendants).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

D LAYCOCK (INSPECTOR OF TAXES) v. FREEMAN, HARDY & WILLIS, LTD.

[KING'S BENCH DIVISION (Lawrence, J.), June 14, July 8, 1938.]

- E *Income Tax—Trade—Succession to trade—Wholesale manufacturing trade carried on by subsidiary company—Taken over by retail company—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 11 (2).*

- F Up to Apr. 1, 1935, the respondent company owned two subsidiary companies which carried on the business of manufacturing and the wholesale sale of boots and shoes, which the respondent company sold by retail in its shops. The subsidiary companies sold the whole of their output to the respondent company. On Apr. 1, 1935, the two subsidiary companies were wound up, and thereafter the respondent company carried on the manufacture of boots and shoes in the works which had belonged to these companies as departments of its business :—

- G HELD : the trade of the subsidiary companies ceased on Apr. 1, 1935, to be carried on as a trade and became merged in the different business of the respondent company. There was, therefore, no succession within Sched. D, Cases I and II, r. 11 (2), to the trade of the subsidiary companies by the respondent company.

- H [EDITORIAL NOTE. The subsidiary companies were carrying on a wholesale trade, whereas the respondent company carried on a retail trade. The merger of such companies is not a succession within the rule, since the precise trade carried on by the company which has been wound up is not carried on by the other company as that trade, but as part of a different trade.

AS TO SUCCESSION TO A BUSINESS, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 111-113, para. 209 ; AND FOR CASES, see DIGEST, Vol. 28, pp. 40-42, Nos. 208-214.]

Cases referred to :

- (1) *Dublin Corpn. v. M'Adam (Surveyor of Taxes)* (1887), 2 Tax Cas. 387 ; 28 Digest 21, case l.

- (2) *Watson Bros. v. Inland Revenue* (1902), 4 F. (Ct. of Sess.) 795; 28 Digest 41, case 1; 4 Tax Cas. 441.
- (3) *Bell v. National Provincial Bank of England*, [1904] 1 K.B. 149; 28 Digest 41, 211; 73 L.J.K.B. 142; 90 L.T. 2; 5 Tax Cas. 1.
- (4) *Malayalam Plantations, Ltd. v. Clark* (1935), 19 Tax Cas. 314; Digest Supp.

CASE STATED under the Income Tax Act, 1918, s. 149 by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The facts and contentions are fully stated in the judgment. The commissioners held, on the facts, that the businesses of the Burlington and Kettering companies ceased on Apr. 1, 1935, and that the respondent company did not succeed to those businesses within the meaning of Sched. D, Cases I and II, r. 11 (2). They were further of opinion that in the year 1935-1936 the respondent company made one profit only, and that that profit could not for income tax purposes be divided into a manufacturing profit and a retail profit.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the appellant.

A. M. Latter, K.C., and John Senter for the respondents.

LAWRENCE, J. : In this case, the special commissioners have decided that the respondent company did not succeed on Apr. 1, 1935, to the businesses of Freeman, Hardy & Willis (Kettering), Ltd., and Freeman, Hardy & Willis (Burlington Works), Ltd., within the meaning of the Income Tax Act, 1918, Sched. D, Cases I and II, r. 11 (2). Before Apr. 1, 1935, the Kettering company and the Burlington company were wholly owned subsidiary companies of the respondent company, and carried on the trade or business of manufacturing and selling boots and shoes to the respondents, who retailed such boots and shoes in their retail shops. The respondent company obtained 20 per cent. to 30 per cent. of its requirements from these two companies, which sold to the respondent the whole of their products. On Apr. 1, 1935, the respondent company acquired the businesses of these two companies which were wound up, and thereafter the respondent carried on the manufacture of boots and shoes in the works which had belonged to the two companies as departments of the respondents' business. In its accounts, the respondent company credited the departments with profit on the manufacture, but this profit was ignored for the purposes of income tax.

The commissioners have held—and Mr. Latter, for the respondent, contends—that the businesses of the Burlington and Kettering companies ceased on Apr. 1, 1935, and that therefore the respondent did not succeed to such businesses. Mr. Latter argues that a trade or business consists in buying or manufacturing and selling, that no one can sell to himself, and that there is no succession unless the trade succeeded to continue as a trade. He relied upon the observations of PALLES, C.B., in *Dublin Corpn. v. M'Adam (Surveyor of Taxes)* (1),

at p. 397, and on those of the Lord President in *Watson Bros. v. Inland Revenue* (2), at p. 444.

The Attorney-General, on the other hand, contends that the manufacture has continued since Apr. 1, 1935, in precisely the same way as before, and that *Bell v. National Provincial Bank of England* (3) is
 A decisive on the present question, the respondent not having put an end to the manufacture.

The question appears to me to be one of some nicety. In my opinion, the decision in *Bell's* case (3) is not decisive, since there the business acquired was of the same nature—namely, banking—as was the successor's
 B business, whereas the business here acquired was wholesale, and the alleged successor's business was retail. As Mr. Latter put it, there the successor extended his trading front by acquiring a new branch bank, which continued to trade as a bank with the public, whereas in the present case the trade of manufacturing and selling carried on by the Burlington
 C and Kettering companies ceased, the manufacture only, but not the sale to the retailer, continuing.

The Attorney-General, on the other hand, argues that succession does not connote carrying on the trade in precisely the same way as the predecessor, and that the merger of a wholesale trade in a retail does
 D not put an end to the wholesale trade so as to prevent the occurrence of a succession. Mr. Latter also argued that it was a question of fact, and cited *Malayalam Plantations, Ltd. v. Clark* (4). The commissioners did not, however, express their decision as a question of fact, and, in my opinion, it is really a question of principle upon which I ought to
 E express my own opinion. Questions of fact might arise as to whether or not the trade carried on by the successor was the same trade as that of the predecessor, but the decision in the present case was not, in my view, upon such questions, but upon the question, which I regard as one of principle, whether the trade must be continued as a trade or whether
 F there may be a succession when the trade carried on by the predecessor is merged in the different trade of the successor.

I have come to the conclusion that the view of the commissioners is right. The words of the rule, "if any person succeeds to any trade,"
 in my opinion mean "if any person takes over and continues a trade
 G as that trade," and do not include the incorporation of a wholesale trade in a retail one. The fact that before the alleged succession the whole-sale trade was carried on entirely with a parent company by subsidiaries is, in my view, irrelevant. The three companies were distinct legal
personae. The trade of the two subsidiaries, in my opinion, ceased on
 H Apr. 1, 1935, as the commissioners held. The appeal is dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Kingsford, Dorman & Co.*, agents for *Harvey, Clarke & Adams*, Leicester (for the respondents).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

Re CURRYER'S WILL TRUSTS, WYLY *v.* CURRYER.

[CHANCERY DIVISION (Morton, J.), July 15, 1938.]

Perpetuities—Alternative dispositions—Two distinct events—“ Whichever shall last happen.”

The testator in respect of his residuary estate made a gift to take effect “ upon the decease of my last surviving child or the death of the last surviving widow or widower of my children as the case may be whichever shall last happen.” It was contended that the gift was wholly void as offending the rules against perpetuities :—

HELD : although the testator had used the words “ whichever shall last happen,” there were here two distinct and separate events, and the gift would be valid if the event which happened was the decease of the last surviving child, and not the death of the last surviving widow or widower.

[EDITORIAL NOTE. The gift in this case is decided to be one upon a double contingency. The gift which is single in point of expression cannot be split, and the effect of the present decision is that the inclusion of the words “ whichever shall last happen ” does not make a gift which would otherwise be referable to two distinct events refer to only one of them, that is to say, single in expression.

AS TO DOUBLE CONTINGENCIES, see HALSBURY, Hailsham Edn., Vol. 25, p. 144, para. 242 ; and FOR CASES, see DIGEST, Vol. 37, pp. 102-106, Nos. 374-398.]

Cases referred to :

- (1) *Monypenny v. Dering* (1852), 2 De G. M. & G. 145 ; 37 Digest 123, 548 ; 22 L.J. Ch. 313 ; 19 L.T.O.S. 320.
- (2) *Miles v. Harford* (1879), 12 Ch. D. 691 ; 37 Digest 104, 387 ; 41 L.T. 378.
- (3) *Re Harvey, Peek v. Savory* (1888), 39 Ch. D. 289 ; 37 Digest 105, 395 ; 60 L.T. 79.
- (4) *Hancock v. Watson*, [1902] A.C. 14 ; 37 Digest 105, 397 ; 71 L.J. Ch. 149 ; 85 L.T. 729.
- (5) *Proctor v. Bath & Wells (Bp.)* (1794), 2 Hy. Bl. 358 ; 37 Digest 105, 393.

ADJOURNED SUMMONS asking for the determination by the court of the question whether the bequest of the trust fund and accumulations “ on the decease of my last surviving child or on the death of the last surviving widow or widower of my children as the case may be whichever shall last happen ” was void as infringing the rule against perpetuities, or whether the validity of such bequest depended upon which event should happen.

Reginald W. Goff for the plaintiff, a trustee of the will and codicils.

George Strickland for the first five defendants, beneficiaries under the will and codicils.

G. M. Parbury for the sixth defendant, a beneficiary under, and a trustee of, the will and codicils.

W. E. Vernon for the seventh defendant, a beneficiary under, and a trustee of, the will and codicils.

Henry Johnston for the eighth defendant, the executrix of the will of William Garibaldi Curryer, and, as such, interested in any property as to which the testator Thomas Curryer may have died intestate.

Strickland : The capital was not dealt with by the will until the final gift. It is not really a question of a gift over, but of a gift in remainder. The testator mentions two events. The words “ whichever shall last

happen " emphasise that there are two events. There are two classes of people, one taking according to whichever event happened. The principle of severance has been laid down in *Miles v. Harford* (2). If a testator says " in this event or in another event," the court can sever, assuming there is no other reason to prevent it from doing so. If, however, a testator expresses in two ways what is one event only, the court will not read words into the will in order to sever. In the present will, the competing events are clearly mentioned, as they were in *Miles v. Harford* (2). The present case is one where there has been a gift of income and there has been a gift of capital in remainder. Therefore, the cases in which there has been a gift over have no application. The testator has quite clearly given capital on two events, whichever shall last happen. [Counsel referred to *Monypenny v. Dering* (1) and *Proctor v. Bath & Wells (Bp.)* (5).]

Johnston : By this will, the testator has fixed one event—namely, the death of the last survivor of 14 people. That is and can only be one event. [Counsel referred to *Re Harvey, Peek v. Savory* (3) and *Hancock v. Watson* (4).]

MORTON, J. : The testator, Thomas Curryer, made his will on Apr. 5, 1898. He made 3 codicils, which are immaterial to the clause I am now considering. The testator died on Sept. 12, 1903. The gift with which I am concerned is contained in the residuary gift, and is a gift of a trust and accumulations in the following terms :

On the decease of my last surviving child or the death of the last surviving widow or widower of my children as the case may be whichever shall last happen I direct my trustees to stand possessed of the trust fund including therein the accumulated fund at the end of the said term of 21 years in trust for my grandchild or grandchildren living at the period of distribution and the issue then living of my grandchild or grandchildren living at the period of distribution and the issue then living of my grandchild or grandchildren dying before that period such grandchild or grandchildren taking their parents' share as tenants in common the shares of grandchildren and other issue being males to be paid at the age of 21 years or being females at that age or marriage.

Then there is a direction as to accruer which I need not read. It is plain that the gift to a class to be ascertained on the decease of the testator's last surviving child does not infringe the rule against perpetuities. It is equally clear that the gift to a class to be ascertained on the death of the last surviving widow or widower of the children would infringe the rule against perpetuities, since a child might marry a person who was not a life in being at the testator's death. In the present case, the testator has combined the events in the clause which I have read. Mr. Strickland contended that the gift was a valid one, and he referred me to *Monypenny v. Dering* (1), and in particular to the judgment of LORD ST. LEONARDS, L.C., where he says, at p. 183 :

Thus the courts have gone at least to this extent, that they will not hold a gift over made in words comprising only one event as made on two events, although in point of fact it may consist very reasonably of two branches, unless the testator has himself so expressed it.

I may add that in this case there will be no words—to quote the words of LORD ST. LEONARDS, L.C., in that case at p. 182—by which the estate would “be carried under the limitation at the expense of any person whom the testator intended to take.” If it so happens that the last survivor is a child of the testator, the class, of course, will be that of children ascertained on that event, and no one whom the testator intended to take will be dispossessed if the testator has sufficiently expressed the alternative to the class. A

The next case to which Mr. Strickland referred me is *Miles v. Harford* (2), where SIR GEORGE JESSEL, M.R., says, at pp. 702, 703 :

As I understand the rule of law it is a question of expression. If you have an expression giving over an estate on one event, and that event will include another event which itself would be within the limit of perpetuities, or, as I say, the rule against perpetuities, you cannot split the expression so as to say if the event occurs which is within the limit the estate shall go over, although, if that event does not occur, the gift over is void for remoteness. In other words, you are bound to take the expression as you find it, and if, giving the proper interpretation to that expression, the event may transgress the limit, then the gift over is void. What I have said is hardly intelligible without an illustration. B C

He then proceeds to give an illustration, and says, at p. 703 :

The testator, in addition to his expression of a gift over, has also expressed another gift over on another event although included in the first event, but the same judges who have held that the second gift over will take effect where it is expressed have held that it will not take effect if it is not so expressed, that is, if it is really a gift over on the death before attaining 25 or taking priest's orders, although, of course, it must include the case of there being no son. That is what they mean by splitting, they will not split the expression by dividing the two events, but when they find two expressions they give effect to both of them as if you had struck the other out of the will. That shows it is really a question of words and not an ascertainment of a general intent, because there is no doubt that the man who says that the estate is to go over if A. has no son who attains 25, means it to go over if he has no son at all, it is, as I said before, because he has not expressed the events separately, and for no other reason. That is my view of the authorities. This is a question of authorities. D E

I have arrived at the conclusion that the testator has expressed the events separately in the present case. It is quite true that he uses the words “which ever shall last happen.” He has quite clearly expressed two separate events : “on the decease of my last surviving child or the death of the last surviving widow or widower of my children.” In my view, there is a sufficient expression of two alternatives, and, as was said by FRY, L.J., in *Re Harvey, Peek v. Savory* (3), at p. 299 : F

The true inquiry is whether the testatrix refers to one event or to two distinct events. G

In my view, the present case differs from *Re Harvey, Peek v. Savory* (3) and from *Hancock v. Watson* (4). The testator has referred to two distinct events, and the fact that he goes on to add the words “as the case may be whichever shall last happen” is not sufficient, to my mind, to make this gift infringe the rule against perpetuities. H

Solicitor : *E. F. Hunt* (for all parties).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

G. SCAMMELL & NEPHEW, LTD. v. ROWLES (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), June 17, 20, 21, 22, July 8, 1938.]

Income Tax—Repayment of tax—Rate of interest.

- A *Income Tax—Deduction against profits—Payments made in compromise of action—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 3.*

Payments properly made by a company for the compromise of an action are proper deductions against profits. This is so though one of the items is a payment of £7,500 to one of the directors for the withdrawal of proceedings for alleged slander in connection with the company's business brought by him against a fellow-director.

- B Where an order is made for the repayment of tax, interest is to be allowed at the rate of $3\frac{1}{2}$ per cent.

[EDITORIAL NOTE. In the present case, it was suggested that, where a sum of money in respect of taxes has been paid to the Crown and is ordered to be repaid, the rate of interest to be allowed should vary according to whether or not the taxpayer was a trader. This argument has been rejected, and it seems that the rate of $3\frac{1}{2}$ per cent. is applicable to all cases.]

- C AS TO DISBURSEMENTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 152, 153, para. 312; and FOR CASES, see DIGEST, Vol. 28, pp. 42-45, Nos. 215-226.

AS TO INTEREST, see HALSBURY, Hailsham Edn., Vol. 17, p. 364, note (t).]

- D Case referred to:

(1) *Egyptian Hotels, Ltd. v. Mitchell* (1914), 6 Tax Cas. 542; [1914] 3 K.B. 118; 83 L.J.K.B. 1510; 111 L.T. 189; *affd.*, [1915] A.C. 1022; 28 Digest 26, 139; 84 L.J.K.B. 1772; 113 L.T. 882.

- E CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

- One of the directors of a private company brought an action against the company and his fellow-directors claiming that he had never ceased to be a director, and certain other relief consequent thereon. In consequence of certain statements made by the plaintiff in that action, the fellow-directors commenced proceedings for alleged slander. Later, both these proceedings were compromised, and in connection with the compromise the company paid (i) £7,500 to one of the fellow-directors to induce him to discontinue the slander action, (ii) £62 10s. towards the plaintiff's costs, and (iii) £53 10s., the company's costs of the preparation of the deed of compromise. The question was whether these sums were wholly and exclusively laid out or expended for the purpose of the company's trade within the meaning of the Income Tax Act, 1918, Sched. D, Cases I and II, r. 3, and were therefore a proper deduction against the profits. The commissioners decided that these sums were not a proper deduction.

J. Millard Tucker, K.C., and Terence N. Donovan for the appellants, the company.

The Solicitor-General (Sir Terence O'Connor, K.C.) and Reginald P. Hills for the respondent, the inspector of taxes.

LAWRENCE, J. : The question in this case is whether or not certain payments made by the appellant company were money wholly and exclusively laid out or expended for the purposes of the trade of the company. The commissioners, after stating the facts in detail, have expressed their decision in the following words :

We, the commissioners, who heard the appeal, were of opinion that the compromise was effected not for the purposes of the appellant company's trade but to enable it to terminate a trading relation which it found inconvenient with the minimum sacrifice of the balance of account resulting from that relationship. In our opinion, therefore, the payments made to secure the assent of the parties to the compromise and the legal costs of carrying it through were not money wholly and exclusively laid out or expended for the purposes of the appellant company's trade.

In my judgment, this is a finding of fact that the payments were made to enable the company to put an end to its trading relations with Blue Belle Motors, Ltd., with as little loss as possible. It is nowhere suggested in the case that the appellant company's trading relations with Blue Belle Motors, Ltd., were not entered into for the purposes of the appellant company's trade, and there is no finding that the termination of these trading relations was entered into for any other purpose. It is not suggested that Mr. Hood Barrs, in demanding £7,500 for withdrawing his slander action, was not acting perfectly *bona fide*, nor is it suggested that a compromise with Mr. Toms could have been effected without the withdrawal of the slander actions, and neither is it suggested that the compromise could have been secured without the other two payments in question having been made. If the commissioners had intended to find that the directors of the appellant company, in making the payments, were not acting in the proper performance of their duties as directors of the appellant company, presumably they would have said so, but they have not. On the contrary, they have expressed their findings in the words above set out. In these circumstances, in my opinion, they have drawn the wrong inference from their own findings of fact, and the appeal must be allowed with costs.

Millard Tucker, K.C. : I ask your Lordship to make an order that any tax found to be overpaid as the result of your Lordship's decision should be repaid with interest at 4 per cent.

Hills : I do not think that any order is needed. The statute says that it must be repaid. What is really wanted is a decision as to the rate of interest.

LAWRENCE, J. : Have you any objection to 4 per cent. ?

Hills : It is not 4 per cent. now. The last order was 3½ per cent.

Millard Tucker, K.C. : I do not suppose that there is very much in ½ per cent., but there is the question of principle which arises. The section says that tax overpaid is to be repaid with such interest as the High Court may allow. Obviously the reason for that is that a taxpayer who has paid more tax than he should have done has been kept out of his money, and, if the taxpayer is a trading company, then the amount of interest given to him should be such as would recompense

him as a trading company—a commercial rate of interest—that is to say, a commercial rate which is slightly greater, perhaps, than the gilt-edged rate of interest. In *Egyptian Hotels, Ltd. v. Mitchell* (1), LORD COZENS-HARDY, M.R., said, at p. 548 :

A The matter is in our discretion—it is such rate of interest as the court may allow. This being a trading company, we think it ought to be 4 per cent.

That was in Apr., 1914, before the War. Of course, later on, 5 per cent. was given during the War.

LAWRENCE, J. : Yes ; but the rates of interest are much lower now than they were in Apr., 1914.

B *Millard Tucker, K.C.* : At the present moment, I should have respectfully submitted that 4 per cent. is not an undue commercial rate of interest. One expects 4 per cent. on even a commercial debenture. It is really only a question of principle. The rate of interest to be allowed should be allowed according to the nature of the taxpayer. If he is a person who is not trading, presumably he will have lost only the rate of interest which, as an ordinary investor, he would have got, but, in the case of a trading company which has parted with a sum of money out of its capital which would otherwise earn its own profits, or go towards earning its own profits, then a commercial rate of interest is the proper rate, in my submission, and that should be 4 per cent.

C *Hills* : My Lord, I have never heard this suggestion made before in my experience here. The suggestion that the rate of interest is to vary with the creditor surely is quite contrary to anything I have ever heard done in recent years. What about a moneylender ? It might be a larger rate of interest, say 50 per cent.

E LAWRENCE, J. : Yes. I think that 4 per cent. was very small for a trading corporation.

F *Hills* : Money in court or anything of that kind would not give even 3 per cent. This is money deposited with the government, and I do not think that that has ever been more than 3½ per cent. in recent years, and the House of Lords gave 3½ per cent.

LAWRENCE, J. : Is that in income tax cases ?

G *Hills* : Yes, this is money in the hands of the government. We cannot speculate as to what might have happened to it in trading. It might have been lost. One person may come along and say, “I have made a great deal of money in my trade,” and the next person may say : “You cannot have any interest because I have been losing money in my trade.”

H LAWRENCE, J. : I will allow interest at the rate of 3½ per cent.

Solicitors : *Ashurst, Morris, Crisp & Co.* (for the appellants, the company) ; *Solicitor of Inland Revenue* (for the respondent, the inspector of taxes).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

[COURT OF APPEAL (Greer, Slessor and MacKinnon, L.J.J.), July 13, 14,
1938.]

Hire Purchase—Action for instalments due—Judgment—Judgment unsatisfied A
—Further action to recover possession of goods hired—Whether second
action barred.

The defendant had entered into a hire-purchase agreement with the plaintiffs for the acquisition of a cold-room. Several instalments being in arrear, the plaintiffs brought an action, and obtained judgment for the amount of the instalments due. As the judgment remained unsatisfied, the plaintiffs retook possession of most of the cold-room, but were prevented from retaking all of it. They therefore brought the present action to recover the rest of the goods. It was contended by the defendant that the result of the judgment in the first action, being an action to recover the value of the chattel, had the effect of terminating the contract and transferring the ownership of the chattel to the defendant :— B

HELD : the first action was merely one for instalments due, and did not operate to transfer the ownership in the chattel. As there was still a breach of contract, the plaintiffs were entitled to recover possession. C

[EDITORIAL NOTE. It should be noted in this case that the hire-purchase agreement was one providing for the payment of a number of instalments and the exercise of an option to purchase. It must also be noted that, upon the findings of the court, the first action was only for instalments then due, and not for the whole of the unpaid instalments. Had the agreement been one for the sale of an article, the price to be paid in instalments, and had the action been brought for the whole of the instalments then remaining unpaid, it would seem that the property would then pass by virtue of the judgment, and, although the judgment remained unsatisfied, any proceedings to retake possession of the property must fail. D

AS TO PROCEEDINGS BY OWNER, see HALSBURY, Hailsham Edn., Vol. 16, pp. 540, 541, para. 805 ; and FOR CASES, see DIGEST, Vol. 3, pp. 95-97, Nos. 256-261.] E

Cases referred to :

- (1) *Helby v. Matthews*, [1895] A.C. 471 ; 3 Digest 93, 245 ; 64 L.J.Q.B. 465 ; 72 L.T. 841 ; *revsg.*, [1894] 2 Q.B. 262. F
- (2) *Brooks v. Beirnsstein*, [1909] 1 K.B. 98 ; 3 Digest 96, 258 ; 78 L.J.K.B. 243 ; 99 L.T. 970.
- (3) *Re Ware, Ex p. Drake* (1877), 5 Ch.D. 866 ; 43 Digest 530, 664 ; 46 L.J.Bey. 105 ; 36 L.T. 677.
- (4) *Brinsmead v. Harrison* (1871), L.R. 6 C.P. 584 ; 43 Digest 531, 668 ; 40 L.J.C.P. 281 ; 24 L.T. 798 ; *on appeal* (1872), L.R. 7 C.P. 547 ; 41 L.J.C.P. 190 ; 27 L.T. 99. G
- (5) *Bradley & Cohn, Ltd. v. Ramsay & Co.* (1912), 106 L.T. 771 ; 21 Digest 222, 567.

APPEAL from a decision of His Honour JUDGE LAWSON CAMPBELL at the Luton County Court, dated Feb. 3, 1938. H

The defendant had obtained from the plaintiffs a cold-room under a hire-purchase agreement. Clause 7 of the agreement was as follows :

If during the currency of this agreement (a) any payment to be made by the hirer under this agreement shall be in arrear, or (b) the hirer shall commit any breach of this agreement . . . or (c) the hirer shall allow any judgment against him to remain

unsatisfied, then and in every such case it shall be lawful for the company (without prejudice to the right of the company to recover arrears of payments and damages for breach of this agreement) to terminate the hiring and to retake possession of the chattel or remove the same in whole or in part from the above-mentioned premises or any other premises where the same may be but nothing herein contained shall prejudice or affect the right of the company if it shall so choose to sue the hirer for the value of the chattel in lieu of retaking possession thereof as aforesaid.

- A** The defendant fell into arrear with the instalments, so the plaintiff started an action, and, on July 8, 1937, obtained judgment by default for £50 19s. 8d. and £6 6s. 8d. costs. This judgment remained in part unsatisfied, and, on Nov. 12, 1937, the plaintiffs went to the defendant's premises in order to retake possession of the goods. Before they had
- B** finished dismantling the cold-room, the defendant arrived on the scene, and prevented them from removing the whole of the goods. The plaintiffs thereupon commenced the present action, wherein they claimed £20, being the value of the portions they had not retaken, and damages for breach of contract. The defendant counterclaimed for damages
- C** for detention of the parts removed.

N. L. C. Macaskie, K.C., and R. C. Vaughan for the appellants.

Anthony Marlowe for the respondent.

- Macaskie, K.C.* : The defendant made default under cl. 7 (a), (b) and (e), and therefore it was lawful for the plaintiffs to terminate the
- D** hiring and retake the chattel. The defendant broke the agreement because he was in arrear. That was not affected by the earlier judgment, which was only for the hiring, and not for the cost, of the goods. Getting a judgment which is unsatisfied is not recovering arrears. [Counsel referred to *Brinsmead v. Harrison* (4), *Re Ware, Ex p. Drake* (3), *Brooks v. Beirnsstein* (2) and *Helby v. Matthews* (1).]

- Marlowe* : This is a question of fact, not a question of law. The judge has found that, in the first action, the plaintiffs sued for the value of the chattel, although in form the action was a claim for arrears of instalments. They sued for the balance which, with the amounts already
- F** paid, was the value of the chattel. If the plaintiffs' contention here is right, they could levy execution upon the previous judgment as well as retake the goods. After two years, the agreement is no longer a hiring agreement, but a sale agreement. Having elected to treat a person as a buyer, one cannot then sue him for possession : *Bradley*
- G** *& Cohn, Ltd. v. Ramsay & Co.* (5). This was equivalent to a contract for sale, and the possession passed to the defendant. The defendant did not allow any judgment to remain unsatisfied during the currency of this agreement. Any outstanding judgment was after the agreement had been terminated. There was therefore no breach under cl. 7 (e).

- H** *Macaskie, K.C.*, was not called on in reply.

GREER, L.J. : This is an unfortunate case, and, if we were entitled to exercise our judgment by reason of our sympathies with the unfortunate defendant, who may have to pay, or have judgment given against him for, the full amount of all the instalments, and at the same

time is called upon to return the goods subject to the hiring agreement, we might think that there was a good deal to be said for the unfortunate defendant. Having become liable under a judgment to pay every one of the instalments provided for in the contract, he is now asked to deliver up the goods, to which, if he had effectually paid all the moneys provided for by the agreement, he would have become entitled as owner. A Unfortunately, however, we have merely to consider the agreement between the parties, having regard to the facts that were before the judge.

In the first instance, an action was brought by the appellants, South Bedfordshire Electrical Finance, Ltd., against the respondent, George Bryant. That was an action for instalments due under a hiring agree- B ment. It was quite definitely not an action for the value of the goods, as has been contended by Mr. Marlowe, but was an action for the unpaid instalments, and, as a result of that action, there was an order made for the amount of the instalments. However, as a concession to the defendant, who probably was unable to pay the amount at once, he C was allowed to pay by so many payments of £2 per calendar month. In fact, that judgment has never been fulfilled. In these circumstances, an action was brought by the plaintiffs, Bedfordshire Electrical Finance, Ltd., to recover the goods which had been hired to the respondent. They said "Mr. Bryant is still in arrears with his payments, he has D not satisfied the judgment, we have not recovered the amount of the judgment and we therefore say that we are entitled to recover the goods." They had attempted to recover the goods, and had only succeeded in recovering a portion of them. Then, with regard to the goods which had been taken away, the defendant counterclaimed in respect of them E and both the claim and the counterclaim arose for decision by the county court judge under the terms of the agreement. The county court judge decided against the plaintiffs' claim for that part of the goods that the plaintiffs had already recovered, and in favour of the defendant for the part to which they said they were entitled—namely, something that they F valued at £100—and he gave judgment on the counterclaim for damages £100. In my judgment, the judge was entirely wrong both on the claim and on the counterclaim. Among the terms of the agreement was cl. 6, which provided as follows :

The hirer [the respondent] shall permit the authorised representatives of the company at all reasonable times to enter upon the said premises for the purpose of [inter alia G removing the chattel].

Then cl. 7 provides as follows :

If during the currency of this agreement (a) any payment to be made by the hirer under this agreement shall be in arrear or (b) the hirer shall commit any breach of this agreement . . . or (c) the hirer shall allow any judgment against him to remain unsatisfied then and in every such case it shall be lawful for the company (without H prejudice to the right of the company to recover arrears of payments and damages for breach of this agreement)—

I regard that as meaning when there was a right to arrears, whether or not those arrears are covered by a judgment—

to terminate the hiring and to retake possession of the chattel or remove the same

in whole or in part from the above-mentioned premises or any other premises where the same may be but nothing herein contained shall prejudice or affect the right of the company if it shall so choose to sue the hirer for the value of the chattel in lieu of retaking possession thereof as aforesaid.

In this case there were many payments in arrear, and the hirer had committed eight breaches of the agreement, and had undoubtedly permitted the judgment obtained against him by the appellants to remain unsatisfied.

Mr. Marlowe, for the respondent, has endeavoured to show that the action in which judgment was recovered, was not an action for arrears of payments or for breach of contract, but an action to recover the value of the chattel. I think that it is clear that it was no such thing, and accordingly there must be judgment for the appellants on the claim, and also for the appellants on the counterclaim. The judgment of the county court judge will be set aside, and judgment will be entered for the appellants on the claim, and for the appellants also on the counterclaim, with costs here and below.

SLESSER, L.J. : I concur. Apart from the particular question that was argued—namely, that the judgment previously obtained for the arrears of instalments had in some manner precluded the suppliers from relying upon rights which they had under the contract—it is clear that, on the conditions set out in cl. 7 being satisfied, they are in terms given the right to retake possession of the chattel and to remove the same in whole or in part. The conditions appear to me to have been satisfied. Under cl. 7 (b), the right arises if the hirer has committed a breach of the agreement, and, under cl. 7 (e), it arises if the hirer has allowed judgment against him to remain unsatisfied. Does it make any difference whether or not, before the time when the company purported to exercise their power to retake possession of these chattels, they had succeeded in obtaining a judgment for arrears of instalments due under the agreement ? I can find nothing, either in the agreement or in any principle of law, to operate so as to prevent their right under cl. 7 accruing or being exercised by reason of the fact that they had previously sued for arrears of instalments.

This agreement appears to me, like the agreement in *Helby v. Matthews* (1), to be an agreement of hire with an option which may be exercised under cl. 8 at any time but which in any event, on the payment of all the instalments, operates under cl. 3 for the hirer to acquire the ownership of the chattel. Until that time, as cl. 3 recites, the chattel remains the absolute property of the company.

There are in cl. 7 certain references to the right of the company to recover arrears of payment and damages for breach of the agreement. It states that :

... it shall be lawful for the company . . . to terminate the hiring and to retake possession of the chattel or remove the same in whole or in part. . . .

Then there are these words :

... but nothing herein contained shall prejudice or affect the right of the company

. . . to sue the hirer for the value of the chattel in lieu of retaking possession thereof as aforesaid.

I am not at all sure that it is necessary that those words should be there inserted, and certainly the case which has been cited to us of *Brooks v. Beirnsstein* (2), which appears to me to be rightly decided, and which deals with the right to sue for arrears of rent after the owner has retaken A possession on default, seems to me in principle to apply, and I can see no reason why, apart from the particular language of this agreement, this company has not got both rights open to it under the contract.

Various cases have been cited to us, though not immediately on the point, and particularly *Re Ware, Ex p. Drake* (3), which, following B *Brinsmead v. Harrison* (4), points out that judgment against a defendant in trover without satisfaction does not vest the property in the goods in the defendant. The general observation there seems to be *a fortiori* applicable to a case where what is sought to be obtained is not the property in the goods as such, but a mere claim for money due under the C agreement. I can see no reason, therefore, either under this agreement or as a matter of general principle, why the company cannot exercise its rights which the hirer has agreed that it possesses under cl. 7. In part it has purported to exercise those rights, and has gone away already with the larger part of this chattel. In so far as it has done that, it has D acted lawfully. In so far, therefore, as the counterclaim was based on a complaint that the company had taken goods of the hirer unlawfully, the counterclaim should be decided in its favour. In so far as the hirer made a claim for the part which was still in his possession, I think that the judgment of the judge on that claim was also wrong. I agree, E therefore, that these appellants should succeed both as to the claim and as to the counterclaim.

MACKINNON, L.J. : I agree. I think that what seemed to be the hard case of the defendant made bad law, but, on further consideration, if F anybody is so foolish as to enter into such an agreement as this, I do not know that his case can be considered harsh.

Appeal allowed with costs.

Solicitors : *Andrew, Purves, Sutton & Creery*, agents for *Walton & Ray*, Stony Stratford (for the appellants) ; *Machin & Co.* (for the respondent). G

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

SUMMERS v. RHONDDA URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), **July 21, 22, 1938.**]

A *Workmen's Compensation—Employment by local authority under scheme for relief of unemployment—Employment for 9 weeks—Whether employment casual—Workmen's Compensation Act, 1925 (c. 84), ss. 8 (2), 10.*

The appellant council had employed a workman under a scheme for the relief of unemployment. Under this scheme, men who had been unemployed for a considerable time were employed for a period of 9 weeks, after which it was unlikely that they would be further employed by the appellants for a considerable time. During the ninth week of such employment, the workman met with an accident arising out of and in the course of his employment, and died. It was contended for the appellants that this employment was of a casual type, and was of such short duration that it could not afford a basis of assessment of average weekly earnings, so that the case came within the proviso to the Workmen's Compensation Act, 1925, s. 10 :—

C **HELD :** (i) nine weeks was an ample period of time upon which to base an assessment of average weekly earnings, and the case came within sect. 8 (2) of the Act.

(ii) the court must look at the nature of the employment, and not at the motive actuating an employer when he employs a workman.

D **[EDITORIAL NOTE.]** It was argued in this case that employment for 9 weeks, which would necessarily be followed by a long period of unemployment, was employment of a purely casual nature. In calculating the earnings of the employee, it was said that regard must be had to the earnings of a person in the same grade, and that the grade was that of an unemployed labourer who had been given special work. It was also argued that regard must be had to the motive of the employer, especially in the case of a local authority attempting to ease the burden of unemployment.

E **AS TO COMPENSATION WHERE EMPLOYMENT HAS BEEN FOR LESS THAN THREE YEARS,** see HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 199, para. 440; and FOR CASES, see DIGEST, Vol. 34, pp. 408-411, Nos. 3322-3341. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 226, 227.]

Cases referred to :

- F (1) *Hunter v. South Shields Corpn.* (1922), 15 B.W.C.C. 264; 34 Digest 429, 3494.
- (2) *Thomson (W.) & Co. v. Mackay* (1921), 90 L.J.K.B. 1337; 34 Digest 255, 2181; 126 L.T. 33; 14 B.W.C.C. 143; *affg.* S.C. *sub nom.* *Mackay v. Cramond (Owners)* (1920), 89 L.J.K.B. 1036.
- G (3) *Perry v. Wright, Cain v. Leyland & Co.* (1900), *Ltd.*, *Bailey v. Kenworthy, Ltd., Gough v. Crawshaw Brothers, Cyfartha, Ltd.*, [1908] 1 K.B. 441; 34 Digest 409, 3329; 77 L.J.K.B. 236; 98 L.T. 327; 1 B.W.C.C. 351.
- (4) *Morgan v. Tareni Colliery Co., Ltd.*, [1938] 1 K.B. 433; [1937] 4 All E.R. 505; Digest Supp.; 107 L.J.K.B. 233; 158 L.T. 400; 30 B.W.C.C. 448.

H **APPEAL** from an award of His Honour JUDGE CLARK-WILLIAMS at the Pontypridd County Court, dated June 14, 1938.

The appellant council had instituted a scheme for the relief of unemployment, under which scheme men residing in the district, who had been out of work for some considerable time, were employed for a period of 9 weeks on works for which financial assistance from outside sources could be obtained. The husband of the respondent had been employed

on drainage work under this scheme. In the ninth week of this employment he met with an accident arising out of and in the course of his employment, and died from chronic nephritis and cardiac weakness accelerated by carrying a 1 cwt. bag of cement. He was earning about £3 per week at the time.

D. P. Maxwell Fyfe, K.C., Joshua Davies and J. H. Barrington for the appellants. A

D. Morgan Evans and Campbell Prosser for the respondent.

Fyfe, K.C. : This was casual employment. The court cannot look merely at what he earned during this period of 9 weeks. After the 9 weeks' work, he might be unemployed for a year. He was not regularly employed. B
His grade was that of an unemployed labourer who had been given special work. The terms of the contract must be considered, and also the motive. This was not a case of seasonal employment. It is within the words of the proviso to sect. 10. [Counsel referred to *Perry v. Wright* (3), *Hunter v. South Shields Corpn.* (1) and *Morgan v. Tareni Colliery Co., Ltd.* C
(4).]

Morgan Evans was not called on.

GREER, L.J. : This case has been argued with the perseverance and lucidity which we expect from Mr. Maxwell Fyfe. I should have said that it was unarguable. It seems to me quite clear that the case is within the provisions of the Workmen's Compensation Act, 1925, s. 8 (2), and that the county court judge was right in so holding. That section states the lump sum payable to the widow of a man who happened to have been killed, as this man was, by an accident arising out of and in the course of his employment. It says : D E

(i) If the workman leaves any dependants wholly dependent on his earnings, the lump sum shall be a sum equal to his earnings in the employment of the same employer during the 3 years next preceding the injury, or the sum of £200, whichever of those sums is the larger, but not exceeding in any case £300.

The law once stopped short at that provision, but it was found to be unsatisfactory, because there were many cases of short employment in which it would not be possible to say what the workman's weekly wages were during the year in which he was so employed. Accordingly, in one of the earlier Acts, which has been continued since, that difficulty was corrected by adding that which is now in sect. 8 (2) (ii) : F G

If the period of the workman's employment by the said employer has been less than the said 3 years, the amount of his earnings during the said 3 years shall, for the purposes of the foregoing rule, be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual employment under the said employer.

At the time of the fatal accident, this man had been in actual employment under the said employer—that is to say, the appellants, the Rhondda Urban District Council. It is a matter of no importance, but their motive in employing him was to see that, at a time when work was scarce, he should have a job doing work which they would have to do at some time H

or another, but which they might not decide to do at that particular time. The motive, however, has nothing whatever to do with the question. The employer's motive may be to help a man who is out of work, or it may be to do work this year that could quite easily have been put off till next year. The employer puts the work in hand this year because there
A are so many men out of employment, and because it is beneficial to the workmen to have the work done at a time when it was desirable to provide employment, in the hope that it would avoid the necessity of helping unemployed men. I cannot imagine any case which the facts bring more clearly within the words of sect. 8 (2) than the present case,
B notwithstanding the fact that the motive of the employer was to assist. It is said that one must put a gloss on that by reason of sect. 10. Sect. 10 also deals with the rules for determining earnings, and provides as follows :

C For the purposes of the provisions of this Act relating to "earnings" and "average weekly earnings" of a workman, the following rules shall be observed : (i) average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated.

The way in which that operates is to be found by looking at sect. 8 (2). We can arrive at the manner in which it is best calculated to give the rate
D per week at which the workman was being remunerated, and that part of the section does not in any way qualify the effect of sect. 8 (2). Then there is a proviso to this effect :

E Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the 12 months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

There are two conditions with which it is necessary to comply before that
F proviso comes into effect. One is that, by reason of the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration. Here, so far from being impracticable, it is quite clear that the rate at which the man was earning can be quite easily computed under the provisions of
G sect. 8 (2), and, if it becomes a question of whether or not a man's employment be casual, that is a question of fact for the judge, which he has decided in favour of the respondent in this case.

We were much impressed by certain words used by that very high authority, the late LORD STERNDAL, M.R., in *Hunter v. South Shields*
H *Corpn.* (1), where he uses some words applicable to facts quite different from those existing in the present case. In the present case, the workman had been employed for a period of 9 weeks, and he met with this accident in the last of the 9 weeks. He had the chance, but not the certainty, of being employed for a further 9 weeks by the same employer. Probably he would not have been so employed, but some other workman

would have been employed. I think it is quite immaterial that in *Hunter's* case (1) the work was given week by week to different employees. It was held, in those circumstances, that employment for one week made it impracticable to make the computation which had to be made, and it was in reference to those circumstances, and not to the circumstances in the present case, that the words relied upon were used. LORD STERNDALÉ, M.R., although it was not necessary to determine the point for the purposes of the case, did seem to say that the class of workman—the grade of work to which the man belonged—was the grade of an unemployed workman. If it were necessary to say whether or not I agreed with that, I should say that I did not agree with it, and that the grade of workman to be considered is the grade determined by the nature of his employment—namely, that he is a labourer, and not a bricklayer. He is a labourer, and not a foreman, and his class of employment is determined by the description of the work which he does as a labourer. For those reasons, I think that the judge was right, and there is no reason to disturb his decision. The appeal will therefore be dismissed, with costs. A B C

SLESSER, L.J. : I agree, and, were it not for the fact that Mr. Maxwell Fyfe has told us that some question of public interest is involved in this appeal, I should be content to add no more. However, in deference to his very lucid and diplomatic argument, I will add a few words. D

The whole question to be considered in this case arises under the Workmen's Compensation Act, 1925, s. 10, which contains rules for determining average weekly earnings. It is a standard which is to be applied both to sect. 8, which deals with the case of fatal accidents, and to sect. 9, which deals with the case of incapacity. It is said in this case that, on the facts of the case, which were agreed between the parties, the county court judge has misdirected himself in the application of those rules. The facts of the case have been stated by GREER, L.J., and it is only necessary here to say that, whatever may have been the motives of the local authority in providing work for this man, what has to be looked at is the nature of the employment. The motive was entirely immaterial. Secondly, Mr. Maxwell Fyfe laid stress upon the point that, being an unemployed man, and being given genuine employment, as I understand it, on certain drainage work in the area of the local authority, it was understood that that employment should not last more than a limited period. The council, it is said : E F G

as and when works require to be done for which financial assistance from outside sources can be obtained, employ usually for a period of 9 weeks to do such works men residing in the district and who satisfy certain conditions. H

Then it appears that normally, unless they are unable to obtain ordinary employment outside, they will not for some time be again assisted in this particular manner by the local council. All these considerations seem to me entirely immaterial to anything which has here to be decided. The question is as to the nature of the employment

at the time when this man met with this accident. The admitted facts are that this man had been employed for over 8 weeks, and that during the ninth week he met with the accident which gave rise to the claim. He was paid at a certain rate—1s. 2½d. per hour—in a normal week of 48 hours, which entitled him, according to the county court judge, to an equivalent weekly wage of £2 18s., or, with certain overtime, £3 per week, which he determined to be his average weekly wage. He said :

I have no doubt that in the present case the rate of remuneration of the workman during his employment by the respondents was approximately £3 per week.

He arrives at that sum by considering how much he was paid per week, basing it on the admitted rate per hour and taking the average of the period during which he worked. It seems to me entirely in conformity with the requirements of sect. 10 (i), which provides :

Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated.

There are certain cases mentioned in the statute where it is conceived by the legislature that that would not be a proper test—namely :

... by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the 12 months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

Thus, the reference to the 12 months as a standard applies to the case of the proviso only, and the reference to the employment of persons other than the injured man, or the deceased man, applies only in cases under the proviso. In my opinion, it is impossible to say that this was a case which necessarily fell within the proviso. It has been decided in more than one case—and I do not think it needed decision—that, *prima facie*, the question of whether or not it is practicable to compute average weekly earnings in the ordinary way by reference to the individual for such period as he has been in employment, or such other period as the judge thinks is expedient, is a matter of fact for the county court judge. There are cases in the books where it has been held, as a matter of law, that the judge has had no evidence and no means by which he could actually come to the conclusion it was practicable to compute the wages, because they were cases where, by the very nature of the employment, it appeared not to be practicable. This, in my opinion, is not such a case. It does not fall at all within the proviso, and I need quote only one passage from *Thomson (W.) & Co. v. Mackay* (2), where LORD BUCKMASTER, speaking of the schedule which contained equivalent provisions in the 1906 Act, said, at p. 146 :

The phraseology of that schedule shows clearly to my mind that it never was intended to do more than to permit the arbitrator to take into consideration, for the purpose of forming his judgment, the remuneration received by people engaged under the same conditions in the same work. To say that it compelled him to accept

their receipts as the standard to apply to a particular incident is to disregard entirely the conditional phraseology in which the schedule is framed.

Those words have reference to the fact that, even where a case does fall within the proviso, all that is required is that the judge may have regard to the payment of other persons in the same grade. Even then it is not compulsory. In this case, in my opinion, it does not fall within the proviso at all. I entirely agree with GREER, L.J., that the period of 9 weeks was ample time upon which to base an assessment of the average weekly earnings. The question of shortness of time, therefore, does not arise. The employment was clearly not of a casual nature. It was regular employment for a period of 48 hours per week—regular employment without any intervals. Nor does it become casual by reason of the fact that at the end of it the man's services would not be required again for an uncertain period. If it did, every seasonal employment might, on a similar basis, be regarded as casual employment, or any employment which ended without any certainty of fresh engagement could be held to be casual. This employment seems to me certainly to be employment which is not of a casual nature. A B C

Thirdly, there is the question of the terms of the employment. That does not refer, in my view, to whether the man is unemployed, or whether he is employed for charity, or whether he is employed for avarice, or for any good or bad motives. It has reference to the fact that the terms of employment are such that, by reason of the uncertainty of the remuneration, which may come partly in the form of perquisites—what are called tips or bonuses—it is impracticable to compute the remuneration. That is what the legislature had in mind when it made provision for cases where by reason of the terms of the employment it is not practicable to assess the average weekly earnings. The case of a railway porter is an instance which immediately occurs to my mind, or the case of a hotel waiter, where, on the particular facts of the case, the assessment may be held to be impracticable because the terms of the employment of the waiter (who may receive a very large gratuity on one day from a millionaire, and a very small one the next day from an impecunious person) are an uncertain basis of reward. It may be that that falls within this case. It does not refer to the case where the motive for the regular employment happens to be one of charity, or the relief of the rates, or for any other purpose, and, with great respect, I would associate myself with GREER, L.J., in saying that the grade is the grade of persons employed at the same work and by the same employer, and whether they are employed because they could not be unemployed, or because they were previously unemployed, or employed at less remunerative work, or for any other reason, seems to me to be entirely immaterial. I respectfully agree that this case is really unarguable, but, since some decision on the matter is apparently required by local authorities throughout South Wales, I have spoken at greater length than the case really justified. D E F G H

MACKINNON, L.J.: I agree. This appeal could succeed only if it were shown to be impracticable to compute the rate of remuneration at which the man was being paid by the employer during the period of his actual employment by the local authority. So far from it being shown to be impracticable to make that computation it seems to me that it is the easiest task which can confront an arbitrator in construing and giving effect to this complicated branch of legislation.

Appeal dismissed with costs.

Solicitors: *William Hurd & Son*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the appellants); *Hosking & Berkeley*, agents for *Thos. Williams & Owen*, Pentre (for the respondent).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

C INFIELDS, LTD. v. P. ROSEN & SON.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and MacKinnon, L.JJ.), April 12, 1938.]

D *Practice—Discovery—Chancery Division—Privilege—Right of parties to take matter before the judge—Inspection of documents by the court—Necessity for inspection by, or report to, judge—Reference to privileged matter in other proceedings—Waiver of privilege—R.S.C., Ord. 31, r. 19A (2).*

E In an action in the Chancery Division, the plaintiffs upon discovery claimed privilege for certain documents. Upon a summons before the master, and by agreement between the parties, the master inspected the documents under R.S.C., Ord. 31, r. 19A (2) and ordered production, subject to the parties' right to have the matter adjourned to the judge. This right being exercised, the judge decided without himself examining the documents or receiving from the master a report as to their nature and contents. In an affidavit in other proceedings, the plaintiffs had referred to the same documents:—

F HELD: (i) by consenting to the master reading the documents, the parties did not deprive themselves of the right of having the matter adjourned to the judge.

(ii) thereupon the judge must not content himself with the view of the master, but must first either examine the documents for himself or receive a report of their nature and contents from the master, and then form his own opinion as to the legal validity of the claim of privilege.

G (iii) the fact that a party claiming privilege for certain documents in one action refers to them in an affidavit in another proceeding or action does not deprive the documents of their privilege.

H [EDITORIAL NOTE. The practice of the Chancery Division differs in this respect from that of the King's Bench Division in that an interlocutory matter may, at the option of the parties, be adjourned to the judge. The hearing of the matter by the judge upon such adjournment is not by way of appeal, but in order that the matter may be dealt with by the judge in person, instead of being dealt with by the master. In the King's Bench Division, if the matter comes before the judge, it is always by way of appeal from the master. Therefore, in the Chancery Division, when there is a question of privilege necessitating the reading of the documents,

the judge himself must either read the documents or receive a report from the master as to their contents.

AS TO PRIVILEGE IN RESPECT OF DOCUMENTS, see HALSBURY, Hailsham Edn., Vol. 10, p. 379, para. 459; and FOR CASES, see DIGEST, Vol. 18, pp. 177, 178, Nos. 1308-1313. See also YEARLY SUPREME COURT PRACTICE, 1938, p. 515.]

Cases referred to :

- (1) *Bustros v. White* (1876), 1 Q.B.D. 423; 18 Digest 96, 478; 45 L.J.Q.B. 642; 34 L.T. 835.
- (2) *O'Rourke v. Darbishire*, [1920] A.C. 581; 18 Digest 84, 377; 89 L.J.Ch. 162; 123 L.T. 68; affg. S.C. *sub nom. Re Whitworth, O'Rourke v. Darbishire*, [1919] 1 Ch. 320.
- (3) *Roberts v. Oppenheim* (1884), 26 Ch.D. 724; 18 Digest 87, 390; 53 L.J.Ch. 1148; 50 L.T. 729.

INTERLOCUTORY APPEAL by the plaintiffs from an order of FARWELL, J., dated Mar. 20, 1938, ordering the production of the documents. The facts and the nature of the documents are fully set out in the judgment of SIR WILFRID GREENE, M.R.

K. E. Shelley, K.C., and *H. C. Infield* for the appellants, the plaintiffs.
R. Moritz, K.C., and *Basil Drewe* for the respondents, the defendants.

SIR WILFRID GREENE, M.R. : This appeal raises a question of some difficulty upon the practice which ought to be followed in cases where privilege has been claimed in an affidavit of documents. The action is an action in which the plaintiffs complain of infringement by the defendants of the plaintiffs' registered design. By the amended defence the defendants added to their particulars of prior publication, which they set up as a ground of defence, an allegation that the alleged design had been published and publicly used in this realm prior to the date of the registration by the exposure and offer for sale by the plaintiffs at their shop at the address mentioned, and in the ordinary course of their business, of certain clips similar to those for which the design was said to have been registered, including under head (iv) introduced by amendment :

The non-metallic parts of clips similar to that marked "D" (of which large quantities were imported from Germany by the plaintiffs during 1932, 1933 and 1934, having been manufactured by Hans Veith, trading as Karl Veith of Leipzig, Germany) during 1932, 1933 and 1934.

That, therefore, is quite a specific allegation in relation to the non-metallic parts of clips of an identified character. The amended defence having been delivered, and fresh issues having been raised by it, further discovery was ordered, and the managing director of the plaintiff company on Nov. 6, 1937, swore an affidavit of documents, in para. 2 of which he said :

The plaintiff company have in their possession or power certain documents numbered 1 to 87 inclusive tied up in a bundle marked with the latter "A" and initialled by me and certain books of account numbered 1 to 6 inclusive tied together in the parcel marked with the letter "B" and initialled by me. I have carefully examined all the said documents and books and to the best of my knowledge and

belief and as I am advised the said documents and books either do not in any way relate to the matters in issue in this action or in so far as they do relate to the same they form, support, evidence and relate exclusively to the case of the plaintiffs in this action; they contain nothing supporting or tending to support the case of the defendants or either of them and they contain nothing impeaching the case of the plaintiffs, wherefore the plaintiffs object to produce the same and say that they are privileged from production.

- A That claim of privilege is correctly made, and the allegations are sufficient to support the claim, but, if the court formed the conclusion on proper materials that the claim for privilege was misconceived, either because the law relating to it had been misunderstood or because the character of the documents was such as to show that the claim was
B misconceived, of course the claim would fail.

- In the present case, subject to one matter which I will deal with at the conclusion of my judgment, and apart from the master's inspection, the only material before the court for the purpose of judging the validity of this claim was the affidavit itself. It was suggested by Mr. Moritz
C that, having regard to the subject-matter of the action, the nature of the allegations in the defence, and the language of this paragraph, it really, on the face of it, meant that the deponent was taking on himself the right to decide a matter which would fall for the court to decide—that is to say, upon which side of the line a particular non-metallic part
D of a clip would fall—and, therefore, the claim was not competent. In my opinion, that argument cannot prevail, because the allegation in the defence is, as I have said, a quite specific allegation, and the statement in the affidavit is quite consistent with the fact, if it be a fact, that the clips to which these documents relate are clips which do not fall within
E the description in the defence.

- The history of the proceedings on this summons is this. The summons came before the master. Arguments were put forward by counsel for the parties, and, upon the conclusion of the arguments of counsel, it was suggested by one side, and the suggestion was assented to by the
F other side, that the master should use the power which is conferred upon him by R.S.C., Ord. 31, r. 19A (2), and inspect the documents before giving his decision. The master accordingly reserved his decision until he had seen the documents. He inspected the documents numbered 1 to 87, and certain entries in the books produced, and formed the opinion
G that the documents and the books ought to be produced. He indicated that he would order accordingly, but he gave the plaintiffs two days in which to decide whether or not they would wish the matter to be adjourned to the judge, and, if they decided to have it adjourned to the judge, it was to be adjourned into court as a procedure summons.
H The plaintiffs exercised that option, and asked for the matter to be adjourned to the judge. That course was in accordance with the ordinary practice in the Chancery Division by which a party can ask for a matter to be adjourned to the judge, not by way of appeal from the master's order, but in order that the matter may be dealt with by the judge in person, instead of being dealt with by the master.

The matter came before FARWELL, J., and he made an order for the production of the documents. That order was in the common form, and I need not refer to it. The reasoning of the judge's judgment is to this effect. He calls attention to the fact that, by the consent of the parties, the master did in fact inspect the documents, and that, having considered the documents, the master came to the conclusion A that they ought to be disclosed. Then the judge says :

The matter having proceeded in that way, and the master having inspected the documents, it appears to me that it would be wrong for me, who have not seen the documents, to go back on what the master has done, and to say that, notwithstanding the fact that the master, with the consent of the parties, has inspected the documents, and come to the conclusion that they ought to be produced, his order was one which ought not to have been made. In my judgment, I am entitled to accept the view which the master has put forward as being the right one—namely, that these documents ought to be produced. B

It does not appear from the judge's judgment that he had before him any information derived from the master as to what in fact the various documents dealt with, beyond such as might be inferred from the conclusion to which the master had come. In other words, the judge was not deciding the case upon the ground that the material before the master had been brought to his mind, and that he had formed his own opinion upon it. There is nothing whatever, either in the judgment or in the master's note, which this court has read, to show that the master conveyed to the judge's mind anything in the nature of a report as to the nature of these documents, or the subject-matter with which they dealt. The judge, therefore, is really taking the opinion of the master. He has accepted that opinion without himself looking at the material upon which the master had formed it, and without obtaining from the master what I think he would have been perfectly entitled to obtain—namely, such a statement or summary or catalogue of the documents as would be sufficient, without actual perusal by the judge himself, to bring to his mind what, as a matter of fact, the various documents dealt with. If he had had that material, it would have been competent to him to decide the question of law as to whether or not the claim for privilege was rightly made. However, he did not deal with the matter in that way. He took the view that, the parties having consented to inspection by the master, and the master having inspected the documents, the plaintiffs were not entitled to ask him to go back on what the master had done. It is really equivalent to saying, with all respect to the judge, that the plaintiffs have in some way deprived themselves by their conduct of the right which every litigant before a master in the Chancery Division has—to request that the matter be adjourned to the judge, in order that he may have the judge's own opinion upon it. I am unable to give that effect to what took place before the master. Before I deal further with that, I must refer to the law relating to the matter of inspection. Before the present R.S.C., Ord. 31, r. 19A, came into effect, the only method by which the judge could look at documents which were in dispute on a matter of privilege was by consent of the C D E F G H

parties. It was laid down by the Court of Appeal as long ago as 1876, in *Bustros v. White* (1), that, where, at the desire of both parties, and with a view to avoiding the delay and expense which might be occasioned by allowing the matter to stand over for the production of a further affidavit, the judge has taken upon himself the trouble and responsibility

A of looking into the documents, and deciding whether they ought to be produced, it is not competent to either party afterwards to question the decision of the judge in the Court of Appeal. It is to be observed that that language was used with reference to a state of affairs under which it was only by the consent of the parties that the judge had jurisdiction
 B to look at the documents, and the rule laid down was that, if they had agreed to that course, they could not afterwards come to the Court of Appeal and ask for the decision to be reversed. R.S.C., Ord. 31, r. 19A, appears to have come into force first of all in 1894, and by subrule (2) it is provided as follows :

C Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

Therefore, for the first time the court had power of its own motion to call for the documents and make its inspection. That being the position, *Bustros v. White* (1) in its present application is necessarily very much

D limited, because, if the judge determines to make use of the power given to him by that subrule, it will not be a case where by consent of the parties he has been given some jurisdiction which he does not possess, which was the case in *Bustros v. White* (1). It was the fact that the jurisdiction was so given to him by consent that was the foundation of
 E that observation in *Bustros v. White* (1). If, however, the judge of his own motion inspects the documents, it appears to me that the right of appeal is not in the least degree affected. It is said, and said truly, that the observation in *Bustros v. White* (1) which I have quoted was referred to with approval in the opinion of VISCOUNT FINLAY in the House
 F of Lords in *O'Rourke v. Darbishire* (2), but it is important to observe the purpose for which he was citing it with approval. He said, at p. 610 :

It [the principle laid down in *Bustros v. White* (1)] appears to me to be directly applicable to the facts of the present case, in which this course [that of inviting the judge to inspect] was taken to avoid a legal argument.

G That, of course, puts the matter on a footing very like that of *Bustros v. White* (1), for the parties agreed that, instead of arguing the matter out, the judge should be invited to make his own inspection in lieu of argument. If the parties agree to do that, it appears to me to follow that they cannot afterwards come to the Court of Appeal, but it does not
 H appear to me to apply to a case where the judge exercises the power conferred upon him by the rule. In the present case, the position is not even the position referred to in *Bustros v. White* (1), because that was a case where the matter under discussion was the appeal from the judge to the Court of Appeal. What we have to deal with here is the adjournment by the master in the Chancery Division to the judge. If,

when the matter comes before the master, he indicates an intention to decide in a particular way, the parties are entitled as of right to ask for an adjournment to the judge. After argument was completed, both parties agreed that the master should look at the documents. He looked at those documents, and indicated the order he was going to make, and he gave two days for the plaintiffs to consider whether or not they wanted an adjournment to the judge. What is the true position? Is it to be said that, where the master, acting under the rule, has inspected the documents, the effect of that is in some way to take away the jurisdiction of the judge himself to investigate the matter and deal with it? I should have thought clearly not. Does it, then, make any difference if the parties, after they have argued the case, have suggested to the master that, before giving his decision on the matter fully argued before him, he should look at the documents? I cannot read a consent or an invitation to that course as by implication amounting to a surrender by either party of the right which he has, if he is dissatisfied with the order which the master proposes to make, to ask that the matter be adjourned to the judge. It seems to me that to hold otherwise would run counter to the practice in the Chancery Division whereby the master's order becomes effective only if an adjournment is not asked. Directly the adjournment is asked, the whole matter is at large, and must be decided by the judge. The position when the matter came before the judge was, I think, this. The master having with the consent of both parties exercised his jurisdiction under the subrule, and having informed himself, by inspection of the documents, as to their contents, and having, by the inspection, made up his mind on the question of law, the party who asked for the matter to be adjourned to the judge was entitled to require the judge to hear his application, and to deal with it on the materials which were before the master, and not merely to accept the master's view without himself considering it. It is not to be thought that anything I say involves that, in a case of complication, where there is perhaps a mass of documents, the judge himself is bound to go through every document. I do not think that that is the law. It appears to me that, where a matter of inspection is before the judge, if the materials are such as to require such action, the judge is entitled to use the mind and the eye of the master in sorting the documents, in putting them into categories or making a note as to what they deal with and what their contents are, and anything of that sort which will relieve the judge of what, in a heavy case, might be a perfectly impossible task for him to perform. A judge is entitled to obtain assistance of that character, but, on the material so obtained, it is for the judge to come to a decision on the question of law that is submitted to him, and, with all respect to the judge, that is not what he did in the present case. In the result, the appeal must be allowed. The portion of the order which orders inspection must be discharged, and the matter must go back to the Chancery Division for decision.

There is one argument which I promised to deal with, which is to this effect. It was said that, quite apart from this question with which I have been dealing, there was before the court material which showed upon its face that the claim for privilege was misconceived. That material consisted in a passage in an affidavit of Mr. Infield, sworn upon
A another summons, in which he made this statement :

There has furthermore been disclosed by the plaintiffs a bundle of documents for which privilege has been claimed by them, which trace the history of the development of the various clip designs supplied by the firm of Karl Veith to the plaintiffs and which are quite inconsistent with the defendants' said allegations.

B That paragraph, we are told, was read without objection upon the hearing of the summons to which the affidavit related, and it is said that the plaintiffs, having made use of the documents for which they are claiming privilege, cannot now maintain that claim, and, further, that this very language which I have read shows upon its face that the documents are
C relevant to the matters in this action and do not fall within the language of the paragraph claiming privilege. It appears to me that that argument has no real foundation. First of all, the reference in this paragraph to those documents does not, in my judgment, amount in any sense to a waiver of the claim of privilege. It would, I think, have been competent
D to the defendants, when it was proposed to read that paragraph, to object to its being read unless the documents were produced. That course was not taken, and the mere fact that the paragraph was read and relied upon without objection does not, in my opinion, amount to a waiver of the privilege. It has been laid down that a reference to a document in a pleading does not amount to a waiver of a claim of privilege. That was in *Roberts v. Oppenheim* (3), where COTTON, L.J., said, at p. 734 :

It is then said that the plaintiffs cannot avail themselves of a claim to protection, because they have referred to the deeds in their pleadings, and R.S.C., Ord. 31, r. 15, is relied on. But that rule only says that if a party will not produce a document to which he has referred in his pleadings, he shall not afterwards be at liberty to put such document in evidence. That is the penalty. He may prefer to lose part of his claim rather than produce the document. In my opinion, that rule does not take away the privilege of the documents, but only prevents them from
F being put in evidence unless produced.

It seems to me that, on the same principle as was laid down there, the
G mere reference to these documents in this paragraph does not in any way amount to a waiver of the privilege. Upon the other point—that the language of this paragraph on its face negatives the allegation in the paragraph claiming privilege—it appears to me that that is a misconstruction of this paragraph, because there is nothing inconsistent
H between the two paragraphs when they are put side by side. Therefore, in my opinion, it is quite impossible to say that this paragraph on its face is sufficient to justify the court in saying that the allegations in the paragraph claiming privilege cannot be true.

Upon the whole matter, therefore, the appeal, as I have said, will be allowed and the order that I have indicated will be made.

SCOTT, L.J. : I agree with the judgment of SIR WILFRID GREENE, M.R., though with great regret. I feel that this power given to the court or judge under R.S.C., Ord. 31, r. 19A (2), was for the express purpose of deciding in a simple way whether or not documents should be produced for inspection, and I am sorry if our decision should in any way seem to complicate the procedure. By that I mean A this. Had the judge, on the summons being adjourned into court, dealt with the matter in the way which, in my conception, was open to him, by asking the master to make a report to him in accordance with his directions, so as to inform his mind upon the question as to whether the documents were, on the one hand, relevant, or, as regards others, sup- B ported only the plaintiffs' case, and then decided the case, after receiving that information, no appeal from that could, for practical purposes, be made to this court, and it does seem to me very important that that sort of question should be disposed of with the least possible complication of procedure. Whether or not it would be possible to consider any C alteration of the rules which would facilitate that principle, I express no opinion, but I am anxious to economise interlocutory procedure as much as possible.

MACKINNON, L.J. : I agree with the proposed order, but I should D like to add this. This is an appeal from the Chancery Division. By the practice of that division, a litigant in an interlocutory matter is entitled to the decision of the master or of the judge at his option. In the King's Bench Division, he is entitled primarily only to the decision of the master, from which he can appeal to the judge. I desire to reserve E the question whether, when a master of the King's Bench Division has decided the question under R.S.C., Ord. 31, r. 19A (2), by inspection of the documents, the unsuccessful party can appeal to the judge in chambers, and can call upon him to inspect the documents over again. I express no opinion on that. It may be that, notwithstanding *Bustros* F v. *White* (1) and *O'Rourke* v. *Darbishire* (2), such a right of appeal does exist. If it does, I am quite satisfied that there ought to be an addition to the rule, or a new rule in this order, saying that there shall be no appeal on such a question.

Solicitors : *Wm. White & Co.* (for the appellants, the plaintiffs) ; G *Herbert Baron & Co.* (for the respondents, the defendants).

[Reported by REGINALD TOWNSEND, Esq., Barrister-at-Law.]

**Re WILSON SYNDICATE CONVEYANCE, WILSON v.
SHORROCK.**

[CHANCERY DIVISION (Bennett, J.), **June 22, 23, 24, 1938.**]

*Mines—Surface working—Express reservation of underground working only—
Whether implied right to enter upon surface excluded.*

A In a conveyance of 1923, there was a reservation to the vendors and their assigns of "all clay, lignite, umber, mines and minerals of every description . . . together with all necessary powers, rights and easements for searching for, winning, working and carrying away the same by underground working," with a provision for compensation for subsidence and damage to the surface or buildings. The plaintiff

B was an assignee of the vendors, and claimed the right to make borings and sink shafts and otherwise to use the surface for the purpose of winning and carrying away the minerals :—

HELD : (i) upon the construction of the conveyance of 1923, the right to work the minerals was restricted to underground working.

C (ii) the express power being restrictive of the implied common law power, the intention of the parties must have been that the vendors were restricted to the rights of working expressly reserved.

[EDITORIAL NOTE. There is *prima facie* incident to the ownership of minerals power on the part of the mine-owner to enter upon the surface to dig pits and get the minerals. This power is not implied where the getting of the minerals would be destructive of the surface, as in quarrying. In the present case, this implied

D power is held to be restricted by the terms of the express reservation, which provides for underground working only.

AS TO RIGHTS TO SURFACE WORKING, see HALSBURY, Hailsham Edn., Vol. 22, pp. 661-663, paras. 1419-1423 ; and FOR CASES, see DIGEST, Vol. 34, pp. 714-717, Nos. 992-1011.]

E Cases referred to :

(1) *Hext v. Gill* (1872), 7 Ch.App. 699 ; 34 Digest 606, 41 ; 41 L.J.Ch. 761 ; 27 L.T. 291.

(2) *Pountney v. Clayton* (1883), 11 Q.B.D. 820 ; 34 Digest 610, 86 ; 52 L.J.Q.B. 566 ; 49 L.T. 283.

(3) *Cardigan (Earl) v. Armitage* (1823), 2 B. & C. 197 ; 34 Digest 714, 992.

F (4) *Stukeley v. Buller* (1614), Hob. 168 ; 17 Digest 299, 1116.

(5) *Re Gerard (Lord) & London & North Western Ry. Co.'s Arbitration*, [1895] 1 Q.B. 459 ; 34 Digest 715, 995 ; 64 L.J.Q.B. 260 ; 72 L.T. 142.

(6) *Dashwood v. Magniac*, [1891] 3 Ch. 306 ; 34 Digest 627, 233 ; 60 L.J.Ch. 809 ; 65 L.T. 811.

(7) *Charrington & Co., Ltd. v. Wooller*, [1914] A.C. 71 ; 17 Digest 327, 1386 ; 83 L.J.K.B. 220 ; 110 L.T. 548.

G (8) *Batten Pooll v. Kennedy*, [1907] 1 Ch. 256 ; 34 Digest 718, 1019 ; 76 L.J.Ch. 162.

(9) *Eardley v. Granville* (1876), 3 Ch.D. 826 ; 34 Digest 652, 497 ; 45 L.J.Ch. 669 ; 34 L.T. 609.

(10) *Smith v. Wilson* (1832), 3 B. & Ad. 728 ; Digest Supp. ; 1 L.J.K.B. 194.

H (11) *Wigglesworth v. Dallison* (1779), 1 Doug. K.B. 201 ; 17 Digest 40, 444.

(12) *Wheeldon v. Burrows* (1879), 12 Ch.D. 31 ; 19 Digest 45, 253 ; 48 L.J.Ch. 853 ; 41 L.T. 327.

(13) *Ellis v. Noakes*, [1932] 2 Ch. 98, n. ; Digest Supp. ; 101 L.J.Ch. 409, n. ; 147 L.T. 453, n.

(14) *North Stafford Steel, etc., Co. v. Ward* (1868), L.R. 3 Exch. 172 ; 17 Digest 297, 1104.

ADJOURNED SUMMONS with witnesses for the determination of the question whether the plaintiff as successor in title to the Wilson Syndicate, Ltd., and his assigns, are entitled to enter and remain upon the property known as Sandford Orleigh in the county of Devon (other than the dwelling-house and ornamental gardens situated thereon) for the undermentioned purposes—namely, (a) to make the necessary borings from the surface for the purpose of searching for clays and minerals under the said property; (b) to sink shafts from the surface necessary to win and work by underground workings the clays and minerals under the said property and to let down the surface; (c) to use the said surface for the purpose of raising, winning and carrying away the clays and minerals abstracted from the property; (d) to do all other necessary acts on the surface of the said property, etc.

H. B. Vaisey, K.C., and H. J. Astell Burt for the plaintiff.

David Bowen, K.C., and Stephen B. Cohen for the defendant.

Burt: The plaintiff gets a right to enter upon the defendant's land from the words in the conveyance and from the local meaning of the term "underground working." The evidence as to the meaning of the term is uncontradicted. It is admissible evidence, and the words have acquired a local signification. Evidence of the local signification is sufficient, and it is not a question of what the parties intended. [Counsel referred to HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 10, p. 271.] "Underground working" is a technical phrase, and it includes searching for minerals on the surface, as this is incidental to the implied power to get the minerals. The right of the owner of the minerals is a right of property, and it is a right which goes beyond the mere right to excavate the minerals. The mine-owner has a right to follow the ordinary course in the district, and he may use the ordinary and proper means of working. It is commercially impossible to get ball clay by tunnel working. [Counsel referred to *Re Gerard (Lord) & London & North Western Ry. Co.'s Arbitration* (5), *Dashwood v. Magniac* (6), *Charrington & Co., Ltd. v. Wooder* (7), *Batten Pooll v. Kennedy* (8), *Eardley v. Granville* (9), *Pountney v. Clayton* (2) and *Smith v. Wilson* (10).]

Bowen, K.C.: What is granted by a conveyance with an exception of the minerals is everything *ab centro ad coelum* other than the excepted mines. In the present case, the conveyance is of all minerals underneath the land and of all means of getting them, whether by underground or by surface working, subject to the payment of adequate compensation for all damage done by subsidence or otherwise to the surface or the buildings thereon, and for the occupation of the surface, and for any damage in consequence thereof. The words "or otherwise" are apt to describe only damage which is not done by reason of occupation. The Wilson Syndicate had adjacent land, and could have exercised their powers of working from the adjacent land. [Counsel referred to *Wigglesworth v. Dallison* (11), *Pountney v. Clayton* (2), *Cardigan (Earl) v. Armitage* (3), *Wheeldon v. Burrows* (12), *Stukeley v. Butler* (4), *Ellis v.*

Noakes (13), *North Stafford Steel, etc., Co. v. Ward* (14), *Hext v. Gill* (1) and *Re Gerard (Lord) & London & North Western Ry. Co.'s Arbitration* (5). Counsel also referred to the following precedents in conveyancing: KEY AND ELPHINSTONE, 13th Edn., Vol. 1, p. 552; PRIDEAUX, 23rd Edn., Vol. 1, p. 758; BLYTHWOOD AND JARMAN, 2nd Edn., Vol. 1, pp. 430, 458; *ENCYCLOPÆDIA OF FORMS AND PRECEDENTS*, 2nd Edn., Vol. 9, p. 260; and to NORTON ON DEEDS, 2nd., p. 126.]

A *Vaisey, K.C.*, in reply: If the plaintiff cannot go upon the land of the defendant, the plaintiff will be left with his minerals useless, and can do nothing with them. Apart from the consideration of commercial methods, B he cannot get them, and will be deprived of his property. It is said that the only way in which the plaintiff can search for minerals is by digging from below. Searching for a thing means looking for it. The plaintiff does not want to search for things on the surface by underground workings. If he thinks there is an outcrop, he wants to search for it on the C surface. The words cannot mean that the plaintiff cannot look for his minerals on the surface.

BENNETT, J.: By a conveyance of May 31, 1923, the Wilson Syndicate, Ltd., conveyed to the defendant, Mr. Guy Shorrocks, in consideration D of a payment by him of £6,000:

all that estate known as Sandford Orleigh in the parish of Highweek in the county of Devon with the mansion house, lodge, cottages, gardens, stables, outbuildings and closes of land comprising a total of 34 acres and 39 perches or thereabouts and more particularly described in the schedule thereto and for the purposes of identification only shown by the colour pink on the plan annexed to the conveyance E of the property to the vendors dated Sept. 29, 1920, secondly a right of way for all purposes for the purchaser his heirs and assigns owner and owners occupier and occupiers of the premises hereby conveyed between the points A and B on the said plan in a straight line with B and C and the road at A and thirdly the full benefit of the covenant restricting the owner of the piece of land coloured yellow on the said plan for a period of 20 years from disturbing the surface thereof by boring or working the clay or any minerals thereunder with the benefit of all rights and powers for F or in connection with enforcing the due performance of such covenant contained in an indenture dated Oct. 30, 1919, and made between Julian Alleyne Baker of the first part Hugh Middleton Ingle of the second part and John Dolbear of the third part to hold the said hereditaments and premises unto and to the use of the purchaser [Mr. Shorrocks] in fee simple subject nevertheless to a reservation to the vendors their heirs and assigns of all clay lignite umber mines and minerals of every description lying or being in or under the hereditaments hereby conveyed (with the exception of the dwelling-house and ornamental gardens) together with G all necessary powers rights and easements for searching for winning working and carrying away the same by underground working only proper compensation to be paid to the purchaser for all damage by subsidence or otherwise caused to the surface or the buildings thereon by the working of the vendors their successors in title or assigns or their lessees or tenants in or about the exercise of such rights and powers.

H Very nearly 13 years afterwards, by a deed dated Apr. 9, 1936, in consideration of the payment of £50, the Wilson Syndicate, Ltd., conveyed to the plaintiff, amongst other things:

all and singular the clay lignite umber mines and minerals of every description lying and being in or under the premises first described in the schedule hereto (with the exception of the dwelling-house and ornamental gardens) together with all necessary powers rights and easements for searching for winning working and carrying away the same by underground working only proper compensation being

paid to the said Guy Shorrocks for all damage by subsidence or otherwise caused to the surface or the buildings thereon by the workings of the said Henry John Wilson or his successors in title or assigns or his or their lessees or tenants in or about the exercise of such rights and powers.

In other words, by that deed the plaintiff acquired from the vendors to the defendant the clay, lignite, umber, mines and minerals excepted from the grant made by the deed of May 31, 1923.

The plaintiff on June 10, 1938, issued the originating summons now before me for the purpose of determining :

Whether the plaintiff as the successor in title to the Wilson Syndicate, Ltd., and his (the plaintiff's) assigns are entitled to enter and remain upon the property known as Sandford Orleigh in the county of Devon (other than the dwelling-house and ornamental gardens situate thereon) for the under-mentioned purposes namely (a) to make the necessary borings from the surface for the purpose of searching for clays and minerals under the said property (b) to sink shafts from the surface necessary to win and work by underground workings the clays and minerals under the said property and to let down the surface (c) to use the said surface for the purpose of raising winning and carrying away the clays and minerals abstracted from the said property (d) to do all other necessary acts on the surface of the said property which are incidental to the working of clays and minerals by underground workings and to the raising and carrying away of such clays and minerals.

All the rights which the plaintiff claims that he and his assigns are entitled to exercise are rights upon the surface of the property granted by the Wilson Syndicate, Ltd., to the defendant. The question whether he has the right in question depends upon the true construction of the deed of May 31, 1923, and in particular of the exception from the property thereby conveyed of the minerals and the reservation therein contained in favour of the Wilson Syndicate, Ltd.

It is not without importance, I think, to have in mind that the exception from the grant is not an exception merely of clay, or ball clay, or any particular mineral. It is an exception of all clay, lignite, umber, mines and minerals of every description. It is not without importance also to have in mind that sometimes the ball clay, which is very largely a matter that has been under discussion since the hearing began, lies close to the surface, and that one of the methods of extracting ball clay is the open method, or the method of quarrying which is exercised, and which evidently results in the destruction of the surface.

It is further desirable to have in mind a principle laid down by SIR GEORGE MELLISH, L.J., in *Hext v. Gill* (1), at p. 718 :

When an owner of both surface and minerals sells the surface and reserves the minerals, with power to get them, he ought, if he intends to have the power of destroying the surface in getting them, to frame his power in such language that the court may be able to say that such was clearly the intention of the parties.

The next matter to have in mind is that, by the grant, what the defendant got was not merely the surface, but all the land down to the centre of the earth and up to the heavens except the mines. That that is what he got appears in a passage from the judgment of BOWEN, L.J., in *Pountney v. Clayton* (2), at p. 839.

With these preliminary observations, one has to consider the language of the deed. By the common law, the vendors—the Wilson Syndicate,

- Ltd.—having excepted from the grant they made to the defendant the minerals and mines and so forth, have, without any express exception, a right incidental to the property which is excepted—the right to get the minerals and to do all things necessary for the obtaining of them. That is established by the decision of the Court of Queen's Bench in *Cardigan* (Earl) v. *Armitage* (3). The exception in the present deed, however, is linked up with an express reservation—a reservation of the right of the vendors to use all necessary powers, rights and easements for searching for, winning, working and carrying away the minerals of every description by underground working only, and at the outset it is necessary, I think, to determine whether the express powers, rights and easements reserved control and restrict the powers incidental at common law to the right or property excepted from the grant, or whether those powers, rights and easements are in addition to the powers incidental to the excepted property at common law.
- In my judgment, the determination of that question depends upon determining the limits of the reserved powers, rights and easements. Are the reserved powers, rights and easements limited and confined to operations to be carried out underground, or do they enable the grantor who reserved the powers, rights and easements to go upon the surface for the purpose of exercising underground those powers, rights and easements?

- After the discussion that has taken place, and after having looked at the various precedents to which my attention has been called by Mr. Bowen, who has argued the case on behalf of the defendant, I have no doubt about that. The powers, rights and easements which are reserved to the vendor expressly by the deed are powers, rights and easements which he can exercise underground only, and he has no right to go upon the surface for the purpose of exercising any of those powers or rights or enjoying the easements.
- It was suggested that the reservation of the easements necessarily involved the right of the plaintiff to go upon the surface, because it was said, and truly said, that the reservation of an easement required the existence of a dominant and a servient tenement, that the dominant tenement here to which the easement was appurtenant was the mine, and that the only possible servient tenement was the surface. That argument, however, seems to me to be fallacious, because it fails to recognise that it was not merely the plane surface which was granted by the deed to the defendant, but all the land, barren land underground as well as the surface, which passed to the defendant by the grant. The barren land underground can be for the purposes of the easement, in my judgment, the servient tenement. One is not compelled, as Mr. Burt, for the plaintiff, urged that the court was compelled, to construe the reservation as giving a right over the surface to the grantor because of the use of the word "easements" in the reservation. Every power, every right, every easement in the reservation—that is to say, the right of

searching for minerals, the right of winning the minerals, the right of working the minerals, the right of carrying away the minerals—is by underground working only.

Having arrived at that construction, so far as the express reservation is concerned, as a matter of construction of the deed as a whole, is it possible to hold that the wider common law right incidental to the minerals A excepted can stand, or is it a case in which you must restrict, because of the narrower interpretation of the express power, the incidental common law power? As a matter of construction, it was urged upon me that the case was covered by *Cardigan (Earl) v. Armitage* (3), to which I have already referred. However, when one examines *Cardigan (Earl) v. B Armitage* (3), it is seen that the express power was not restrictive of the implied incidental power. It enlarged the implied incidental power, and it was for that reason that the court held, as it did in *Stukeley v. Butler* (4), that the two powers could exist side by side. To my way of thinking, it is reasonably plain, when one finds that the express power C is restrictive of the implied common law power, that it must have been the intention of the parties that the grantor should be restricted in the rights he had reserved to himself to their exercise by underground working.

That conclusion upon the construction of the deed enables an answer D to be given to all the questions which are asked by the originating summons. Speaking for myself, I do not regard it as altogether a convenient way of getting matters in dispute between parties decided. It is always difficult when there are certain matters of construction in the air, but there is no difficulty in deciding, in the view I take of the E meaning of this deed, the questions that are asked. The plaintiff has none of the rights which by the summons he asks the court to say he has, because all of them are rights which he can exercise only by going upon the surface, and, in my judgment, the deed gives him no right to enter upon the surface for any purpose at all. Accordingly, I dismiss the F summons with costs.

Solicitors : *J. R. Welch, Son & Algar*, agents for *James Mason*, Newton Abbot (for the plaintiff) ; *Gibbs, White & King*, agents for *Michelmores & Davies*, Sidmouth (for the defendant).

[Reported by W. K. SCRIVENER and T. A. DILLON, ESQS., Barristers-at-Law.] G

ATTORNEY-GENERAL v. GLYN, MILLS & CO.

[KING'S BENCH DIVISION (Lawrence, J.), June 16, 17, July 8, 1938.]

Estate and Other Death Duties—Succession duty—Succession—Private Act of Parliament avoiding restraint upon alienation—Whether succession destroyed—Succession Duty Act, 1853 (c. 51), ss. 2, 12, 15.

A Under a settlement of 1888, out of property brought into settlement by cousins of the deceased, the deceased was given a life interest subject to forfeiture in the event of alienation, and, subject thereto, the settled property was entailed in tail male in the usual form. In 1918, the entail was barred and the settled property made subject to the joint appointment of the deceased and his eldest son. At the same time, the settled property was resettled, the material clause of the resettlement

B being that the eldest son was given a power to charge the settled property with the payment after the death of the deceased of any sum not exceeding £50,000 free of death duties, such charge not to take effect unless the eldest son survived the deceased. By a private Act, passed in 1921, it was provided that the above power to charge might be exercised during the lifetime of the deceased, and, notwithstanding the provision for forfeiture in the event of alienation, the deceased might release his

C life interest in any sum so charged. The Act also contained a general saving to His Majesty of all estate, right, title, interest, claims or demands. In 1923 and 1925, by three charges the sum of £50,000 was raised. The eldest son died on July 30, 1930. The deceased died on Oct. 3, 1932, and, this date being more than three years after the £50,000 had been raised, there was no claim to estate duty in respect thereof. The Crown

D claimed succession duty in respect of the £50,000 under the Succession Duty Act, 1853, ss. 2, 12, 15 upon a succession by the eldest son to the settlers in the 1888 settlement:—

E HELD: (i) the resettlement in 1918 was a disposition by the eldest son within the Succession Duty Act, 1853, s. 12, and the private Act of 1921 did not dispose of the property, but left the parties free to determine whether or not they would exercise their powers of disposition under the resettlement, the Act only being necessary to enable the deceased to alienate his interest. By joining in the raising of the charges, the deceased had accelerated the title of the eldest son by surrendering *pro tanto*, within the meaning of the Succession Duty Act, 1853, s. 15, his life interest.

F (ii) The Crown clearly had a claim to succession duty before the Act of 1921 was passed, and the Act saved every claim on the part of the Crown upon the settled property, including the liability to succession duty.

G [EDITORIAL NOTE. The question here is whether the charges were raised by virtue of the powers of the parties themselves under the resettlement, or whether they were raised by virtue of the private Act of Parliament. The view is taken that the private Act was only necessary in order to obviate the difficulty due to the restraint upon alienation placed upon the deceased's life interest by the settlement, and it is therefore held that the private Act did not get rid of the succession.

H AS TO WHAT CONSTITUTES A SUCCESSION, see HALSBURY, Hailsham Edn., Vol. 13, pp. 349, 350, para. 383; and FOR CASES, see DIGEST, Vol. 21, pp. 84-89, Nos. 601-651. FOR SUCCESSION DUTY ACT, 1853, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 8, p. 53.]

Cases referred to:

- (1) *Braybrooke (Lord) v. A.-G.* (1861), 9 H.L. Cas. 150; 21 Digest 94, 694; 31 L.J.Ex. 177; 4 L.T. 218; *varying* (1860), 5 H. & N. 488.
- (2) *Lord Advocate v. Jamieson* (1886), 13 R. (Ct. of Sess.) 737; 21 Digest 85, case *f*.

(3) *Northumberland (Duke) v. A.-G.*, [1905] A.C. 406; 21 Digest 84, 602; 74 L.J.K.B. 734; 93 L.T. 88; *affg.*, [1904] 1 K.B. 762.

INFORMATION seeking to recover succession duty claimed upon the death of the late fourth Baron Wolverton in respect of a sum of £50,000 raised and paid in his lifetime to his now deceased son, George Glyn, as below-mentioned.

By an indenture dated Dec. 31, 1888 (hereinafter called the 1888 settlement), five cousins of the deceased, the fourth Baron Wolverton, assigned to the trustees thereunder certain personal property representing the estate of the second Baron Wolverton, upon trust after the death of the second Baron Wolverton's wife and subject to certain prior dispositions now immaterial to invest that personal property in the purchase of freehold hereditaments to be settled to the use of the deceased during his life (but subject to a provision for forfeiture in the event of alienation) with remainder to the use of his first and every other son successively in tail male and divers remainders over, and the 1888 settlement contained a direction that, until the purchase of such hereditaments, the income arising from the settled land should (subject to the prior dispositions) be applied as if the same were rents and profits arising from the hereditaments thereby directed to be purchased. By a disentailing deed, dated Dec. 30, 1918, George Glyn, the eldest son of the deceased, with the consent of the deceased as the protector of the 1888 settlement, conveyed and assigned the freehold hereditaments and investments then constituting the settled property to one Edward Arthur Bonnor Maurice, subject to the existing life estate of the deceased but discharged from the estate in tail male of the said George Glyn, and all subsequent estates, to hold the same to such uses or upon such trusts as the deceased and George Glyn should by deed jointly appoint, and subject thereto to the use of or in trust for George Glyn absolutely. By an indenture, dated Dec. 31, 1918 (hereinafter called the resettlement), the deceased and George Glyn in exercise of their joint power of appointment under the disentailing deed appointed that subject to the existing life estate of the deceased the freehold hereditaments comprised in the settled property should go to such uses as they should by deed jointly appoint and in default of and subject to such appointment (and subject to a term of 1,000 years which is not now material) to the use of George Glyn for life with remainders over and the deceased and George Glyn and Edward Arthur Bonnor Maurice thereby assigned the investments comprised in the settled property subject to the prior interests therein during the life of the deceased and to the powers and charges therein mentioned as to a part thereof upon trust for George Glyn absolutely if he should survive the deceased and subject thereto upon the trusts and with and subject to the powers and provisions upon with and subject to which capital money arising under the Settled Land Act, 1882, from the freehold premises thereby settled would be held and so as to be primarily liable to be invested in the purchase of freehold hereditaments in fee simple

to be conveyed and settled in like manner as the freehold premises thereby settled. By cl. 9 of the resettlement George Glyn was empowered to charge the settled property with the payment after the death of the deceased of any sum not exceeding £50,000 free of death duties provided that any such charge should not take effect unless George Glyn survived the deceased. By the Wolverton Estate Act, 1921, it was *inter alia* provided by cl. 4 that, notwithstanding the proviso contained in cl. 9 of the resettlement, it should be lawful for George Glyn, with the consent of the deceased, to exercise the power of charging so that any charge made thereunder should take effect after the death of the deceased whether or not George Glyn should survive the deceased, and that, notwithstanding the provision for forfeiture in the event of alienation contained in the 1888 settlement, it should be lawful for the deceased to release his life interest in any sum so charged so as to enable the said sum to be raised and paid during the lifetime of the deceased. Clause 14 of the Act contained a general saving to His Majesty of all such estate right title interest claim and demand of in to or out of or upon the settled property as he had before the passing of the Act or would could or might have had if the Act had not been passed. By an indenture dated Nov. 29, 1923, George Glyn, in exercise of the power conferred upon him by cl. 9 of the resettlement as extended by cl. 4 of the Wolverton Estate Act, 1921, charged the settled property with the sum of £12,000 free of death duties for his own absolute benefit, irrespective of whether or not he survived the deceased. By an indenture dated Nov. 30, 1923, the deceased released his life interest in the settled property to the extent of the sum of £12,000, and shortly afterwards the sum of £12,000 was raised by the trustees of the 1888 settlement out of personal property in their hands as part of the settled property, and was paid by them to or by the direction of George Glyn. By an indenture dated Nov. 4, 1925, George Glyn in exercise of the power charged the settled property with the further sums of £17,000 and £21,000 free of death duties for his own absolute benefit irrespective of whether or not he survived the deceased. By an indenture dated Nov. 5, 1925, the deceased released his life interest in the settled property to the extent of the sums of £17,000 and £21,000, and shortly afterwards the sums of £17,000 and £21,000 were raised by the trustees of the 1888 settlement out of personal property in their hands as part of the settled property, and were paid by them to or by the direction of George Glyn, who died on July 30, 1930. The deceased died on Oct. 3, 1932, a date more than 3 years after the sums of £12,000, £17,000 and £21,000 (making in all the above-mentioned sum of £50,000) were raised and paid to or by the direction of George Glyn, and no estate duty became payable upon the death of the deceased in respect of the said sums.

In the foregoing circumstances, a claim was made for succession duty at the rate appropriate to the relationship of George Glyn to the five cousins of the deceased as being payable upon the death of the deceased

in respect of the sum of £50,000 under the Succession Duty Act, 1853, ss. 2, 12, 15, as a succession taken by him under the dispositions contained in the 1888 settlement and the resettlement as effectuated by the respective charges and accelerated by the respective releases. No estate duty having been paid in respect of the sum of £50,000 upon the death of the deceased, the appropriate rate of duty was $11\frac{1}{2}$ per cent. A by virtue of the Succession Duty Act, 1853, s. 10, the Customs and Inland Revenue Act, 1888, s. 21 (1), and the Finance (1909-10) Act, 1910, s. 58.

The Attorney-General (Sir Donald Somervell, K.C.) and J. H. Stamp B
for the appellant.

A. M. Latter, K.C., and J. H. Bowe for the respondents.

LAWRENCE, J. : In this case, the Attorney-General claims succession duty upon the death of the fourth Lord Wolverton in respect of a sum of £50,000 raised and paid in his lifetime to his now deceased son, C Mr. George Glyn. The main question to be decided is whether the Wolverton Estate Act, 1921, prevents the attraction of succession duty.

It was argued on behalf of the Crown, on the authority of *Braybrooke (Lord) v. A.-G.* (1), that, as under the disentailing deed of Dec. 30, 1918, and the resettlement of Dec. 31, 1918, Lord Wolverton and Mr. George D Glyn had a joint power of appointment over the settled property, subject to Lord Wolverton's life estate, the charges created by the deeds of 1923 and 1925 respectively were dispositions made by Mr. George Glyn within sect. 12 of the Succession Duty Act, and that under sect. 15 E thereof the duty was payable on the death of Lord Wolverton, who, it was argued, had surrendered *pro tanto* his prior life interest. It was further argued that the Wolverton Estate Act, 1921, had not affected the matter, because, under their joint power of appointment, Lord F Wolverton and Mr. Glyn could do what they wished with the reversion, apart from the Act, and that, as regards Lord Wolverton's life interest, that was no part of the succession, and therefore the fact that the Act enabled Lord Wolverton to alienate his interest was irrelevant. Lastly, it was argued that, as Mr. Glyn was entitled to the reversion by virtue of the dispositions before the Act of 1921, the saving provisions of sect. 14 of that Act preserved the right of the Crown to succession duty. The G defendants relied principally upon the authority of *Lord Advocate v. Jamieson* (2), and contended that the sums raised by Mr. Glyn in the present case no more form part of a succession under a disposition within the meaning of the Succession Duty Act than did the sums authorised by Act of Parliament to be paid to Lord Belhaven and Mr. Ramsay in H that case.

In my opinion, the Crown is entitled to the succession duty claimed. *Lord Advocate v. Jamieson* (2) is distinguishable on the ground that the sums directed to be paid by the Act in that case formed no part of the succession, and would never have been payable apart from the Act (see

per Lord President INGLIS, at p. 742), whereas in the present case the sum of £50,000 is part of the succession, and could have been raised upon the settled property apart from the Act of 1921 after the life estate of Lord Wolverton. In the first place, I am of opinion that the original settlement of 1888 created a succession to which Mr. George Glyn was the

A successor, and the settlors were predecessors, and that, in accordance with the *dictum* of the EARL OF HALSBURY, L.C., in *Northumberland (Duke) v. A.-G.* (3), at p. 409, that succession having once been established, no act of the parties could afterwards get rid of it. I am further of the

B opinion, in accordance with the view of the majority of the House of Lords in *Braybrooke (Lord) v. A.-G.* (1), that the deeds of Dec. 30 and Dec. 31, 1918, respectively, were dispositions made by Mr. George Glyn within the meaning of sect. 12 of the Succession Duty Act, and that succession duty would, therefore, have been payable under that section on the death of Lord Wolverton, apart from the Act of 1921. Does the

C Act of 1921, then, in enabling the parties to accelerate Mr. George Glyn's title to the succession, get rid of the succession? In my view, it does not. It did not dispose of the property. It merely altered the powers of the parties, leaving it to them to exercise those powers or not, as they pleased. They were so pleased, and, in executing the deeds of 1923 and

D 1925 respectively, I hold that Lord Wolverton accelerated the title of Mr. George Glyn by surrendering his life interest *pro tanto* within the meaning of sect. 15 of the Succession Duty Act. I am further of opinion that cl. 14 of the Act of 1921 saves to His Majesty every claim upon the settled property which he might have had if the Act had not been passed,

E and I think it is clear that His Majesty had a claim to succession duty upon the settled property if the Act of 1921 had not been passed. Accordingly I make the declaration prayed, and direct that an account should be taken.

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *Bircham & Co.* (for the respondents).

F

[Reported by W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

Re FOSTER, HUDSON *v.* FOSTER (No. 2).

[CHANCERY DIVISION (Crossman, J.), July 8, 15, 1938.]

Insurance—Policy taken out by father on life of son—Proceeds held to belong to father's estate—Premiums after death of father paid by or on behalf of son—Premiums paid under common mistake as to right to policy moneys—Lien.

In Nov., 1908, a father took out a policy of insurance upon the life of his son, the policy moneys to be payable on the death of the son on or after his twenty-first birthday. The father died on July 25, 1925, having up to that time paid all the premiums accruing due upon the policy. The son attained 21 years of age on Sept. 26, 1916. After the death of the father, all premiums were paid either by the son or upon his behalf. The son died on June 2, 1936, and it was held that the policy moneys belonged to the estate of the father. In 1932, the son became of unsound mind, and an order was made by the master in lunacy ordering the premiums due on the policy to be paid by the receiver of the son's estate, the order also stating that the policy was part of the absolute property of the son. It was found as a fact that all parties concerned acted at all times under the mistaken belief that the policy belonged to the son, and the payment of premiums by the son and by the receiver was made on that basis :—

HELD : the personal representative of the son was entitled to a charge on the policy moneys for the premiums paid by him or on his behalf.

[EDITORIAL NOTE. The well-known decision of FRY, L.J., in *Re Leslie, Leslie v. French* (1) sets out four cases in which there can be a lien upon policy moneys for premiums paid by a stranger or by a part-owner of the policy. It was stated in *Strutt v. Tippet* (4), that the list given in *Re Leslie* (1) was not exhaustive. The present case, though the decision is based upon a statement in the judgment of FRY, L.J., in *Re Leslie* (1), confirms this statement, and would appear to add a fifth case to the four set out in the headnote to *Re Leslie* (1).

AS TO LIEN ON POLICY MONEYS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 531, 532, para. 843 ; and FOR CASES, see DIGEST, Vol. 29, pp. 383-387, Nos. 3065-3090.]

Cases referred to :

- (1) *Re Leslie, Leslie v. French* (1883), 23 Ch.D. 552 ; 29 Digest 383, 3066 ; 52 L.J.Ch. 762 ; 48 L.T. 564.
- (2) *Re Tyler, Ex p. Official Receiver*, [1907] 1 K.B. 865 ; 29 Digest 385, 3083 ; 76 L.J.K.B. 541 ; 97 L.T. 30.
- (3) *Angullia v. Estate & Trust Agencies* (1927), Ltd., [1938] 3 All E.R. 106 ; Digest Supp.
- (4) *Strutt v. Tippet* (1889), 62 L.T. 475 ; 29 Digest 384, 3078.
- (5) *Re Jones' Settlement, Stunt v. Jones*, [1915] 1 Ch. 373 ; 29 Digest 385, 3082 ; 84 L.J.Ch. 406 ; 112 L.T. 1067.
- (6) *Ramsden v. Dyson* (1866), L.R. 1 H.L. 129 ; 32 Digest 259, 437 ; *reversg.* S.C. *sub nom.* *Thornton v. Ramsden* (1864), 4 Giff. 519.
- (7) *Re Stokes, Ex p. Mellish*, [1919] 2 K.B. 256 ; 29 Digest 386, 3086 ; 88 L.J.K.B. 794 ; 121 L.T. 391.
- (8) *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234 ; 29 Digest 383, 3069 ; 56 L.J.Ch. 707 ; 56 L.T. 220.
- (9) *Re Smith's Estate, Bilham v. Smith*, [1937] Ch. 636 ; [1937] 3 All E.R. 472 ; Digest Supp. ; 106 L.J.Ch. 377 ; 157 L.T. 511.

ORIGINATING SUMMONS to determine, in the first place, whether the estate of the father or that of the son was entitled to the proceeds of an

insurance policy. This question was determined in favour of the father's estate, and the decision thereon is reported at p. 357, *ante*. The personal representative of the son then claimed that he was entitled to a lien upon the proceeds of the policy in respect of the premiums paid since the death of the father by or on behalf of the son.

A *J. Leonard Stone* for the plaintiff.

Roger W. Turnbull for the defendants.

Stone : The premiums were paid by the son, in a belief of the validity of his own title. In view of the court's decision, that turns out to have been incorrect. In the circumstances, it becomes material to inquire

B whether or not the father's executors had knowledge of, or in any way acquiesced in, what was done. The other son, Cecil, was an executor under the father's will, and he was also a trustee of the son's settlement. The other executor is affected with notice or knowledge in a more startling way, because he swore an affidavit on the appointment of a receiver of the son's affairs. On that affidavit, the receiver paid the premiums under an order of the court. Of the 11 premiums, totalling £790 12s. 6d., four were paid by the receiver. This policy has been created by the payment of premiums under a mistake common to everybody concerned, and the least that could be done would be to recoup the son's estate. [Counsel referred to *Re Leslie* (1), *Re Tyler, Ex p. Official Receiver* (2) and *Angullia v. Estate & Trust Agencies* (1927), *Ltd.* (3).]

Turnbull : The question of payment of premiums on policies has often come before the courts, and *Re Leslie* (1) has concluded the matter. To recover, it is necessary to find two elements. There must be a

E standing by and allowing, on the one hand, and a mistaken belief, on the other. It does not matter what the owner believes, so long as there is not guilty knowledge. If some one, unknown to the owner, goes and improves property, that person can have no right at all to a lien on the property. I do not know why the judge, in *Leslie's* case (1),

F restricted his remarks to policies. It is an application of the principle of the general law, and applies to all kinds of property. Subject to the proof of the facts, I do not feel able to dispute the right of the son's executors to recover out of the policy moneys an amount equal to the premiums paid by the receiver. The premiums paid by the son are in

G a very different position, and, on behalf of the father's executors, it is my duty to resist the claim to the repayment of those premiums, or of any part of them. Both parties were, at all material times, under the mistaken belief that the policy belonged to the son. Since the father's executors thought that the policy belonged to the son, there could be

H no question of standing by or of acquiescence or of allowing, or anything of that sort. This is not a case in which there can be a lien for repayment. It is sought to enlarge the classes referred to in the judgment in *Re Leslie* (1), and to add a fifth class. That is to say, it is sought to add a class consisting of persons who are entitled to recover them because they have been paid under a mistake, either of fact or of law,

common to both parties. There is no justification for such a submission, and there is no authority to support it. If that contention is right, it must follow that there would equally be a right to recover in case of a unilateral mistake. Where there is mutual mistake, there is nothing done by the owner to induce the payment. There has been no active step or acquiescence. Therefore, the principle of unilateral mistake must be applied. It is not only policies which would be affected. *Re Leslie* (1) is a case which has stood the test of time, and the correctness of the decision has been consistently recognised. The classes of cases enumerated by FRY, L.J., in that judgment, to render applicable the principle of lien, are complete and exhaustive. [Counsel referred to *Strutt v. Tippet* (4), *Re Jones' Settlement*, *Stunt v. Jones* (5), *Ramsden v. Dyson* (6), *Re Stokes, Ex p. Mellish* (7), *Falcke v. Scottish Imperial Insurance Co.* (8) and *Re Smith's Estate, Bilham v. Smith* (9).]

Stone, in reply.

CROSSMAN, J. : In addition to the facts which I stated in my judgment on the first question, I find that the mortgage of May 20, 1928, contains the usual covenant to keep up the policy. This covenant is entered into by the son with Cecil Geoffrey Foster—who is called Cecil Foster in the mortgage, and is one of the proving executors of the will and codicil of the father—and the plaintiff, Walter Shelton Hudson, who were the mortgagees under that mortgage. I also find that on May 9, 1932, the master in lunacy made an order in the matter of the son, ordering among other things that the policy in question was to be kept on foot. This order was made on the application of Gerald Robert Foster, one of the proving executors of the will and codicil of the father, and on reading an affidavit of Gerald Robert Foster sworn on Feb. 6, 1932, in which it was stated that the policy was part of the absolute property of the son, and held by the trustees of the son's settlement as security for £4,017 19s. 9d. owing by him to them. Pursuant to an order of May 9, 1932, the receiver appointed by the order paid four premiums of £71 17s. 6d. each year on the policy. Those are the additional facts which I think are material.

I have been referred to *Re Leslie, Leslie v. French* (1), in which the headnote is as follows :

When a person, not the sole beneficial owner, pays the premiums to keep up a policy of life insurance, he is entitled to a lien on the policy or its proceeds in the following cases : (1.) By contract with the beneficial owner ; (2.) By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation ; (3.) By subrogation to their right of some person who, at the request of the trustees, has advanced money for the preservation of the property ; (4.) By reason of the right of a mortgagee to add to his charge any money paid by him to preserve the property. In no other cases can a lien on a policy for premiums paid be acquired either by a stranger or by a part owner of the policy.

Counsel for the legal personal representative of the son disputes the correctness of the concluding sentence of that headnote, and contends that certain passages in the judgment, at pp. 564, 565, of the report,

show that there is a fifth case in which a lien can be acquired—namely, when the person who pays the premium does so in the belief that he is the owner of the policy. The following passage in the written judgment of FRY, L.J., which was adopted by PEARSON, J., appears at p. 564:

- A It has been further argued that the plaintiff is entitled to a lien, on the ground of the acquiescence of the other persons interested in the policy in the payments made by Mr. Leslie, and it is said that when one person allows another to expend money upon his property, and stands by during such expenditure, a lien is created in favour of the person making the expenditure. But it is certain that no such lien is created, except in the case of a person who makes the payment under a belief in the validity of his own title. In the present case there is nothing whatever to show that Mr. Leslie acted under any mistake with regard to his rights in the policy, and it is certain that during a considerable part of the period covered by his payments he was in possession of the opinion of counsel as to his legal rights.

The next paragraph is not relevant for this purpose. Then comes this paragraph (at p. 565):

- C In my judgment the arguments of the plaintiff in support of his lien fail, and I conclude that, from the time of the marriage down to the year 1863, Mr. Leslie made the payments in question in maintenance of his own right in the policy, and that from 1863 he made the payments in pursuance of his covenant with his daughter's trustees, but that in no case did he make them by reason of any contract between himself and his wife, or by reason of any mistake as to his title to the policy, and consequently that he is entitled to no lien on the policy moneys as against her.

- D I find as a fact in the present case that, on the evidence, all parties concerned acted in the mistaken belief that the son was the owner of the policy. Counsel for the father's personal representative contends that the passages which I have read do not show what counsel for the son's personal representative contends that they show, but show only that
- E the lien can be acquired when the person who pays the premium does so in the belief that he is the owner of the policy, and the true owner of the policy, knowing that he himself is the true owner, allows this to be done. In my judgment, this latter contention is right.

- F Counsel for the personal representative of the father, though not in a position to consent to anything, stated that he could not argue that the premiums paid by the receiver were not recoverable by the son's personal representative. These premiums were paid under an order of the master in lunacy which was made on the application of Gerald Robert Foster. The latter made the application as the brother of the son, but
- G he was in fact one of the legal personal representatives of the father, who was the true owner of the policy. It is said that the premiums paid by the son himself are in a different position. Counsel for the personal representative of the son says the same with regard to the earlier premiums by reason of the covenant to keep up the policy made
- H by the son in the mortgage of May 20, 1930, with the mortgagees, one of the latter being in fact one of the personal representatives of the father. I am not satisfied that either the fact that Gerald Robert Foster, who made the application on which the order of the master in lunacy of May 9, 1932, was made, happened to be one of the personal representatives of the father, or the fact that Cecil Geoffrey Foster, who was one

of the trustees of the settlement of May 11, 1935, with whom the covenant in the mortgage of May 20, 1928, to keep up the policy was made, happened to be one of the personal representatives of the father is sufficient by itself to decide the question which I have to determine. In my judgment, the material circumstance is that all parties concerned acted at all times under the mistaken belief that the policy belonged to the son, and everything material that was done, including the payment of the premiums by the son and the payment of the premiums by the receiver, was done on that basis. I find that in effect all the payments were made by the son and the receiver in accordance with an implied arrangement between all parties, and, in these circumstances, I hold that the personal representative of the son is entitled to a charge on the policy moneys for the premiums paid by the son as well as for the premiums paid pursuant to the order of the master in lunacy. A

I ought to mention that Mr. Stone put forward another argument, in support of his contention that the money belonged to the son's personal representative, based on *Re Tyler, Ex p. Official Receiver* (2). He contended that an executor—the executor of the father in this case—is in the same position as that of the Official Receiver in *Re Tyler* (2), and that the father's personal representative ought to be ordered to do what is fair and equitable and repay the premiums. I think, however, that an executor is not in the same position as that of the Official Receiver; he is not an officer of the court in the same way as the Official Receiver is. I do not think that I can order the father's personal representative to repay the premiums because I think that it is a fair thing to do unless I can find, as in fact I have found, that he is bound to do so. In the circumstances, I do not think it is necessary for me to consider the argument any further, because I have already sufficiently found in favour of Mr. Stone's contention. B

Solicitors: *Sweepstone, Stone, Barber & Ellis*, agents for *Ford & Warren*, Leeds (for the plaintiff); *Speechly, Mumford & Craig*, agents for *Mumford, Thompson & Bird*, Bradford (for the defendants). C

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.] D

I do not think that I can order the father's personal representative to repay the premiums because I think that it is a fair thing to do unless I can find, as in fact I have found, that he is bound to do so. In the circumstances, I do not think it is necessary for me to consider the argument any further, because I have already sufficiently found in favour of Mr. Stone's contention. E

R. v. BOURNE.

[CENTRAL CRIMINAL COURT (Macnaghten, J.), July 18, 19, 1938.]

Criminal Law—Abortion—By surgeon—Danger to life—Pregnancy of young girl due to rape—Offences against the Person Act, 1861 (c. 100), s. 58.

A A young girl, not quite 15 years of age, was pregnant as the result of rape. A surgeon, of the highest skill, openly, in one of the London hospitals, without fee performed the operation of abortion. He was charged under the Offences against the Person Act, 1861, s. 58, with unlawfully procuring the abortion of the girl.

B The jury were directed that it was for the prosecution to prove beyond reasonable doubt that the operation was not performed in good faith for the purpose only of preserving the life of the girl. The surgeon had not got to wait until the patient was in peril of immediate death, but it was his duty to perform the operation if, on reasonable grounds and with adequate knowledge, he was of opinion that the probable consequence of the continuance of the pregnancy would be to make the patient a physical and mental wreck.

C **[EDITORIAL NOTE.]** As the accused was found not guilty, the statement as to the law in this matter is in the form of the direction to the jury. The judge carefully distinguishes between danger to life and danger to health, and between the act of the professional abortionist and an operation openly performed by a qualified surgeon. The case is one of first impression, and is, therefore, the only statement of the law as to the duties of a surgeon in such cases.

D AS TO ABORTION, see HALSBURY, Hailsham Edn., Vol. 9, pp. 458-460, paras. 783-785; and FOR CASES, see DIGEST, Vol. 15, pp. 836-838, Nos. 9190-9205.]

E TRIAL OF AN INDICTMENT WITH A JURY. The defendant was charged under the Offences against the Person Act, 1861, s. 58, that he unlawfully procured the abortion of a girl aged about 15 years. The facts are fully stated in the summing up.

The Attorney-General (Sir Donald Somervell, K.C.), L. A. Byrne and H. Elam for the Crown.

Roland Oliver, K.C., and Gerald Thesiger for the defendant.

F MACNAGHTEN, J.: Members of the jury, now that you have heard all the evidence and the speeches of counsel, it becomes my duty to sum up the case to you and to give you the necessary directions in law, and then it will be for you to consider the facts in relation to the law as laid down by me, and, after consideration, to deliver your verdict. You no doubt are aware that, under our system for the administration of justice, in a trial by jury it is for the judge to give directions to the jury upon matters of law, and it is for the jury to determine the facts. The jury, and the jury alone, are the judges of the facts in the case.

H The charge against Mr. Bourne is the very grave charge under the Offences against the Person Act, 1861, s. 58, that he unlawfully procured the abortion of the girl who was the first witness in the case. It is so grave a crime that the punishment may be penal servitude for life. It is one of those crimes, like murder, which is only triable by the judges of the High Court, and, judging by the cases that come before the court,

it is a crime by no means uncommon. This is the second case at these July sessions at this court where a charge of an offence against that section has been preferred, and I mention that case only to show you how different the case now before you is from the type of case which usually comes before a criminal court. In that case, a woman without any medical skill or any medical qualifications did what is alleged against Mr. Bourne here: she unlawfully used an instrument for the purpose of procuring the miscarriage of a pregnant girl. She did it for money. £2 5s. was her fee, and she came from a distance to a place in London to do it. £1 had to be paid to make the appointment. She came, she used her instrument, and, within an interval of time measured not by minutes but by seconds, the victim of her malpractice was dead on the floor. She was paid the rest of her fee and she went away. That is the class of case that usually comes before the court. The case here is very different. A man of the highest skill, openly, in one of our great hospitals, performs the operation. Whether it was legal or illegal you will have to determine, but he performs the operation as an act of charity, without fee or reward, and unquestionably believing that he was doing the right thing, and that he ought, in the performance of his duty as a member of a profession devoted to the alleviation of human suffering, to do it. That is the case that you have to try to-day.

It is, I think, true that it is a case of first instance, first impression. So far as I know, the matter has never arisen before a jury for them to determine in circumstances such as these, and there was, it seems, even amongst counsel some doubt as to what was the proper expression of the law in such a case as this. So, yesterday, in response to a request by Mr. Oliver, I indicated to you my view of the law. You will take the law from me. If I err in stating to you what the law is, and if you find the accused guilty, there is a Court of Criminal Appeal which will put the matter right. I have had an opportunity of reading the direction that I gave you yesterday, and I see no reason to alter or to modify it at all. The question that you have got to determine is whether the Crown has proved to your satisfaction beyond reasonable doubt that the act which Mr. Bourne admittedly did was not done in good faith for the purpose only of preserving the life of the girl. If the Crown has failed to satisfy you of that, Mr. Bourne is entitled, by the law of this land, to a verdict of acquittal. On the other hand, if you are satisfied beyond all real doubt that Mr. Bourne did not do it in good faith for the purpose only of preserving the life of the girl, your verdict should be a verdict of guilty.

There has been much discussion before you as to the meaning of the words "preserving the life of the mother." I will deal with that in a moment, but, before doing so, I desire to say that I fully agree with the criticism of Mr. Oliver that the Infant Life (Preservation) Act, 1929, is dealing with the case—indeed, I think I explained it to you yesterday—where the child is killed while it is being delivered from the body of

the mother. It provides that no one is to be found guilty of the offence created by the Act—namely, “child destruction”—unless it is proved that :

... the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.

- A Those words express what, in my view, has always been the law with regard to the procuring of an abortion, and, although not expressed in sect. 58 of the Act of 1861, they are implied by the word “unlawful” in that section. No person ought to be convicted under sect. 58 of the Act of 1861 unless the jury are satisfied the act was not done in good faith for the purpose only of preserving the life of the mother. My view is that it has always been the law that the Crown have got to prove the offence beyond reasonable doubt, and it has always been the law that, on a charge of procuring abortion, the Crown have got to prove that the act was not done in good faith for the purpose of preserving the life of the mother. It is said—and, I think, rightly—that this is a case of great importance to the public, and more especially to the medical profession, but you will observe that it has nothing to do with the ordinary cases of procuring abortion to which I have already referred. In those cases, the operation is performed by a person of no skill, with no medical qualifications, and there is no pretence that it is done for the preservation of the mother’s life. Cases of that sort are in no way affected by the consideration of the question that is put before you. In the ordinary cases, no question of that sort can arise. It is obvious that that defence could not be available to the professional abortionist.
- E As I say, you have heard a great deal of discussion as to the difference between danger to life and danger to health. It may be that you are more fortunate than I am, but I confess that I have felt great difficulty in understanding what the discussion really meant. Life depends upon health, and it may be that health is so gravely impaired that death results. There was one question that was asked by the Attorney-General in the course of his cross-examination of Mr. Bourne, where the matter was put thus :

- G I suggest to you, Mr. Bourne, that there is a perfectly clear line—there may be border-line cases—there is a clear line of distinction between danger to health and danger to life ?

- H That is the question that the Attorney-General put, and he assumes that it is so. Is it ? Of course there are maladies that are a danger to health without being a danger to life. Rheumatism, I suppose, is not a danger to life, but a danger to health. Cancer is plainly a danger to life. But is there a perfectly clear line of distinction between danger to life and danger to health ? I should have thought not. I should have thought that impairment of health might reach a stage where it was a danger to life. The answer of Mr. Bourne was :

I cannot agree without qualifying it. I cannot say just yes or no. I can say there is a large group whose health may be damaged, but whose life almost certainly

will not be sacrificed. There is another group at the other end whose life will be definitely in very great danger.

Then he added :

There is a large body of material between those two extremes in which it is not really possible to say how far life will be in danger, but we find, of course, that the health is depressed to such an extent that their life is shortened, such as in cardiac cases, so that you may say that their life is in danger, because death might occur within measurable distance of the time of their labour. A

He is speaking of a case such as this. If that is a view which commends itself to you, so that you cannot say that there is this division into two separate classes with a dividing line between them, then it may be that you will accept the view that Mr. Oliver put forward when he invited you to give to the words "for the purpose of preserving the life of the mother" a wide and liberal view of their meaning. I would prefer the word "reasonable" to the words "wide and liberal." Take a reasonable view of the words "for the preservation of the life of the mother." I do not think that it is contended that those words mean merely for the preservation of the life of the mother from instant death. There are cases, we were told—and indeed I expect you know cases from your own experience—where it is reasonably certain that a woman will not be able to deliver the child with which she is pregnant. In such a case, where the doctor expects, basing his opinion upon the experience and knowledge of the profession, that the child cannot be delivered without the death of the mother, in those circumstances the doctor is entitled—and, indeed, it is his duty—to perform this operation with a view to saving the life of the mother, and in such a case it is obvious that the sooner the operation is performed the better. The law is not that the doctor has got to wait until the unfortunate woman is in peril of immediate death and then at the last moment snatch her from the jaws of death. He is not only entitled, but it is his duty, to perform the operation with a view to saving her life. B
C
D
E

Here let me diverge for one moment to touch upon a matter that has been mentioned to you—namely, the various views which are held by different people with regard to this operation. Apparently there is a great divergence of view even in the medical profession itself. Some there may be, for all I know, who hold the view that the fact that the woman desires the operation to be performed is a sufficient justification for it. That is not the law. The desire of a woman to be relieved of her pregnancy is no justification for performing the operation. On the other hand, no doubt there are people who, from what are said to be religious reasons, object to the operation being performed at all, in any circumstances. That is not the law either. On the contrary, a person who holds such an opinion ought not to be a doctor practising in that branch of medicine, for, if a case arose where the life of the woman could be saved by performing the operation and the doctor refused to perform it because of some religious opinion, and the woman died, he would be in grave peril of being brought before this court on a charge of man- F
G
H

slaughter by negligence. He would have no better defence than would a person who, again for some religious reason, refused to call in a doctor to attend his child, where a doctor could have been called in and the life of the child saved. If the father, for a so-called religious reason, refused to call in a doctor, he also would be answerable to the criminal law for the death of his child. I mention those two extreme cases merely to show that the law—whether or not you think it a reasonable law is immaterial—lies at any rate between those two. It does not permit of the termination of pregnancy except for the purpose of preserving the life of the mother. / As I have said, I think that those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who, in those circumstances, and in that honest belief, operates, is operating for the purpose of preserving the life of the woman. /

These general considerations have got to be applied to the particular facts of this case. The verdict of the jury must depend on the facts of the case proved before them. No doubt—and I think the evidence now makes it clear—it is very undesirable that a young girl should be delivered of a child. Parliament has recently raised the age of marriage for a girl from 12 to 16, presumably on the view that it is very undesirable that a girl under the age of 16 should marry and have a child. The medical evidence given here establishes that view. Apparently the pelvic bones are not set until a girl is 18, and it is an observation that appeals to one's common sense that it must be undesirable that a girl should go through the state of pregnancy, and, finally, of labour, when she is of tender years. Then, too, you must consider the evidence about the effect of rape, especially on a child, as this girl was, under the age of 15. Within the last ten days she has reached the age of 15. Here you have the evidence of Dr. Rees, a gentleman of eminence in the profession, that, from his experience and his knowledge, the mental effect produced by pregnancy brought about by the terrible rape which Dr. Gorsky described to you must be most prejudicial. You are the judges of the facts, and it is for you to say what weight you give to the testimony of the witnesses, but no doubt you will think it is only common sense that a girl who for 9 months has to carry in her body the reminder of the dreadful scene and then go through the pangs of childbirth must suffer great mental anguish, unless, indeed, she is a girl of a very exceptional character, such as a feeble-minded girl, or one belonging to the class described as "the prostitute class," some girl "marked cross from the womb and perverse." In the case of an ordinary decent girl, brought up in an ordinary decent way, you may well think that Dr. Rees was not over-stating the effect on her mind of giving birth to her child. So far as danger to life is concerned, you cannot, of course, be certain of the

result unless you wait until a person is dead. Nobody suggests that the operation only becomes legal when a patient is dead. The case was mentioned of a person suffering from acute appendicitis, and the circumstances that would justify the surgeon in performing the operation for the removal of the appendix. Take the case of a child suffering from symptoms which the doctor diagnoses as appendicitis. The symptoms subside, and the doctor says: "The symptoms have subsided, and the child will probably get quite well, but at the same time I am not sure that they have definitely subsided, and to-morrow the child may be much worse." The doctor says to the parents: "If you will let me operate to-day, I can guarantee the life of your child. The operation can be performed, and can be performed with perfect safety. If, however, the child gets worse, and the appendicitis becomes acute, I may have to operate, and I will have to operate then in such circumstances that I cannot guarantee the life of the child. I will do my best, but the child may die." Supposing that choice is put to a parent: "Will you have the operation to-day or will you wait until to-morrow to see if the operation becomes immediately necessary?" What man or woman can answer the question except by saying: "Do it, and do it now. Do it while it is still safe to do it. Do not wait to see whether she is near death." When the operation is performed, it may be found that the appendix is not inflamed, and that the diagnosis was mistaken, but is the surgeon to blame for performing the operation? He used his best judgment. There you have a case where only the result can prove whether the diagnosis was right or wrong, whether the anticipation was right or wrong. In the case that we are considering—that of the danger to the child—the doctor or the surgeon who has to decide the matter can only base his opinion on knowledge and experience, and, if he in good faith thinks that it is necessary for the purpose of preserving the life of the girl, in the circumstances that I have explained to you, then not only is he entitled to perform the operation but it is also his duty to do so. With regard to any other operation on the human body, obviously no difficulty arises. The surgeon is justified in cutting off an arm or a leg, or taking out an eye, if, in his honest opinion, he thinks it is desirable to do so for the sake of the patient's health. The difficulty that arises in the case of abortion is that by the operation the potential life of the unborn child is destroyed. The law of this land has always held human life to be sacred, and the protection that the law gives to human life it extends also to the unborn child in the womb. The unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother.

I do not think it is necessary for me to recapitulate the evidence that has been given before you with regard to the reasons why Mr. Bourne in this case thought it right to perform the operation. He has given his evidence, and the Attorney-General accepts his evidence as a frank

- statement of what actually passed through his mind. In view of the age of the girl and the fact that she had been raped with great violence, he thought that the operation ought to be performed. As I told you yesterday, and as I tell you to-day, the question that you have got to determine is not whether you are satisfied that he did it in good faith
- A** for the purpose of preserving the life of the girl. The question is whether the Crown have proved the negative of that. Have the Crown proved that he did not remove the pregnancy of this girl in good faith for the purpose of preserving her life? That is the question you have got to answer when you come to consider the facts. If the Crown have satisfied
- B** you beyond reasonable doubt—if there is a doubt, by our law the accused is always entitled to be acquitted—that he did not do this act in good faith for the purpose of preserving the life of the girl, then he is guilty of the offence with which he is charged. If the Crown have failed to satisfy you of that, then by the law of England he is entitled to a verdict of
- C** acquittal. The case is a grave case, and no doubt raises matters of grave concern both to the medical profession and to the public. As I said at the beginning of my summing up, it does not touch the case of the professional abortionist. As far as the members of the medical profession themselves are concerned—and they alone could properly
- D** perform such an operation—we may hope and expect that none of them would ever lend themselves to the malpractices of professional abortionists. As Mr. Bourne said, in cases of this sort no doctor would venture to act except after consulting some other member of the profession of high standing, so as to confirm his view that the circumstances were such
- E** that an operation ought to be performed and that the act was legal.

Solicitors: *The Director of Public Prosecutions* (for the Crown); *Le Brasseur & Oakley* (for the defendant).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

F

Re MAVILLE HOSE, LTD.

[CHANCERY DIVISION (Simonds, J.), July 12, 1938.]

- G** *Companies—Winding up—Voluntary winding up—Examination of persons—Order to produce books—Procedure to contest validity of order—Discretion of court to order production—Oppressive exercise of discretion—Companies Act, 1929 (c. 23), s. 214.*
- H** A company issued two debentures to an associated company to secure £2,000 and £4,000 respectively. The associated company had guaranteed certain payments which might become due from the first company. Subsequently the first company went into liquidation, and an order was made by the registrar upon the application of the liquidator for the attendance for examination of one of the directors of the associated company. The order, which was made under the Companies Act, 1929, s. 214, went on to order the director at the same time to produce the bank books of the company and all statements of account and all docu-

ments showing a loan by the associated company or relating to the circumstances of the issue of the debentures :—

HELD : (i) the proper way to contest the validity of that part of the order which ordered the production of documents was to move the court to discharge it, and not to attend and refuse production of the documents.

(ii) in so far as the order ordered the production of books and documents, it was, in the circumstances of this case, oppressive, and a wrong exercise of the discretion of the court under the Companies Act, 1929, s. 214 (3). A

[EDITORIAL NOTE. The first point raises a question of procedure. The alternatives are (i) a motion to discharge the order of the registrar, or (ii) to attend and, at the examinee's peril, refuse production, when he might possibly be subject to committal or attachment. It is held that the examinee ought not to be exposed to this risk, and that a motion to discharge is the correct procedure to test the validity of the order. The further question as to the production of the documents is decided purely upon the circumstances of the present case, but it seems clear that any such order ought not to be made until the examinee has been questioned and a *prima facie* case thereby established as to the necessity for the inspection of such documents by the liquidator. B

AS TO EXAMINATION OF PERSONS IN WINDING UP, see HALSBURY, Hailsham Edn., Vol. 5, pp. 637-641, paras. 1054-1060; and FOR CASES, see DIGEST, Vol. 10, pp. 891-900, Nos. 6066-6149.] C

MOTION to discharge an order made by the registrar on the application of the liquidator of Maville Hose, Ltd. Maville Hose, Ltd., passed a resolution for voluntary winding up on Mar. 7, 1938. It was alleged that Croft Mill Twist Co., Ltd., an associated company, had advanced £2,000 and £4,000 on the security of two debentures issued by Maville Hose, Ltd., in Sept., 1931, and Jan., 1932. In Jan., 1932, Croft Mill Twist Co., Ltd., gave a guarantee of moneys which might become due from Maville Hose, Ltd. Robinson, a director of Croft Mill Twist Co., Ltd., was ordered to attend the registrar's chambers to be examined and to produce certain books. Particulars of the books to be produced are set out in the judgment. The order was made under the Companies Act, 1929, s. 214, and the court was moved to discharge it as being oppressive and not a proper exercise of the discretion given to the court by the section. D

Roger Turnbull for the applicant. E

J. B. Lindon for the liquidator. F

SIMONDS, J. : In the liquidation of Maville Hose, Ltd., the registrar has made an order, to which I shall presently refer, under the Companies Act, 1929, s. 214, which provides as follows : G

(1) The court may, at any time after the appointment of a provisional liquidator or the making of a winding-up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs, or property of the company. H

(2) The court may examine him on oath concerning the matters aforesaid, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(3) The court may require him to produce any books and papers in his custody or power relating to the company, but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien, and the court shall have jurisdiction in the winding up to determine all questions relating to that lien.

A The registrar has, as I say, made an order under the section, and it is an order which is based on a statement made by the liquidator, a statement which is not revealed to the party against whom an order is sought, but is, of course, a statement made in the utmost good faith by the liquidator of the company. The order in the case is made against Robinson, a director of Croft Mill Twist Co., Ltd. It is plain on the face B of the order that the object of the liquidator in seeking to examine Robinson under this section is to obtain information and, if necessary, to test the validity of a debenture or debentures of the company held by the Croft Mill Twist Co., Ltd. In these circumstances, the registrar has made an order by which Robinson, described as a director of the C Croft Mill Twist Co., Ltd., is ordered to attend at chambers on a certain day to be examined on behalf of the liquidator under sect. 214 of the Act. Against that part of the order no criticism is directed here. It is clear that, when an order for examination is made under sect. 214, the proper course for the proposed examinee, if he objects in any way to the order, is to attend, and to refuse to answer any questions which he D thinks he ought not to be asked. The matter of his refusal can, if thought fit, be referred by the registrar to the court. The order proceeds :

... and the said Geoffrey Robinson is hereby required to bring with him and produce, at the time and place aforesaid, the documents mentioned in the schedule hereto, and all other books, papers, deeds, writings, and other documents in his E custody or power in anywise relating to the above-named company.

Then the schedule contains a list of documents : (i) a debenture to secure £2,000, dated Sept. 24, 1931 ; (ii) a second debenture, which is described ; (iii) a guarantee given by Maville Hose, Ltd., to the Croft Mill Twist Co., Ltd., then :

F The bank pass book or bank statements of Croft Mill Twist Co., Ltd., or any other document showing the payment of any moneys advanced to Maville Hose, Ltd., by way of loan, in respect of which the above-mentioned debentures were issued. All documents showing the state of account between Croft Mill Twist Co., Ltd., and Radford Manufacturing Co. G.m.b.H. of Chemnitz. All documents showing or relating to the circumstances of the issue and giving by Maville Hose, Ltd., of the debentures and guarantee above-mentioned.

G To that part of the order exception is taken by Robinson, who moves the court that the order shall be discharged or varied in so far only as it relates to the requisition to produce the documents which I have mentioned. The objection is based on two main grounds : (i) that the H documents are not documents in the custody or power of Robinson within the meaning of the section ; and (ii) that, in any event, the order is oppressive, and is one that ought not to have been made in the exercise of the discretion of the court under subsect. (3). To that the liquidator answers that the procedure adopted by the applicant is wrong, and that he ought not to move the court to discharge the order, but

ought to attend before the registrar, and, if he thinks fit, refuse to produce the documents. The liquidator further says that that order has been properly made in the exercise of the jurisdiction.

The correct procedure, where a proposed examinee is ordered to attend, is for him to attend, and to refuse to answer questions which he thinks ought not to be asked. In my opinion, however, it is not right A that the examinee should be left with no other course than that of attending before the court and refusing to produce documents he has been ordered to produce. He ought not to be put in peril of a finding by the court that he has refused to obey a proper order of the court. In effect, counsel on behalf of the liquidator has said: "If you think B the order is not a proper order, you can disobey it, but you do so at your peril." That cannot be the right course. It seems to me that the right course for the proposed examinee is to come to the court and ask that the order should be discharged so far as he claims that it is an improper order. I cannot think that, where there is an order made C against him to produce certain books and do certain things, he should refuse to obey the order, and, if the court finds it was a proper order which he ought to have obeyed, risk committal or attachment for disobeying the order. His proper course is to test, here and now, the validity of the order. I think, therefore, that the applicant is right in D coming to the court to have the order, if it be an improper one, discharged.

In my view, he is right in claiming that this is an order which ought not to have been made under the Companies Act, 1929, s. 214 (3). I do not propose in this case to determine the question, which may well E be of some difficulty, whether a director of a company either in general or in any particular case can be said to have in his custody or power documents which belong to the company of which he is a director. I can see that there is a good deal to be said for and against that proposition, and I do not propose to discuss it. I think that, in the exercise of the F discretion which the court has under this section, an order directing a proposed examinee to bring a large number of documents before the court should not, in the special circumstances of the case, be made. I have considered the statement of facts on which the registrar made his order, and I do not think that he properly exercised his discretion in G directing the proposed examinee to bring all these documents before the court—at any rate, at this stage of the proceedings. I say "at this stage of the proceedings," because it may well be that, when the examinee attends before the registrar, it will be right and proper, upon certain answers being given by the examinee, for the registrar to direct that H certain documents should be produced. That cannot be determined until it is ascertained what answers the examinee gives, what answers he refuses to give, and whether he is sustained in his objection to answer these questions, it may be, by the court. It appears to me that there are numerous questions to be determined before it can be decided that a

company against which a hostile claim is made shall be ordered to produce to the court, for the purpose of their examination by the court, a number of documents, a great number of which may be privileged from discovery. It is very important in exercising the jurisdiction under sect. 214—which is, in any case, an inquisitorial jurisdiction—to be careful not to allow the section to be oppressive as between the company, on the one hand, and a third party, on the other hand, against whom it is proposed, and indeed contemplated, that hostile action may be taken. Therefore, in the exercise of my discretion in this case, and having read the statement on which the order was made, I shall discharge that part of the order which requires Robinson to bring with him the reports and documents which are referred to in the schedule to the order. In saying this, I prejudge neither what questions he may lawfully refuse to answer nor what documents may, on his answers, properly be ordered to be produced. The liquidator must pay to the applicant his costs of this application.

Solicitors : *Peacock & Goddard*, agents for *Elliot, Smith & Co.*, Mansfield (for the applicant); *Ashurst, Morris, Crisp & Co.*, agents for *Taylor, Simpson & Mosley*, Derby (for the liquidator).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

WOODING v. MONMOUTHSHIRE AND SOUTH WALES MUTUAL INDEMNITY SOCIETY, LTD.

JAMES v. SAME.

HAWKINS v. SAME.

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), July 4, 5, 6, 28, 1938.]

Workmen's Compensation—Insolvency of employer—Liability of insurers to workman—Mutual indemnity society—Non-payment of calls—Workmen's Compensation Act, 1925 (c. 84), s. 7.

A mutual indemnity society, by the terms of its memorandum and articles of association, protected a colliery company against its liabilities under the Workmen's Compensation Act in respect of all workmen who had not contracted out of the Act. Originally the arrangement was that for the first 18 months after any accident the company in effect met all payments due to the injured workman, but upon the expiration of that period the liability in respect of each injured workman was to be actuarially assessed, and a call for such sum was then made upon the company. The 18 months' indemnity period above referred to was later altered to 5 years. A receiver of the company was appointed by debenture holders, and an injured workman thereupon claimed compensation from the indemnity society under the Workmen's Compensation Act, 1925, s. 7. The society repudiated this claim, on the ground that the calls from time to time made upon the company in respect of the injured workman had not been paid at the date of the appointment of the receiver, which was found to be the fact:—

HELD: (i) during the indemnity period there was no contract of insurance.

(ii) in respect of the later period there was a contract of insurance.

(iii) (SLESSER, L.J., dissenting) the calls not having been paid, there was no subsisting contract of insurance at the date of the appointment of the receiver, and therefore the indemnity company were under no liability to the injured workman under the Workmen's Compensation Act, 1925, s. 7.

[EDITORIAL NOTE.] The difference of view in this case is one of considerable general importance, although the terms of the contract here in question and the facts are somewhat complicated. The real question at issue is whether a contract to insure all the workmen of a company in respect of liability under the Workmen's Compensation Act is several or collective as regards each individual workman injured. In other words, if it is found that, in calculating the premium payable, the case of a particular workman has been omitted, are the insurers in a position to refuse indemnity, or is their only remedy that of suing for the difference in premium? By a majority, the court appear to have decided in favour of severability, but the complicated nature of the facts and the contract here in question makes the exact basis of the decision a little obscure.

AS TO LIABILITY OF INSURERS ON INSOLVENCY OF EMPLOYER, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 191, 192, para. 423; and FOR CASES, see DIGEST, Vol. 29, pp. 406-408, Nos. 3204-3213. See also WILLIS'S WORKMEN'S COMPENSATION, 31st. Edn., pp. 204-214.]

Cases referred to :

- (1) *Pailin v. Northern Employers' Mutual Indemnity Co.*, [1925] 2 K.B. 73; 29 Digest 407, 3210; 133 L.T. 77; 18 B.W.C.C. 32.
- (2) *Prudential Insurance Co. v. Inland Revenue Comrs.*, [1904] 2 K.B. 658; 29 Digest 443, 3415; 73 L.J.K.B. 734; 91 L.T. 520.
- (3) *Daff v. Midland Colliery Owners' Mutual Indemnity Co.* (1913), 82 L.J.K.B. 1340; 29 Digest 407, 3206; 109 L.T. 418; 6 B.W.C.C. 799.
- (4) *Lysons v. Knowles (Andrew) & Sons, Ltd.*, *Stuart v. Nixon & Bruce*, [1901] A.C. 79; 34 Digest 423, 3433; 70 L.J.K.B. 170; 84 L.T. 65; 3 W.C.C. 1; *revsg.*, [1900] 1 Q.B. 780; and *revsg.*, [1900] 2 Q.B. 95.
- (5) *Ball v. Hunt (William) & Sons, Ltd.*, [1912] A.C. 496; 34 Digest 395, 3228; 81 L.J.K.B. 782; 106 L.T. 911; 5 B.W.C.C. 459.

APPEAL from an award of His Honour JUDGE THOMAS at the Tredegar County Court dated Jan. 20, 1938. The facts of the case are fully set out in the judgments.

Hon. Sir Stafford Cripps, K.C., Gilbert J. Paull and A. L. Macmillan for the appellants, the workmen.

H. Wynn Parry, K.C., and J. P. Ashworth for the respondents, the indemnity society.

GREER, L.J. : I have read the judgment prepared by MACKINNON, L.J., and agree with his conclusion in favour of the respondents, for the reasons he states. I can state my own view quite shortly. With regard to the two cases of Wooding and James, who were injured in 1923, it seems to me quite clear that on Dec. 31, 1927, a premium was due from the employers, the Ebbw Vale Steel, Coal and Iron Co., Ltd., to the Monmouthshire and South Wales Mutual Indemnity Society, Ltd., and that they failed to pay it. Accordingly, these two men were after that date uninsured by their employers. Whether the two plaintiffs were in fact doing light work at their old wages or were not, seems to me

immaterial, as their employers were under a liability towards them which might mature at any moment by reason of a declaration of liability by the county court. Having failed to pay the premium due under the articles of association of the indemnity society, the employers were unable to say at the date of the appointment of the receiver that these two men were

- A insured, inasmuch as they had for years been in default with regard to the payment of the premium. The same is true with regard to the third plaintiff, Hawkins, though with regard to him, his accident having happened in 1929, the abstention from paying the premium had not continued for so many years as it had in the case of the other two men.
- B I desire to add one further observation. It may well be that the agreement between the indemnity society and the Ebbw Vale Co. never became a true insurance until their credit balance was added to the common fund. Until that was done, the insurance, so far as regarded the Ebbw Vale Co.'s workmen, was not a true insurance, but only an
- C agreement by the Indemnity Society to pay on behalf of the employers the exact amount the employers were liable to pay to their workpeople. For these reasons it seems to me to be sufficient to say that I agree that the appeals should be dismissed in all three cases.

- D SLESSER, L.J. : The claims of the workmen in these appeals arise under the Workmen's Compensation Act, 1925, s. 7, which, so far as it is here material, is to the following effect :

- (1) Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then, in the event of . . . a receiver . . . of the company's business . . . having been duly appointed . . . the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to . . . the winding up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer. . . .

- The three workmen appellants in these cases were all employed by a
- F company called the Ebbw Vale Steel, Iron and Coal Co., Ltd., and all sustained accidents while in that employment, the particulars of which I shall consider hereafter. On Oct. 21, 1936, a receiver of the Ebbw Vale Co. was appointed, and thereafter proceedings were brought by the workmen against the respondent indemnity society claiming compensation from them upon the ground that the Ebbw Vale Co. had entered
- G into a contract of insurance with them as insurers, and that, consequently, on the receiver having been appointed, the rights of the Ebbw Vale Co. against the insurers were by the above section transferred to and vested in the workmen.

- H The first question which arose in the county court was whether the Ebbw Vale Co. had entered into a contract of insurance with the respondent society with respect to a liability under the Act to the workman. The county court judge, in a reserved judgment, came to the conclusion that the position of the respondents was not that of insurers, and that they were no more than agents of the Ebbw Vale Co. to meet

their liabilities to the appellants. In arriving at this conclusion, he purported to follow the decision of this court in *Pailin v. Northern Employers' Mutual Indemnity Co.* (1). In that case it was held that the effect of the articles of indemnity which were there contained in the terms of the contract between the employers and the indemnity company was only to require the indemnity company to pay out to the employer A such sums as stood to the credit of the member of the indemnity company for that purpose, with a right to require the employer to replenish his fund when it was exhausted, and that, as such sums as were advanced by the indemnity company to the workmen had to be refunded to them by the employers, the contract between the colliery company and the B indemnity company was not one of insurance. I am of opinion that, when the articles in the present case are considered, they differ materially from those in *Pailin's* case (1), and have the effect of indemnifying the employers against risks out of a general fund, and are, therefore, properly to be taken to be terms of a contract of insurance. C

To explain why I think that the county court judge was wrong in his view, it is necessary to consider the articles of association in this case, which, as I have said, constitute the terms of the contract, in some detail. They were framed originally on June 24, 1898, and provide for the protection of members against "ordinary" and "extraordinary" D accidents. The ordinary accident, which is the present case, is defined as an accident which results in the death or injury of less than three persons ordinarily employed underground, and, in the case of such ordinary accidents, the financial machinery for insurance differs from that provided in the case of accidents called extraordinary. E These articles were subsequently amended, but the judge appears to have taken the view, in the first place, that their original form, as applied as a term of a contract with an employer, did not constitute a contract of insurance, and I deal with them upon that unamended basis first. F Whilst and whenever any mine is entered in the register of protected mines as protected against ordinary accidents, the society is to indemnify the member against the payment of any compensation under the Workmen's Compensation Act (art. 35 (a) (1)). There is then constituted an ordinary accident account (art. 35 (f)), and the directors may make calls upon the members protected with regard to such accidents as shall G occur in a particular financial year. Before its expiration, the directors are to make what are called provisional calls in respect of that year of such amount as shall in their opinion be at least sufficient adequately to provide moneys required to indemnify the member paying the sum against all compensation and damages payable by such member in H respect of accidents (art. 35 (e)).

The sums so obtained by the provisional calls within the period of eighteen months commencing at the beginning of a particular year to be credited to a separate account, called the "ordinary accident account," are to be applied, first, to the payment of all sums payable during the

- eighteen months in respect of ordinary accidents occurring during the particular year. Each member is to have a separate ordinary accident account, the sums paid by him in respect of the provisional calls being credited to such account in respect of the particular year, and there is to be debited to such account the amount paid by the society on behalf
- A of the member during the eighteen months (art. 35 (f)). Similar provisions exist as to re-insurance, which it is not necessary here to consider. Next, after the expiration of the eighteen months, the aggregate number of workmen in respect of whom compensation shall still be payable by each member protected in respect of ordinary accidents which occurred
- B during the particular year, and also the compensation still payable, are to be ascertained, and the directors are to assess on an actuarial basis the aggregate amount which may thereafter become payable by each member, and are to make a call (the permanent fund call) on each member protected in respect of the particular year of the amount found by the
- C assessment. Thereafter the ordinary accident account of each member for the particular year is to be closed and the balance struck (art. 35 (g)). Any member whose ordinary accident account shows a debit is to pay the sum to the society to be placed to the credit of the society's ordinary accident account for the particular year. If the ordinary accident
- D account of any member shows a credit, the amount shall be applied in paying on behalf of the member the amount of his permanent fund call and the balance, if any, shall be refunded to the member. The moneys obtained by the permanent fund call are paid into a fund (the permanent accident fund) to be applied first to the payment of moneys payable
- E by the society (except such moneys as shall be payable out of the ordinary accident fund of any particular year) and in providing for the liabilities of the society in respect of such moneys and the administrative expenses and refund and bonuses (art. 35 (h)).

- It is thus true that, down to the time when the ordinary accident
- F account of each member is struck and the consequent adjustments made, the member himself ultimately pays the cost of his own compensation payments, and to this extent, if the matter ended there, the case would resemble that of *Pailin* (1), where, as SCRUTTON, L.J., points out at p. 86 :

- ... compensation ... [was] paid out of an ordinary accident fund, composed in the first
- G instance of calls from each member, but as to which each member was obliged, if required, to pay up to the fund the sums which the fund had paid on his account. An account was kept for each member, credited with his calls, debited with sums paid in respect of his accidents, and if it became in debit a special call was made on him to make up the deficiency.

- The county court judge has, however, overlooked the fact that thereafter
- H the moneys are to be paid into a fund of the society and placed to the credit of the society's ordinary accident account as a whole. Whether, therefore, thereafter the liability of an individual member will or will not exceed the amount which he pays to the society, which may properly be regarded as in the nature of premium, the risk is taken by the society and the relation is truly one of insurance, though it is to be met in the

first place by the contributions of the individual member, and not out of a standard rate of contribution assessable on all members. It is, nevertheless, a contract whereby, for consideration, the employers secure to themselves some benefit—the payment of a sum of money upon the happening of an uncertain event (*per* CHANNELL, J., in *Prudential Insurance Co. v. Inland Revenue Commissioners* (2)). The only other material provision on this matter is contained in art. 35 (i), which provides that, after the expiration of five years from the commencement of each particular year, the society is to cause a further actuarial estimate of its total outstanding liabilities in respect of ordinary accidents which occurred during the particular year, and shall ascertain the amounts already paid prior to the expiration of such period out of the permanent accident fund, and, if the aggregate of the permanent fund calls after deduction of amounts paid exceed the total liability of the society as estimated, the excess may be refunded to the members protected in respect of ordinary accidents in certain proportions, and, if the aggregate of the permanent fund calls paid shall fall short of the total of the liabilities, adjusting calls may be made on the members in respect of the particular year, the amount of the refund or call bearing the proportion to the aggregate calls that the amount of the permanent fund calls bears to the aggregate permanent fund calls paid by the members in respect of the particular year. This provision and a subsequent provision for bonuses do not affect the true character of the contract, which, at any rate, after the eighteen months have elapsed, for the reasons I have stated, becomes truly one of insurance.

The amendments which were subsequently made by the respondent society do not affect the nature of the contract. By resolution dated Apr. 12, 1927, among other matters, art. 35 (which dealt with mutual insurance against ordinary accidents) is deleted, and a new article substituted therefor. I shall consider hereafter how far this amendment affects the rights of the parties in this present case. In any event, it is to be observed that the liability of the member to carry his own accidents for eighteen months disappears, and in lieu thereof the amount of the outstanding liability of members is first to be assessed after the expiration of five years, and thereafter, subject to adjustments, the moneys obtained by the financial calls are credited to the ordinary accident fund of the society, and the observations I have made as to the existence of a contract of insurance after eighteen months apply equally to its incidents after five years. On Dec. 19, 1932, yet other articles were adopted in substitution for, and to the exclusion of, all existing articles (except as therein mentioned) as from Jan. 1, 1933, and among those so mentioned by cl. 11 as continuing transitional provisions is art. 35 of the existing articles of association—that is to say, art. 35 as amended on Apr. 12, 1927, which, it is said, is to continue where necessary to have effect and bind the society and every member. These amendments, therefore, cannot, on any view, affect the nature of the contract which

I have held to be one of insurance, but only postpone the insurable nature of the contract from eighteen months to five years.

- At this stage it becomes necessary to consider the particular cases of the three workmen appellants, in order to adjudicate upon other arguments which are relied upon by the respondents. In the case of David
- A Wooding, it appears that he met with his accident on Aug. 24, 1923, and, in consequence, was paid 35s. per week from the date of the accident until Jan. 28, 1928. Thereafter, however, sometimes doing light work, he received wages at his old rate, and did not therefore obtain compensation during those periods, which were ten in number. At all other
- B times he was unable to work at all, but at no time was he physically fit for anything more than light work. On May 19, 1928, within five years after the accident, the respondent society sent to the employers a letter in the following terms :

1923 Cases.

- C Dear Sirs, I beg to enclose a statement showing the list of cases of accidents and industrial diseases which occurred at your collieries and works during the 12 months to Dec. 31, 1923, and which were outstanding and in which compensation was being paid as on Dec. 31, 1927. You are probably aware that under the terms of the society's articles of association all future liabilities arising from these accidents are now taken over by the society. Before making the final financial adjustments in regard thereto, I should be much obliged if you will kindly confirm whether these cases agree with your records of outstanding cases. I am to add
- D that the figures shown as to the outstanding liability arising from these accidents have been assessed on the basis of the Post Office Annuity Tables, and that cases on full compensation have been dealt with on the actual amount of weekly compensation paid, and cases on light work on the actual partial compensation when such payments have exceeded 10s. per week and on a minimum of 10s. per week when payments have been less than 10s. ; excepting cases which have been settled since Dec. 31, 1927, when the outstanding liability has been assessed for the actual
- E payments paid since that date. Kindly sign the enclosure when returning it to me. A formal statement, embodying this assessment, will be sent to you at a later date, setting forth your company's position relative to the whole of your accidents which arose during the 12 months to Dec. 31, 1923, together with any further observations which it may be deemed necessary to make in regard to the matter.

- F The list included that of D. J. Wooding, of whom the compensation was, on Dec. 31, 1927, said to be 35s. weekly, and the actuarial valuation on the Post Office Annuity Tables £1,221. Shortly after that date, namely, after Jan. 28, 1928, Wooding, in fact, was on light work at full pay, and was not receiving compensation, and the employers deleted his name
- G and that of other men not then receiving compensation from the list and returned it thus amended to the society, the effect of which deletions was to reduce the valuations from £13,139 to £9,223.

On July 31, 1928, the society wrote to the employers as follows :

Ordinary Accident Accounts for the year 1923.

- H Gentlemen, I have to give you notice that pursuant to art. 35 of the society's articles the directors have assessed your outstanding liability in respect of ordinary accidents which occurred at your protected works during the year 1923 at £9,223, and have by resolution of their board made a final call upon you of that amount payable to the ordinary accident fund. The directors have also pursuant to the said article caused your ordinary accident account with the company for the year 1923 to be closed and a balance struck, and such account shows a balance to your credit of £6,406 17s. 9d. which has been applied pursuant to such article towards payment of the final call of £9,223 made upon you as mentioned above, leaving a

balance payable by you of £2,816 2s. 3d. This balance is by the terms of the directors' resolution making a call payable by you as follows: On Aug. 31, 1926 £—; on Feb. 28, 1930, £2,816 2s. 3d. Payment is to be made to the society at their offices at 5, Park Place, Cardiff, and failure to pay the said call or any instalment thereof on the due date above mentioned will render you liable to be charged with interest on the amount which you are in default at such rate as the directors may determine. I am further instructed to inform you that whilst the directors considered it their duty to assess the outstanding liability of the members protected against ordinary accidents which occurred during 1923 upon the basis of the usual annuity tables, and to make a final call of corresponding amount on the members in respect thereof they are taking and will continue to take all possible steps to settle such outstanding liabilities on a more favourable basis and hope to be able to do so with the credit balances shown on the closing of the members' 1923 accounts and the instalment of the first call payable on Aug. 31, 1928.

Their calculation was based upon the £9,223 I have just mentioned. There was enclosed an account showing a balance of £2,816 2s. 3d. which was to be paid by the employers, which was less than it would have been had Wooding been included.

On this, five distinguishable arguments have been addressed to the court by the respondents, the first of which has found favour with the majority of this court. It is rightly pointed out that, for the appellants to succeed, it is necessary for them to show that on Oct. 21, 1936, the employers could have claimed the compensation they were liable to pay to the workmen as an indemnity from the respondents, for the appellants can be in no better position than were the employers, and it is said such a claim would not lie.

As I understand the contract between the employers and the respondents, its terms are to be ascertained from the memorandum and articles of association, and those terms provide that every member whose mines are protected against ordinary accidents must furnish to the society for entry in the register of protected mines particulars of the whole number of workmen employed, except such as have contracted out. A breach of this clause disentitles them to protection (art. 5 (c)). The protection is as regards all the men not contracted out employed in the mine and applies so long as a member has his mine entered in the register (art. 35 (a) (1)), and, subject to specific provisions, it would then appear that the obligation to indemnify a member against the payment of compensation to all his workmen in the protected mine is complete. I will assume that, in fact, in the calls made upon the employers there were excluded from the calculations the particular cases of the appellants, so that the employers have not paid the full amount of their premiums; but, in my view, that fact alone would not have disentitled the claim of the employers, and so of the appellants, in Oct., 1936, for the reason that, apart from obligations as to default, the consideration is not several as regards each individual workman, but collective, covering all men employed in a protected mine, unless expressly excepted. In other words, assuming in this case the calculation of liability of employers to prove wrong by reason of omission of employers' liability, the remedy under the contract of the insurers would be to sue for the difference and not to refuse the indemnity.

This conclusion is strengthened by a consideration of the only provisions expressly dealing with the subject of default, that is, those in arts. 12 and 35 (*m*). Under the former the provision that, whenever a member is in default as regards the payment of any money due to the society, he shall not be entitled to any indemnity in respect of any accident is made subject to art. 35 (*m*), which is in the following terms :

Whenever a member protected under this article shall fail to pay any moneys due to the society within such reasonable time as the directors may from time to time prescribe for that purpose, he shall not while such default continues be entitled to any indemnity under this article in respect of the particular year or years in respect whereof he shall so be in default, save in so far as any moneys paid by him in respect of such year or years shall be sufficient after deduction of a due proportion (to be determined by the directors) of the administration and other expenses of the society to provide for such indemnity. The directors may apply any sums payable to a member by way of refund or bonus under sub-cll. (*h*), (*i*) or (*j*) of this article, in or towards satisfaction of the moneys in respect whereof the member shall so be in default and shall be entitled to recover the said moneys or the balance thereof by proceedings in any court of competent jurisdiction. Save as hereinbefore provided a member who ceases to be protected under this article by virtue of a determination by the directors under art. 10 (2) hereof shall have the same rights and be subject to the same liabilities as a member retiring under sub-cl. (*k*) of this article.

The provisions of that sub-clause, as amended in 1927, are substantially to the like effect :

Whenever a member protected under this article shall fail to pay any moneys payable by him to the society under this article in respect of any particular year within such reasonable time as the directors may in their discretion allow for such payment such member shall not whilst such default continues be entitled to any further indemnity under this article in respect of ordinary accidents which occurred at his mine or works during that year save in so far as any moneys standing to the credit of his account with the society in respect of that year shall be sufficient, after deduction of a due proportion (to be determined by the directors) of the administration and other general expenses of the society, to provide such indemnity. The directors may apply any sums payable to a member by way of refund or bonus under sub-cll. (*i*) or (*j*) of this article in or towards satisfaction of any moneys in respect whereof the member shall so be in default. Save as hereinbefore provided a member who ceases to be protected under this article by virtue of a determination by the directors under art. 10 (2) shall have the same rights and be subject to the same liabilities as a member withdrawing his mine or works from protection under sub-cl. (*k*) of this article.

These conditions, which contemplate default, disentitle the employer to indemnity in respect of the particular year he is in default generally, and, although they speak of "any moneys payable by the society," they do not limit the disability to any particular workman in respect of whom payments are said by the respondents to be in default. The provisions as to the payment of sums to a member by way of refund or bonus being made applicable in satisfaction of any moneys in respect whereof a member shall be in default further emphasise the collective nature of the article. The default is not as regards a particular workman, but a general insufficiency of payment. Moreover, the article only operates, on any interpretation, if the member fail to pay within such reasonable time as the directors may prescribe, and in the present case there is no evidence that the directors ever prescribed a period in respect of the appellants, so that the article never came into operation. In my judgment, therefore, failure to answer such amount of a call, or, to put it

in another way, to pay such fraction of the general premium as might have been paid if the appellants' cases had been included in the contemplated or actual calculations does not disentitle the employers to the general benefits of an indemnity spread over all the injured workmen in the protected mine, but only, under this very unusual contract, enables the insurers to recover from the employers any sum due outstanding, after crediting the employers with sums payable to a member by way of refund or bonus. **A**

Next it is said that the omission of Mr. Wooding's name on the inquiry constituted a variation of the original contract, which, in the articles, insured the member against payment of any compensation in respect of workmen resulting from accident in any mine. Of course, on sufficient evidence, there is no reason why it should not be held that the employer and the society had varied the terms of their particular contract, but I am quite unable to see how such an inference can be drawn from these communications. The society, who had the power under the amended articles (art. 35 (g)) after the expiration of five years to assess on an actuarial basis so far as practical, chose to select a particular date—namely, cases still on hand on Dec. 31, 1927—and asked the employer for a schedule of such cases. In the covering letter, which I have quoted, the statement is said to show the list of cases which were outstanding and in which compensation was being paid as on Dec. 31, 1927. Subsequently, in dealing with a later valuation, they asked that cases should be added wherein the workman "is engaged on light work but is not in receipt of partial compensation, for the reason that his present weekly wage is equal to or exceeds his pre-accident wage." Perhaps the answer to such latter question would provide a better basis for the actuarial estimate, but in any event, Wooding not being paid compensation on Dec. 31, 1927, though very shortly afterwards he was again being compensated, the employers did no more than truthfully answer the question that had been put to them. There is no reason, however, from this to assume any variation in their contract; nor do I think that the conduct of the parties justifies any inference of variation. I do not read the judge to have found any variation as a fact. **B**
C
D
E
F

The third argument is sought to be based upon estoppel. It is said that, relying on and in consequence of the answer which was a representation that Wooding was not insured, valuations were affected to the detriment of the respondent society, and that consequently the employers should have been precluded from denying that their contract had not been varied by the exclusion of Wooding, and that the workman can be in no better position than his employers under sect. 7, but, in so far as I am of opinion that the statement made by the employers was true, it follows that the doctrine that the representor must be prevented from not making his representations good can have no application. The county court judge has found against any estoppel. I think he was right, and the cross-appeal based on this argument must fail. **G**
H

The fourth argument by the respondents to be considered is a subtle one. It is said that, in so far as Wooding from time to time recovered sufficiently to do light work, and did not then receive compensation, on the assumption that the amended art. 35 of Apr. 12, 1927, applies, and particularly sub-cl. (b), any relapse must be taken to be a fresh accident, and that on this view Wooding had a partial accident in 1928, and that therefore, the liability for this further accident falling within the five years thereafter, the employer was during that period himself liable to bear his compensation, even though the contract as a whole be a contract of insurance, so that the especial liability for Wooding of the employer was not in respect of any liability insured against, because it was only after the five years that liability would fall upon the accident fund of the society and they would carry the risk. To this, Sir Stafford Cripps has two answers. In the first place, he relies upon the opinion of LORD DUNEDIN in *Daff's* case (3), at p. 814:

C the moment an accident happens . . . there is vested in the workman . . . a present claim of compensation . . . the indemnity is of the same character, vesting for once and for all time, so long as the claim exists. In other words, it is an indemnity to pay all claims in respect of the accident, not a series of indemnities against successive weekly payments as each fall due.

D It would, he argues, of course be possible to show that by alteration of the articles this claim, though vested in the workman, was no longer the subject of insurance, but Sir Stafford Cripps says that there cannot be found in the articles any provision that the right to existing vested insured claims, as in the original art. 35, is so altered. Art. 117 of the original articles, which was relied upon, provides that:

E The power to alter the regulations for the time being of the society, conferred by the Companies (Consolidation) Act, 1908, s. 13, is to extend to any and every alteration that may seem expedient and it is to be no objection to any such alteration that it affects the rights from time to time acquired hereunder, whether retrospectively or prospectively.

F This is no more, he contends rightly, than an enabling power. It yet remains for the respondent society to point to an alteration so made. The amendment by resolution of Apr. 12, 1927, is that art. 35 shall be deleted and a new article substituted therefor. It is silent as to the effect of the old art. 35 in regard to the rights already vested. It is true that in the resolution of Jan. 1, 1933 (cl. 6), the regulations are said to be in substitution for and to the exclusion of all the existing articles of association except as therein mentioned, but, as art. 35 of the articles of 1927 is expressly kept alive, if those articles have no effect upon the particular articles of 1928, the resolution of Jan. 1, 1933, does nothing to affect them.

H On the whole, I have come to the conclusion on this point that the final result is as Sir Stafford contends: that it is the original articles (which make no distinction between an original accident and a second one) which must be looked to, and not the amending art. 35 (b) of 1927. In this case, therefore, it would matter nothing whether Wooding, in the language of LORD DUNEDIN in *Daff's* case (3), made a series of claims

against successive payments as each fell due. The whole must be regarded as one indemnity. I think it right, however, assuming that this view is mistaken, on the assumption that the amended art. 35 (b) applies, to say that I have come to the conclusion that, even under this article, Wooding's case could not have been treated as a series of separate accidents each time he failed to work after a temporary bout at light A work, because of the language of that sub-clause. It is to the following effect :

Throughout this article "accident" includes the contracting of a disease entitling a workman to compensation under the Acts, and such accident shall be deemed to happen or occur at the time when the workman is first incapacitated or suspended by reason of such disease, but so that where such a disease recurs after the workman shall have ceased to be entitled to compensation the recurrence of such disease shall be deemed a fresh accident happening when the recurrence takes place. Similarly, where a workman wholly or partially incapacitated by an accident in the ordinary sense recovers and ceases to be entitled to compensation and such total or partial incapacity recurs so as to entitle him to compensation without his being involved in any fresh accident, such recurrence shall be deemed a fresh accident happening when the recurrence takes place. B C

In my view of the facts of this case, it is not possible to say that Wooding at any time "ceased to be entitled to compensation." In *Lysons v. Andrew Knowles & Sons, Ltd.* (4), it was pointed out that the right to compensation given by the Workmen's Compensation Act, 1896, s. 1, is not abrogated by the later sections which deal with the quantum of compensation. In the language of the EARL OF HALSBURY, L.C., at p. 85 : D

The language in which the right was given must be looked at, I think, with care to see whether the language was (as it appears in the first instance) intended in its universality, or was intended to be cut down, as is contended, to a very limited right by sections or phrases in the schedule. E

The right to compensation exists during incapacity, although in the circumstances of the moment no amount of compensation is actually payable, because the earnings equal the pre-accident earnings. On this view, which has been followed in many subsequent cases (see in particular *Ball v. Hunt* (5)), Wooding's rights to compensation, in respect of the fact that he was unable to do anything but light work, never ceased, though at particular times he was not entitled to receive particular sums, and therefore the respondent society were in error when, as it appears by re-registering his case, they treated it as a new accident. On any view, therefore, their case fails. F G

The case of James, who also met with his accident in 1923, is distinguishable from that of Wooding, in that the respondent society in their letter of Feb. 10, 1927, never included his case as one which arose during the six months to Dec. 31, 1923, and it was still on hand on Dec. 31, 1926. The request to add thereto "any other cases wherein the workman is engaged on light work but is not in receipt of partial compensation for the reason that his present weekly wage was equal to his pre-accident wage" was apparently not complied with by the employers. In his case also, he, being a man who was intermittently H

employed at light work, was treated by the society under art. 35 (b) as having sustained a series of accidents, being transferred from 1923 to 1928, and thereafter, apparently for the same reason, to 1932. All the conclusions which I have come to in the case of Wooding apply equally to James, though in his case it is right to add that on no conceivable view could an estoppel be suggested.

A The final case of Hawkins is different, for this man met with his injury in Apr., 1929, and must, admittedly, be bound by the amended articles of 1927. In his case, therefore, it is necessary on any view to consider the effect of art. 35 (b) as amended not merely as an alternative defence.

B Hawkins, who admittedly is only fit for light work, has never actually received a declaration of liability, but it is conceded that his case is such that he is entitled to one. He appears to me to be, on the principle of *Lysons v. Knowles* (4) and the other cases I have cited, a person who has not "ceased to be entitled to compensation," and, his original accident

C being in 1929, the five years during which the liability would be carried by the employers would end in 1934. In so far as the receiver was not appointed until 1936, I am of opinion that his case also falls within sect. 7 as a case where the employer had entered into a contract with an insurer with respect to a contingent liability to him.

D I have yet to deal with the fifth argument, which relies upon a general default apart from failure to pay premiums in the specific cases of the appellants with which I have already dealt, and applies generally to the whole case, to the effect that, as the result of the receiver being appointed, at material times the employer was no longer entered in respect of his

E mine on the register of protected works and was consequently not indemnified. This argument depends upon the contention that by the appointment of the receiver there had been a default, and that by art. 13 (a) of the amended articles of Apr., 1927, in the event of a member having a receiver appointed, the protection of such member in respect

F of any mine should therewith be determined. To this it is necessary to say, first, that, by the amended art. 15, if the protection of a member determines, he continues bound to perform all the obligations, and that in this respect the case is not otherwise than that of *Daff v. Midland Colliery, etc., Indemnity Co.* (3), where the House of Lords declined to

G draw the conclusion that there was a forfeiture under a somewhat similar clause which provided that

whenever a member is in default as regards the payment of any money due to the company he shall not be entitled to any indemnity. . . .

The like observation would apply to art. 12 of the original articles. In

H my opinion, a more conclusive argument against this contention lies in the fact that, in terms, by resolution of Dec. 19, 1932, the regulations of the company which were then adopted kept open as to transitional provisions only arts. 24 to 36, and I do not think it would be right, having regard to the *prima facie* exclusion of the existing articles other than those specifically mentioned, to say that art. 13 (a) of the amended

articles of Apr., 1927, was still in existence at the material time. I do not find it necessary to read into art. 35 as amended, or in its original form, as the case may be, the circumstances in which the employer admittedly on the register may be deemed to be taken off it. In other words, had the society in 1932 wished by transitional provisions to have kept alive art. 13 (a) of the 1927 articles, they could have done so ; **A** but they did not and preferred to exclude it, among others, as not being an expressly preserved article.

I am therefore of opinion, for the reasons above stated, that all these appeals should be allowed and the cross-appeal fails.

B
 MACKINNON, L.J. : The appellant Wooding was, in 1923, a haulier employed by the Ebbw Vale Steel, Iron and Coal Co., Ltd. On Aug. 24, 1923, he met with an accident in one of their mines. Admittedly he in consequence became entitled under the Workmen's Compensation Acts to be paid 35s. per week during his total incapacity for work resulting **C** from that accident. He was so paid by the Ebbw Vale Co. until Jan. 28, 1928. He was then given light work by the company at his former wage, and the payment of compensation ceased. Thereafter there were successive periods during which he was again off work, and was paid the 35s. weekly by the Ebbw Vale Co., and periods when he was again at **D** work and receiving wages instead of compensation. In Mar., 1936, he had finally to give up work, and from that date onwards he was paid the 35s. weekly compensation by the Ebbw Vale Co. On Oct. 21, 1936, a receiver was appointed by the debenture holders of the Ebbw Vale Co. This was under a floating charge on the assets of that company. **E** By the Companies Act, 1929, s. 264, the liability of the company to pay Wooding 35s. per week would be a preferential payment to be paid in priority to ordinary debts, and by sect. 78 of the same Act the receiver is liable to provide for this as a preferential payment out of any assets coming into his hands. This, I presume, is not disputed by the receiver. **F** By an application dated June 27, 1937, Wooding claimed an arbitration under the Workmen's Compensation Acts, alleging that the respondents, the Monmouthshire and South Wales Mutual Indemnity Society, Ltd., are liable to pay to him the 35s. per week compensation which the Ebbw Vale Co. by reason of his accident in Aug., 1923, became liable to pay **G** to him during any week when by reason of that accident he was incapacitated from working.

This claim can only arise under the Workmen's Compensation Act, 1925, s. 7 (1). The material parts of that section are :

H
 Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then . . . if the employer is a company, in the event of . . . a receiver . . . of the company's . . . undertaking having been duly appointed . . . the rights of the employer against the insurers as respects that liability shall . . . be transferred to and vest in the workman, and upon any such transfer the insurers shall . . . be subject to the same liabilities as if they were the employer, so however that the insurers shall not be under any greater liability to the workman than they would have been under to the employer.

It is to be noted that this Act did not make it compulsory for an employer to be insured, nor specify that there must be any contract of insurance in any particular terms. This has been remedied by the Workmen's Compensation (Coal Mines) Act, 1934, as regards employers who are owners of a coal mine. Further, the section does not limit the freedom of an employer and his insurer, if any, as parties to a contract. Some reliance was placed by the appellants on a supposed *dictum* of LORD SHAW in *Daff's* case (3), as suggesting that such freedom was in some way limited by reason of the prospective and conditional interest of the workman in the insurance contract. I do not think that LORD SHAW said anything of the sort. Nor do I understand how he could have done so. The Act does not confer on the workman any right to make his employer insure. It only assigns to him, on the employer's insolvency, the benefit of any insurance the employer may then happen to have in existence, but it gives him no greater right than the employer could then enforce.

Suppose, for example, there were an ordinary policy issued to an employer to indemnify him fully against his liability under the Workmen's Compensation Act. A workman meets with an accident and is entitled to 30s. per week compensation. The insurance company repay the employer the 30s. per week for a time, and then offer to compound their future liability under the policy for £X. The employer accepts the offer, and takes the £X. Afterwards the employer becomes insolvent. I cannot see how the workman could possibly succeed in a claim for 30s. per week against the insurance company under sect. 7 of the Act of 1925. There are only transferred to him under that "the rights of the employer against the insurers" at the date of the insolvency, and "the insurers shall not be under any greater liability to the workman than they would have been to the employer."

The effect of this seems to be this: The question whether Wooding can claim that the respondent society is liable to pay him 35s. per week must depend solely on whether an affirmative answer can be given to the question: "Could the Ebbw Vale Co. on Oct. 20, 1936, have successfully claimed that the respondent society as their insurers were liable to indemnify them against the 35s. per week that they were liable to pay to Wooding?" That question must be answered by an examination of the contractual relation existing between the company and the society, and the rights of the company thereunder in Oct., 1936. Unhappily that relation has at all material times been in a condition of lamentable and discreditable obscurity, and the evidence as to what happened between the company and the society between 1923 and 1936 was fragmentary and incomplete. No insurance policy had been issued in 1923 by the society to the company. The contract between them at that date has to be gathered from the memorandum and articles of the society dated June 24, 1898. In the memorandum, the first of the objects for which the society is established is stated to be: "to indemnify the

members of the society against the payments of any compensation payable under the Workmen's Compensation Acts . . . to any workman, or his dependants, in respect of any accident," etc.

The articles provide for a mine-owner becoming a member of the society. The Ebbw Vale Co. was at all material times a member. An extraordinary accident is defined as one involving more than three workmen, an ordinary accident as one that is not an extraordinary accident. Wooding's was an ordinary accident. Art. 22 provides that, on any claim by a workman under the Workmen's Compensation Acts for arbitration, the member must notify the society, who are then, under arts. 29, 30, to take control of the proceedings. Arts. 31 to 34 provide for an expenses fund, to be supplied by calls upon the members, to provide for this duty of the society.

Article 35 (which covers more than four closely printed pages) is headed "Mutual insurance against ordinary accidents." It opens by stating in sub-cl. (a) that, when any mine of any member is entered in the register of protected mines, "the society is to indemnify such member against the payment of any compensation under the Workmen's Compensation Acts," etc. As on Aug. 24, 1923, the Ebbw Vale Co. was a member, and as the mine in which Wooding was injured was entered in the register of protected mines, it would appear to follow from these clear words that the society undertook to indemnify the company against their liability to pay Wooding his 35s. per week. These clear words are followed by some four pages of highly successful obscurity. Sub-cl. (d) provides that moneys payable to a member by the society (which would seem to include the 35s. per week for Wooding) shall be paid monthly or quarterly, etc., but sub-cll. (e), (f) appear to provide that each member has to pay to the society by provisional calls the whole of the sums necessary to provide the indemnity to him in respect of an ordinary accident for 18 months after the beginning of the year in which the accident happened, less the proceeds of any re-insurances effected against accidents occurring in the particular year. As Wooding's accident was on Aug. 23, 1923, and the company became liable to pay him 35s. per week, the effect of this appears to be that, under sub-cl. (d), the society would monthly or quarterly repay the company the 35s. per week, but under sub-cll. (e) and (f) the company would, by provisional calls, have to pay the society all the money necessary (less the proceeds of any re-insurances against accidents in 1923) to provide for these repayments to itself up to the end of June, 1924. There was no evidence that there were any such re-insurances. Nor was there any evidence that this apparently insane procedure was in fact carried out. If, however, it was, or ought to have been, the result would appear to be that the company soon after Aug., 1923, paid 35s. per week to Wooding up to June, 1924, that they were repaid by the society monthly or quarterly, but by virtue of provisional calls the company provided the society with the money to make such repayments; and this, up to June, 1924, would be the

manner in which the society fulfilled its undertaking "to indemnify the company against its liability" to Wooding.

It seems clear (if anything can be clear as to these articles) that, in respect of the company's liability to Wooding up to the end of June, 1924, there was no indemnity at all, and no contract of insurance. The
 A company had to provide out of its own funds the whole of the money paid to Wooding, and, so far as I can see, the only advantage of membership as regards the company's liability to Wooding up to June, 1924, would be the services of the society in dealing with his claim under arts. 29, 30. For this 18 months' period there was really no contract
 B of insurance, and the principle of *Pailin v. Northern Indemnity Company* (1) would apply.

Sub-clauses (g) to (j) provide for a permanent accident fund to provide for the indemnity of the member in respect of his future liability after the expiration of the 18 months. The effect of sub-cl. (g) appears to
 C be that Wooding and all other workmen of the company who met with accidents in 1923, and are still entitled to compensation at the end of June, 1924, would be ascertained, and calls upon an actuarial basis made in respect of the aggregate amount likely to be payable to all and each of such men in the future. Sub-cll. (h), (i) and (j) provide with character-
 D istic obscurity for the accounts of the permanent accident fund, refunds, adjusting calls, and bonus payments. These involve a further actuarial assessment at the end of 5 years from the beginning of each year in which ordinary accidents have happened.

This part of the scheme does, I think, bring in the element of insurance.
 E The provision for the actuarial assessment of the prospective liability for each workman, and the lumping of the payments for them all in a common fund, involve the element of uncertain future events, in respect of which a present payment in the nature of a single premium is paid. It is true that the system lacks the most obvious feature of insurance,
 F namely, that the losses of all the members should be met by their united and approximately uniform contributions. For the part of the fund to pay for an individual member's liabilities appears to be provided only by that individual, and it is difficult to see what pecuniary advantage is ultimately derived by any member from his membership. However,
 G if, in respect of Wooding, as one of the workmen injured in 1923, the company had paid under sub-cl. (g) in July, 1924, the actuarial assessment in respect of the future liability to him, I think the company could at all times thereafter have been entitled to say that the society was by a contract of insurance liable to indemnify the company against any
 H future payments by the company to Wooding.

There was no evidence that the company did make such payment in July, 1924, to the society. Sir Stafford Cripps suggested that, as the payment ought to have been made, we ought to assume that it was made. I know of no ground to justify such an assumption. Moreover, the evidence as to the dealings of the parties then and later is utterly incon-

sistent with such a payment having been made in fact. That evidence consists of a correspondence between the society and the company beginning in May, 1928. By that time the articles of association had been altered. This was by a special resolution of Mar. 28, 1927, confirmed on Apr. 12, 1927, and the alteration was to take effect as from Jan 1, 1928.

The former art. 35 was replaced by a new one. The material changes appear to be (i) by sub-cl. (b), a provision that, where a workman has met with an accident but recovers so as to cease drawing compensation, and then incapacity recurs, such recurrence shall be deemed to be a new accident; (ii) in effect a period of 5 years from the beginning of the year in which an accident happens was substituted for the period of 18 months under the old article. Apparently during the 5 years, as formerly during the 18 months, the company would pay the workman his compensation, the society would make provisional calls to provide the equivalent of such payments, and would then repay the company. Then, at the expiration of the 5 years, the society is to assess "on an actuarial basis so far as practicable" the outstanding liability of the member to pay compensation in respect of the ordinary accidents of the fifth year before, and the member is to pay that sum. I note that the old sub-cl. (g) spoke of assessing the prospective liability to "each such workman," whereas the new sub-cl. (g) omits that phrase; but I do not think this can make any material difference. The second actuarial assessment, under sub-cl. (i) of the old art. 35, at the end of 5 years, seems to be abolished; or perhaps the two actuarial assessments at the end of 18 months and of 5 years are now replaced by the single one at the end of 5 years. There is apparently another change of language, but perhaps not of substance. Under the old art. 35, the provisional calls for the 18 months formed an ordinary accident account, and the final call at the end of the 18 months went into a permanent accident fund. But under the new article, apparently, the calls during the 5 years, and also the final call at their end, go into the ordinary accidents account.

It is difficult to imagine what might be the effect of the new sub-cl. (b). Wooding is an example of a man who was constantly going back to work for a period, and in such period receiving wages instead of compensation. He first resumed work in Jan., 1928, and between that date and his final incapacity in Mar., 1936, it is agreed that there were some ten occasions when his incapacity recurred, and his compensation began again. If, under the new sub-cl. (b), each recurrence of incapacity is to be deemed to be a new accident, so as, presumably, to start a new 5 years' period, the time for the assessment and final call would be correspondingly postponed. Indeed, if his final incapacity in Mar., 1936, was to be deemed to be a new accident, then the end of the 5 years would not occur until Dec. 31, 1940.

On May 19, 1928, the society wrote to the company the letter which has been read by SLESSER, L.J. This is treating the 1923 cases as

governed by the new articles, which had only come into force in Jan., 1928. Why the old art. 35 had not been complied with, and the assessment for the permanent accident fund for these cases made in July, 1924, I am, in the absence of any evidence about it, at a loss to imagine. But, clearly, that had not been done, and the old period of 18 months
 A had in some way been prolonged, so that the 1923 cases were "still outstanding on Dec. 31, 1927," and so could be treated as if the new articles applied to them. The letter of May 19, 1928, enclosed a list showing 21 1925 cases "still on hand on Dec. 27, 1927", and it referred to them as cases in which "compensation was being paid as on Dec. 31,
 B 1927." According to the agreed statement of facts, Wooding was being paid compensation on that date. He resumed light work, and earned wages, from Jan. 24 to Feb. 2, 1928.

It appears from the documents that, in reply to the letter, the company crossed out six of the cases, including Wooding's, from the society's
 C list, so reducing the call upon them from £13,139 to £9,223; and having crossed out the Wooding item, the company did not pay to the society the £1,221 assessed upon them ("on an actuarial basis as far as practicable") in respect of his case. There was no evidence to explain why this was done. I can only guess that the company were at that date in
 D straits for money, and preferred to go on paying the weekly sums to Wooding instead of having to pay down so large an amount as £1,221 in respect of him. On Jan. 23, 1929, there is a document, headed "Ordinary Accident Claim", referring to Wooding's accident of Aug. 24, 1923, with a statement: "Transferred from 1923 to 1928." I do not
 E know if this means that the 5 years were to start from 1928, so as to postpone the final call till Dec., 1932. On the agreed statement of facts, Wooding resumed work on July 16, 1928, and worked for a year and a day till July 17, 1929. Thereupon, the company wrote to the society on Aug. 3, 1929, as to Wooding:

F We beg to advise you that this man has failed to work on July 17, 1929, and shall be glad if you will please supply us with a 1929 reference number.

It may be that their idea was that, under the new art. 35 (b), Wooding's was to be treated as a new accident on July 17, 1929, with a start of 5 years from Jan. 1, 1929. In some manner there comes yet another
 G document of Oct. 30, 1930, by which the date of Wooding's accident is "transferred from 1923 to 1930", but apparently, notwithstanding this, Wooding's case was in some 1928 list. On Nov. 3, 1933, the company wrote to the society as follows:

D. J. Wooding,

H Will you please let us have a new reference number.

Then there are other letters, the last of which is that of Nov. 15, 1933, written by the society to the company:

D. J. Wooding,

Referring to your memorandum of the 14th inst., we would state that as the society is not liable for any future liability attached to the above case, it will not

be necessary for the society to value this case. With regard to your query, as to what year you may put the case under, we would suggest that you place same under the year 1930 or 1931, the years for which your company have agreed to take over the liability.

That reference that the company "have agreed to take over the liability" seems to refer to a correspondence that had taken place in May, 1932, arising out of the financial difficulties of the company. The result of other letters is that the company agree that they shall not after Mar. 31, 1932, be entitled to further indemnity under art. 35, and the company undertakes to refund to the society any sums ascertained to be due in respect of those years. There follow further letters reporting that the man Wooding had again failed, and asking, for instance: "Will you please give us authority to pay compensation on his failure?" It was suggested that these indicated that the society still recognised some interest in Wooding's case, but perhaps one should remember sub-cll. (b), (c) of the old art. 35, repeated in sub-cll. (c), (d) of the new article, and the practice of getting the society's approval that had no doubt been followed thereunder.

Meanwhile, in Dec., 1932, yet another new set of articles was adopted, to take effect as from Jan. 1, 1933. These provided for an entirely new system by the issue of policies of insurance, but art. 3 provides that, for the purpose of discontinuance of the old system, the transitional provisions in the appendix shall have effect. Para. 7 in the appendix provided that the ordinary accident fund and its assets and liabilities should be taken over by the society. Para. 8 provided that the ordinary accident accounts for the accidents occurring in 1928, 1929, 1930, 1931 and 1932 should be dealt with under the existing articles, but the directors might fix an earlier period than five years from the beginning of any of such years for the purpose of a final call under art. 35 (g), (h), (i), and on the closing of each of such accounts the assets and liabilities thereof were to be taken over by the society.

Wooding's accident was in 1923, but, as I have pointed out, the parties appear subsequently to have agreed to treat it as a 1928 accident, and later as a 1929 or 1930 accident. If it was to be treated as a 1928 or 1929 or 1930 case, there is no evidence that the society at the end of 5 years, or at any earlier period fixed by the directors, made a final call that included Wooding's case, or that the company paid such a call.

The foregoing sets out, to the best of my understanding, (i) the contractual obligations of the company and the society, and (ii) the manner in which up to Oct., 1936, they had respectively carried out, or failed to carry out, those obligations. As I said at the beginning, the fate of the present claim depends on the answer to the question: Could the company, just before the appointment of the receiver in Oct., 1936, have successfully claimed a declaration that the society was liable to indemnify them against their future weekly payments to Wooding? If he had read, as I have, the medical report of the results of his accident to this poor man, the most impartial judge who ever lived might avow that he would

strive to answer this question in the affirmative. Claiming no such qualification for myself, I admit that I have so striven, but I have failed in the attempt and am driven to think that the answer must be "No."

Such a claim by the company must primarily be formulated under the articles adopted in Dec., 1932, and in force in Oct., 1936. If it be based on para. 7 of the transitional provisions, under which the society takes over the liabilities of the accident fund as from Jan. 1, 1933, then it would be necessary to go on to allege that the company, on Dec. 31, 1932, was entitled to an indemnity from the accident fund in respect of its future payments to Wooding. To allege this, however, it seems to me that it would be necessary to aver that, either at the end of the 18 months' period under the first articles, or at the end of the 5 years' period under the second, or on the date, if any, to which by mutual agreement the parties had postponed the obligation, the company had paid the final call in respect of Wooding's case made upon them by the society. This could not be proved; indeed the evidence seems to show that it did not happen.

If the claim were based on para. 8 of the transitional provisions, upon the ground that by mutual agreement Wooding's accident must be deemed to have occurred in one of the 5 years named therein, then the liabilities of the account for each of such years were to be taken over after the date when final calls were made and paid, and the accounts closed. Again there is no evidence that this happened so as to include Wooding's case, and the evidence is rather that it did not.

The truth is that under the system there were two periods. In the first period, to borrow a phrase of SCRUTTON, L.J., in *Pailin's* case (1), the society were to be indemnified agents, in the second they were to be indemnifying insurers. The first period under the old articles was to be 18 months, and, under the new, 5 years; but by mutual agreement of the parties it might in either case be prolonged. The second period would only begin when the company paid the final call, which was in effect the premium in consideration of which the society passed from the status of indemnified agents to that of indemnifying insurers. Unhappily, as regards Wooding, there is no evidence that this event ever happened. On the contrary, the evidence is that it never did.

In these circumstances, it seems to me that, if on Oct. 29, 1936, the company had claimed a declaration that the society was thenceforward liable to repay to the company any weekly payment it might make to Wooding, that claim must have failed. Of course, it might be that even at that late date they might acquire the right to indemnity upon payment of the appropriate final call (the premium that had never been paid), but any such right as this would be valueless to the present claimant. His case is, and to be of any value to him must be, that at some date before Oct. 21, 1936, there was an accrued and unconditional right in the company thenceforward to be indemnified by the society

against all future payments to him. This, I think, he failed to establish, his greatest difficulty, perhaps, being to predicate when it was that such a right did accrue. By the section under which he has to claim, "the insurers shall not be under any greater liability to the workman than they would have been under to the employer."

There was a good deal of argument on behalf of the respondents in which "estoppel" was talked about. I do not understand this argument, and I do not think any question of estoppel arises at all. The supposed claim of the company in Oct., 1936 (and the present claim of the appellant as its assignee), must be: "By the contract between us you promised to indemnify us." The answer of the society, I think, is simply: "We did promise to indemnify you, but only upon the payment of a certain consideration at a certain date. By mutual agreement the date for that payment has been from time to time postponed. The payment has never yet been made, and until it is made our obligation under the contract does not arise." In the result I think this appeal must be dismissed.

The facts in the other two cases of James and Hawkins are, of course, different, but I do not think I need set out those facts in detail. The principles I have indicated as to Wooding's case seem to me to be equally applicable to these cases, and I think the appeals in both those cases must also be dismissed.

GREER, L.J.: With regard to the cross-appeal, we have all come to the conclusion that the cross-appeal fails. There is, however, a question of costs which arises. With regard to the cross-appeal, the rule which has been established is the same as it is with regard to a counterclaim, and the costs would only include the costs whereby the hearing of the appeal had been increased by reason of the cross-appeal. In this case I do not think there will be any such costs, and it will be simpler to say that the cross-appeal will be dismissed without costs.

Appeal dismissed with costs. Cross-appeal dismissed without costs. Leave to appeal to the House of Lords.

Solicitors: *Smith, Rundell, Dods & Bockett*, agents for *T. S. Edwards & Son*, Newport, Mon. (for the appellants); *Slaughter & May* (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

HANSCOMBE v. BEDFORDSHIRE COUNTY COUNCIL.

[CHANCERY DIVISION (Farwell, J.), July 12, 13, 27, 1938.]

Highways—Boundary of highway—Ditch inside fence—Presumption—Onus of proof—Statutory right to fill in—Highway Act, 1835 (c. 50), s. 67—Highway Act, 1864 (c. 101), s. 48.

A A highway was bounded by a fence, and on the road side of the fence there was a ditch. The land immediately adjoining the ditch belonged to the plaintiffs. In 1937, the defendants, without the consent or knowledge of the plaintiffs, laid pipes in a portion of the ditch and filled it in completely. They justified these acts on the grounds (i) that the portion of the ditch filled in was part of the highway, and (ii) that, if that were not so, the acts were within the scope of their statutory powers. The ditch clearly served the purpose of carrying off the overflow from a pond on the plaintiffs' land and the surface-water from that land. It also carried off the surface-water from the road. At all times, the cleaning and repair of the ditch had been undertaken by the plaintiffs:—

B
C HELD: (i) the presumption that the ditch did not form part of the highway had not been rebutted, and the ditch was vested in the plaintiffs. (ii) the highway authority had no statutory power to fill in the ditch without the owner's consent, and the plaintiffs were therefore entitled to a declaration of title and nominal damages.

[EDITORIAL NOTE. There is no rule of law which prevents a ditch from being dedicated as part of a highway, but the presumption is that a ditch on the road side of a fence does not form part of the highway. After such a ditch has been piped in, the site may be subsequently dedicated, but all these matters are, of course, a question of evidence. Highway authorities have powers of making, cleaning and scouring ditches for the purpose of preventing any nuisance on the highway, but it is here held that they have no power, without the consent of the owner, to fill in a ditch not vested in them as the highway authority.]

E AS TO PRESUMPTIONS AS TO DITCHES BORDERING A HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 260, 261, para. 315; and FOR CASES, see DIGEST, Vol. 26, p. 315, Nos. 471-474.]

Cases referred to:

- F (1) *Chorley Corpn. v. Nightingale*, [1906] 2 K.B. 612; *affd.*, [1907] 2 K.B. 637; 26 Digest 315, 472; 76 L.J.K.B. 1003; 97 L.T. 465.
(2) *Harrison v. Rutland (Duke)*, [1893] 1 Q.B. 142; 26 Digest 317, 491; 62 L.J.Q.B. 117; 68 L.T. 35.

G ACTION for a declaration as to the title to a ditch adjoining or upon a highway vested in the defendants, and for an injunction to prevent the defendants from piping in the same. The facts are fully stated in the judgment.

R. F. Roxburgh, K.C., and *Geoffrey Barratt* for the plaintiffs.

R. M. Montgomery, K.C., *C. Montgomery White* and *Humphrey Whitbread* for the defendants.

H *Roxburgh, K.C.*: In this case, the ditch has been used at all material times by the landowner for the purpose of draining his land, and it is now suggested that the landowner can be deprived of the use of the ditch without notice and without compensation. This is the first time it has been suggested that an owner can be presumed to have dedicated a ditch without reserving to himself rights of user, when

all the time he was using the ditch for the purpose of draining his land. The plaintiffs' title to the land abutting the highway is conceded, and they are presumptively the owners of the soil of the highway: *Harrison v. Rutland (Duke)* (2). The ditch could not be dedicated as part of the highway, because it could not be used for the purpose of passage: *Chorley Corp'n. v. Nightingale* (1). Where the ditch was in existence at the time the road was dedicated, and the ditch was used for draining adjacent land, it is inconceivable that the landowner intended to dedicate the ditch so as to deprive himself of the right to use it for draining his land. No doubt the local authority had power to use the ditch for the purpose of draining the road, but there was either no dedication of the ditch at all or a dedication subject to the right of the landowner to use it in common with the local authority. There is a presumption against the dedication of a ditch: LUMLEY ON PUBLIC HEALTH, 10th Edn., p. 780.

Montgomery, K.C.: The ditch has always been necessary to the road. The land falls from the east across the road, and, unless a ditch was there, the land would be constantly flooded. Since 1929, this road has been vested in the county council as a county road. I am not suggesting that this is the first time it vested, but it vested then. The Local Government Act, 1929, s. 29, vested the road in the county council, and subsect. (2) provides that, where any drain is used in connection with such road, the county council shall continue to have the right of user of the drain. The ditch—which, I think, is a drain for the purpose of the Act—was dedicated with the roadway. Originally it ran all the way along the roadway until some date after 1817. From one map, however, we do know that by 1866 an enclosure had taken place, and that the roadway had been moved away from the drain to the north of Cole's farm. Whether or not the ditch was dedicated as part of the highway, it was the duty of the owner of the adjacent land to keep it clear. It was a ditch draining the road. The dedication enabled the highway authority to prevent any action which would interfere with the use of the space as road, and therefore the putting in of the pipe was perfectly legal, and could not be prevented. The proper conclusion is that this ditch is part of the roadway, and could properly be filled in or dealt with by the road authority dealing with it as a matter of maintaining and supporting the road. It was thought that the right thing to do was to put in a pipe, and that was done. In making these improvements, the county council has done only what was its right and its duty.

FARWELL, J.: In this case, the plaintiffs, as trustees of the will of the late William Hanscombe, are the owners in fee simple of the land situate on both sides of, and abutting on, a highway known as High Road, in the village of Shillington, in the county of Bedford. The defendants are the Bedfordshire County Council, and, as such, the highway authorities for the district. The subject-matter of the dispute is

a small portion of a ditch abutting immediately on the east side of the High Road leading from Henlow south towards Hitchin. The road is bounded on each side at this point by a hedge or fence, and the ditch is within, and on the road side of, the fence. The land immediately abutting the portion of the ditch in question is in the occupation of

A one Cole, as tenant of the plaintiffs.

In 1937, the defendants, acting in the circumstances mentioned hereafter, laid 6-ins. socketed, but not cemented, pipes in the portion of the ditch in question, and filled in that portion of the ditch completely. These acts were done without the knowledge or consent of the plaintiffs,

B who claim that they constitute a trespass on their property. The defendants seek to justify what they have done on alternative grounds, (i) that the portion of the ditch in dispute is or was vested in them as part of the highway, or (ii) that, if that is not so, the acts done were within the scope of their statutory powers. The highway is admittedly

C an old way, and no evidence has been given as to when, or by whom, or in what circumstances, or on what terms, it was dedicated to the public. The ditch, a small portion of which is in dispute, served for many years to carry the overflow from a pond situate on the plaintiffs' land on the east side of the road. The ditch, starting from the pond,

D runs in a north-westerly direction, and is joined by another ditch running approximately due west. It then proceeds in a westerly direction for a short distance, and then turns almost due north, and, prior to 1937, ran along the High Road past Cole's land to a point somewhat to the north of that land, where it leaves the High Road and runs north to

E empty into another pond, from which there is an overflow on the north side. The land to the east of the High Road slopes upwards, and the surface water from that land drains into the ditch, so that the ditch was undoubtedly of importance to the plaintiffs and their predecessors in title, both to carry away the overflow from the pond and to carry away

F the surface-water from the higher land to the east of the road. The ditch is also required to carry off the surface-water from the road, and channels have been cut in the grass verge, between the road and the ditch, to carry such water into the ditch. Until the happening of the events which give rise to this action, the defendants never exercised any acts of owner-

G ship over the ditch. The ditch was at all times kept cleansed and in order by the plaintiffs' servants or agents. Moreover, the plaintiffs' predecessors had from time to time done certain work in connection with the ditch, such as the insertion of an inspection-chamber and the diversion of the greater part of the overflow from the pond, and the

H sinking of an artesian well to carry water therefrom along pipes parallel to the ditch. As a result of the work done by the plaintiffs or their predecessors immediately prior to this action, little or no overflow from the pond passed down the ditch past Cole's land, although it continued to carry off all water draining into it from Cole's land and other land of the plaintiffs to the east of the road. At the part of the road abutting

on Cole's land, the highway is somewhat narrow, the metalled portion being 15 ft. 6 ins., and in 1937 a heavy lorry passing along the road opposite Cole's land ran too near the ditch and one wheel slipped over the edge of it. It was found difficult to extricate the lorry from its position, and, in so doing, the bank of the ditch on the roadside was broken away. The defendants, by their agents, in order to preserve the road and to safeguard the user of it, did their best to repair the bank, but found it impossible to do so satisfactorily. Accordingly, they laid 6-ins. pipes in the drain, to carry away the water, and then filled in the ditch completely. I am satisfied on the evidence that the repair of the bank of the ditch was necessary to safeguard the road, and that for that purpose, apart from any question of the plaintiffs' rights, the method adopted was a proper one. Moreover, the laying of the pipes to the ditch, in the way in which they were laid, preserved the use of the ditch for carrying away all surface-water and water getting into it. Nevertheless, if the ditch is the plaintiffs' property, the acts constituted a trespass by the defendants, and, unless they are within their statutory powers, the plaintiffs are entitled to complain. I may say at once that, in my judgment, if the plaintiffs are right in this action, the acts complained of have not resulted in any substantial damage. I am satisfied that the pipes laid by the defendants are as effective as the ditch was to carry away the surface-water, and that nothing they have done has rendered Cole's cottage damper than it was before the acts complained of were done.

In these circumstances, it is necessary to consider what is the legal position of the parties. If the ditch in question is vested in the defendants, *cadit questio*. I will, therefore, first consider the question of title. As I have already said, the land on both sides of that portion of the road is the property of the plaintiffs, and that which is vested in the defendants as the highway authority is the High Road, and whether this ditch is vested in them must depend on whether or not it forms part of that which was dedicated to the public. The rights of the public in a highroad are to pass and re-pass along it, and their right to use the way for that purpose is not limited to that part of the way which is metalled or made up, but extends to the whole highway. When, therefore, a highway, the whole portion of which is capable of being used to pass and re-pass, is bounded by a fence or hedge, the whole portion is deemed to have been dedicated to the public. When, however, a portion of the whole is a ditch, which *prima facie* is not adapted for the exercise by the public of their right to pass and re-pass, the presumption, in my judgment, is that the ditch does not form part of the highway. That is a presumption which may be rebutted (see *Chorley Corp'n. v. Nightingale* (1), but the onus lies on those who assert that the ditch is part of the highway.

In the present case, there is, in my judgment, no sufficient evidence to rebut the presumption. Some effort was made to show that at one time

- the hedge on the eastern side of the road north of Cole's land was set back much further than it is at present, and that the ditch was well within the hedge for a considerable distance, but, even if the evidence adduced is admissible at all, which I doubt, it is, in my view, wholly insufficient to rebut the presumption. Even if there was at one time a
- A considerable space between the ditch and the hedge, there is nothing to indicate that the space was part of the highway and not waste of the manor, as it may well have been. Further, I think that, in a case of this kind, the presumption against the ditch being part of the highway is extremely strong. No doubt the ditch serves a useful purpose in draining
- B the road, but quite obviously it was, and is, of the greatest importance to the owner of the adjoining land on the east to preserve his rights in it. It was almost essential to him for draining his land, and, to my mind, it is impossible to suppose that any owner, when dedicating the road, could have intended to part with his rights in the ditch. There
- C is no suggestion in this case that the dedication was made subject to any such rights, and, in the absence of some affirmative evidence to the contrary, the presumption that the ditch is not part of the highway must prevail. In cases where the only purpose of the ditch is to drain the highway, the presumption may be more easily rebutted, but that is
- D not so in this case, and the defendants have failed to satisfy me that the ditch is vested in them. That being so, I have now to consider whether the acts complained of were within the statutory powers of the defendants. The defendants rely on the Highways Act, 1835, s. 67, and sect. 48 of the Act of 1864. In my judgment, neither of these sections
- E assists the defendants. I can find nothing in the first section referred to which authorises a highway authority to fill in a ditch belonging to another, and the defendants therefore cannot rely on that section. By the Act of 1864, which must be read in conjunction with the earlier Act, a highway authority is authorised to do various acts for improving
- F roads, and, for that purpose, to acquire property or rights compulsorily, upon giving the requisite notice to the owner. However, there is nothing, in my judgment, in that Act, even when read in conjunction with the earlier Act, which authorises a highway authority to go upon the land of an adjoining owner to fill in a ditch on his land without his consent.
- G If it is necessary to widen the road by taking in the ditch and filling it in, the highway authority may no doubt take the necessary steps to acquire the land for that purpose, but they would be entitled to acquire it only on such terms as might be proper, having regard to the rights of the owner as to drainage or otherwise. However, not having taken any
- H such steps in this case, the defendants are not entitled to fill in a ditch without regard to the rights of the owner.

It was stated at the bar that the defendants had no desire to prevent the owner from using the pipes for drainage purposes, but no proposal to preserve such rights to him in any legal form has been made, and, although the present authority may not raise any such objection, it does not

follow that their successors will adopt the same attitude. For these reasons, I have come to the conclusion that the plaintiffs are entitled to succeed in this action. They have very properly abandoned at the bar their claim for a mandatory order, and at the present time I see no ground for granting an injunction, but I will give them liberty to apply. They are entitled to a declaration of title and to nominal damages of 40s., together with the costs of the action, the costs to be taxed on the High Court scale. A

Solicitors: *Pothecary & Barratt*, agents for *Hawkins & Co.*, Hitchin (for the plaintiffs); *F. Venn & Co.*, agents for *J. B. Graham*, Clerk to the Bedfordshire County Council (for the defendants). B

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

WESTMINSTER BANK, LTD. v. WILSON. C

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
June 27, 28, 29, 30, July 28, 1938.]

Deed—Settlement—Execution by one party—Settlement in satisfaction of covenant and containing a release of the covenant—Sufficiency of execution by one party—Execution upon faith of execution by other parties. D

In a deed executed in 1923, A. covenanted to pay B. a weekly sum to be applied to the maintenance of herself and a son then expected to be, and afterwards in fact, born. By that deed A. had an option to execute a settlement by which similar benefits should be secured to B. and the son, such settlement to be in satisfaction of the weekly sum payable under the deed. A settlement was engrossed to which A. and B. were parties, the plaintiff bank also being named as a party as the trustee. The settlement secured to B. and the infant benefits similar to those in the deed of 1923, and also contained a release of the covenant in the deed. The settlement was executed by A. and unconditionally delivered to B., who, however, refused to execute it, and eventually returned it unexecuted. The property settled was India Stock, and, after the execution of the settlement by A., this was sold by the bank and the proceeds paid to A. The bank did not execute the settlement. B. sought a declaration that the handing over of the proceeds of sale constituted a breach of trust:— E

HELD: (per SCOTT and CLAUSON, L.JJ.) in the circumstances, the execution of the settlement by A. was analogous to a written offer by him to contract, and the failure of B. to execute the settlement was analogous to a failure to accept that offer. The settlement was, therefore, wholly inoperative, and the bank were under no liability to B. or the infant. F

(per SIR WILFRID GREENE, M.R.) the execution of the settlement bound A.; but, as he executed it upon the faith that B. would execute it, the failure of B. to execute it rendered it inoperative to bind A. G

[EDITORIAL NOTE. In this case there is a divergence of view among the members of the court, but both views lead to the same result. SIR WILFRID GREENE, M.R., thinks that the execution by the settlor was sufficient to create a settlement binding upon him, treating the transaction as a unilateral one. The other members of the court treat the transaction as essentially a bilateral one, requiring the consensus of the parties. In the result, that divergence is of no importance, since, even if it is a unilateral transaction, the settlement was executed upon the faith that the other H

party would also execute, and upon the failure of the second party, the execution by the first becomes of no effect.

AS TO EXECUTION BY ONE PARTY, see HALSBURY, Hailsham Edn., Vol. 10, p. 86, para. 134; and FOR CASES, see DIGEST, Vol. 17, pp. 203-205, Nos. 140-169.]

Cases referred to :

- A (1) *Butler & Baker's Case* (1591), 3 Co. Rep. 25 a; 17 Digest 205, 169.
- (2) *Cooch v. Goodman* (1842), 2 Q.B. 580; 17 Digest 203, 140; 11 L.J.Q.B. 225.
- (3) *Morgan v. Pike* (1854), 14 C.B. 473; 17 Digest 223, 384; 23 L.J.C.P. 64; 22 L.T.O.S. 242.
- (4) *Xenos v. Wickham* (1866), L.R. 2 H.L. 296; 17 Digest 204, 149; 36 L.J.C.P. 313; 16 L.T. 800; *revsq.* (1863), 14 C.B.N.S. 435.
- B (5) *Mallott v. Wilson*, [1903] 2 Ch. 494; 17 Digest 233, 479; 72 L.J.Ch. 664; 89 L.T. 522.
- (6) *Donaldson v. Donaldson* (1854), Kay, 711; 40 Digest 534, 774; 23 L.J.Ch. 788; 23 L.T.O.S. 306.
- (7) *Re Chrimes, Locovich v. Chrimes*, [1917] 1 Ch. 30; 27 Digest 124, 1002; *sub nom. Re Chrimes, Lucovich v. Chrimes*, 86 L.J.Ch. 217; 115 L.T. 706.
- C (8) *Luke v. South Kensington Hotel Co.* (1879), 11 Ch.D. 121; 17 Digest 222, 370; 48 L.J.Ch. 361; 40 L.T. 638.

APPEAL by the plaintiffs from an order of MORTON, J., dated Jan. 21, 1938. The facts are fully stated in the judgment of SIR WILFRID GREENE, M.R.

- D *Sir Walter Monckton, K.C., H. Wynn Parry, K.C., and Valentine Holmes* for the appellants.
- Serjeant Sullivan, K.C., and H. L. A. Hart* for the respondent.

SIR WILFRID GREENE, M.R. : By an indenture dated Feb. 1, 1923, and made between a gentleman whom I will call the settlor of the one part and the first defendant of the other part, the settlor covenanted to pay to the first defendant during her lifetime (with a qualification not necessary to be stated) or until the execution by the settlor of a settlement in accordance with what was described as his "option" in that behalf thereafter contained, a clear weekly sum of £20 until Mar. 31, 1923, and thereafter a clear weekly sum of £10. Out of these payments the first defendant was to maintain, until it should attain the age of 21 years, a child then expected to be born to her. Clause 2 contained a covenant by the settlor to pay the weekly sum to the guardian of the child if the first defendant should predecease the settlor. Clauses 4 and 5 were in the following terms :

- 4. Provided always that in case the settlor shall by will bequeath or by settlement secure to the beneficiary during her life an annuity of equal or greater amount than the weekly sum hereby made payable as aforesaid then the annuity so bequeathed or secured shall be in satisfaction of such weekly sum which shall in that case cease to be payable from such date.
- 5. Any provision made by the settlor for the beneficiary as in the last clause is contemplated may contain any trusts not repugnant to the preceding text which the settlor may desire and any declaration by him that the same is in satisfaction of the provisions hereinbefore contained shall be final binding and conclusive on all parties.

The child referred to in the deed of 1923 was born on Mar. 25, 1923, and is the second defendant. I will refer to him as "the infant." Early

in Oct., 1923, the settlor procured the sum of £15,000 India $4\frac{1}{2}$ per cent. stock to be inscribed in the name of the plaintiff bank. This sum he intended to settle upon trusts in favour of the first defendant and the infant. The bank was to be the trustee of the proposed settlement. The settlor gave instructions to the bank to pay to the first defendant out of the income derived from the stock the sum of £130 per quarter (equivalent to the £10 per week payable under the deed of covenant), and these payments were made until they were discontinued in the circumstances hereinafter stated. **A**

The draft of the proposed settlement was agreed between the solicitors for the settlor, the solicitors for the first defendant and the bank, and the engrossment was prepared for execution by the parties, who were to be the settlor, the first defendant and the bank. This document, which I will call the settlement, was to the following effect. It recited (i) the deed of 1923, (ii) the settlor's desire to provide for the first defendant and the infant, the transfer of the India Stock to the bank for that purpose, to be held and applied by the bank upon the trusts thereafter declared, and (iii) an agreement between the settlor and the first defendant that "in consideration of the provision by these presents made as hereinafter appearing" the first defendant should release the settlor from all liability and claims, under the deed of 1923, and that forthwith upon the execution of the settlement the deed of 1923 should cease to have effect. **B** **C** **D**

The testatum was as follows :

Now this indenture made in pursuance of the said agreement and in consideration of the premises witnesseth and it is hereby agreed and declared as follows.

Then followed a series of numbered clauses. Clause 1 provided that : **E**

The trustees shall stand possessed of the said sum of £15,000 India $4\frac{1}{2}$ per cent. stock upon trust [for investment].

By cl. 2 the trustee was to stand possessed of the stock and the investments representing it (called "the trust fund") and the income thereof, and of any sums paid under cl. 5 upon the trusts thereafter declared. **F**

Those trusts were as follow. Clause 3 gave a protected life interest in the trust fund to the first defendant. Under cl. 4, the first defendant was to receive a clear £10 per week out of the income of the trust fund, and the remainder (if any) of the income at the end of the year. By cl. 5, the settlor covenanted with the first defendant, and as a separate covenant with the trustee, whenever necessary to make up the income of the first defendant to a clear £10 per week. **G**

By cl. 6, the trustee was to stand possessed of the trust fund, subject to the foregoing provisions, upon certain trusts in favour of the infant. Clause 7 contained a power to apply capital for the advancement of the infant. Clause 8 contained **H**

an ultimate trust for the settlor. Under cl. 14 (b), the trustee was to be entitled to remuneration according to its scale of fees. Clause 15 contained power to appoint new trustees. Clauses 16 and 17 were in the following terms :

16. In consideration of the settlement by these presents made by the settlor

and the covenants on his part herein contained the first beneficiary hereby releases the settlor his executors and administrators and his estate from all the covenants on his part contained in the hereinbefore recited indenture of Feb. 1, 1923, and from all claims and demands thereunder. 17. In consideration of the premises it is hereby agreed and declared by and between the settlor and the first beneficiary that as from the execution of these presents the hereinbefore recited indenture of Feb. 1, 1923, and all the provisions therein contained shall cease to have effect.

- A The settlement was signed, sealed and delivered by the settlor on or about Aug. 12, 1925. This is in terms admitted. Nor is it disputed that it was delivered unconditionally and not as an escrow. The settlement was therefore unquestionably the deed of the settlor. The consequences that flow from this I will consider later.
- B On Aug. 12, 1925, the settlement executed by the settlor was sent by his solicitors to the solicitors to the first defendant for execution by her, with a request for its return so that it might be executed by the bank. In the events which happened, the first defendant retained the settlement, but did not execute it, nor was it ever executed by the
- C bank. It is not necessary to go into the reasons why the execution did not take place, it is sufficient to state the fact. It appears, and I am prepared to assume, that the first defendant was willing to execute it, provided the deed of 1923 was either destroyed or placed in custody satisfactory to her. However, mere willingness to execute does not in
- D any way alter the legal results which flow from the fact that she never did execute the settlement.

The rest of the history, so far as it is relevant to the questions which we have to decide, may be stated quite shortly, In Nov., 1926, the settlor requested the bank to sell the India Stock and remit the proceeds to him.

- E The banks sold the stock on Nov. 15, 1926, but objected to handing over the proceeds of sale to the settlor without the consent of the first defendant. Lengthy correspondence took place, in the course of which the bank was informed by letter from the settlor's solicitors, dated Dec. 30, 1926, that the settlement had been executed by the settlor, and that the
- F first defendant had refused to execute it. A copy of the settlement was sent to the bank on Jan. 3, 1927. On Feb. 3, 1927, the solicitors to the first defendant wrote to the solicitors to the settlor stating that the first defendant was prepared to accept the settlement, but to this the settlor's solicitors refused to agree, taking up the position that the settlor had
- G revoked the proposal for the settlement. This attitude they maintained, and eventually, on May 16, 1927, the first defendant, who had been advised by leading counsel, returned the settlement to them through her solicitors unexecuted. The covering letter is important, and I quote it at length :

H

Re Haliburton, infant.

Dear Sirs, Under present circumstances we are advised that Miss Wilson is not entitled to retain the document executed by Mr. Strauss and we accordingly return it in accordance with his request conveyed through you. This, however, must not be taken as any admission that Mr. Strauss is under no obligation to execute a settlement in the terms of that document and the return of the document is without prejudice to any question as to the rights of Miss Wilson or the infant to have a settlement executed. We wish formally to repeat that Miss

Wilson is willing to execute a settlement in the terms of the document executed by Mr. Strauss.

On June 11, 1927, the bank wrote to the solicitors to the first defendant informing them that they proposed to pay over the proceeds of sale of the stock to the settlor unless during the course of the week proceedings were commenced to restrain them from so doing. No proceedings were commenced, and the bank, which had been furnished with a copy of the letter of May 16, 1927, handed over the proceeds of sale to the settlor against his indemnity on June 27, 1927. No steps were taken by the first defendant to assert any rights under the settlement until this action was commenced by the bank, when she and the infant raised the present claim by way of counterclaim. The settlor is now insolvent, and his covenant contained in the deed of Feb. 1, 1923, if it is still in force, is of little, if any, value. A B

One more matter of fact requires to be mentioned. On Jan. 15, 1927, the settlor through his solicitors cancelled his instructions to the bank to make payments to the first defendant out of the income of the India Stock, and thereafter the quarterly payments of £130 were made by the settlor direct to the first defendant at her bank. C

I have not thought it necessary to give more than a bare outline of these events, since, in my view, that outline is sufficient to raise the questions which we have to decide. An attempt was made before us to set up a case to the effect that the first defendant was prevented from executing a settlement by misrepresentation as to the true legal position. Such a case ought to have been pleaded, and, had it been pleaded, many matters would have required investigation. In my opinion, it was not open to the defendants to raise this case. In any event, although there may be matters for criticism in the method adopted to recover the settlement from the first defendant, I can find no sufficient ground for holding that she was persuaded not to execute it by anything in the nature of misrepresentation. Moreover, in view of the lapse of time which had taken place, and the settlor's repudiation of the settlement, I do not think that it was open to the first defendant, at the time when the suggested misrepresentations were made, to execute the settlement so as to deprive the settlor of any right which he had to treat it as no longer binding upon him. The bank had no notice of the suggested misrepresentations. By their counterclaim (with which alone we are concerned) the first defendant and the infant claim a declaration that the bank was trustee of the India Stock and the proceeds of sale thereof upon the trusts declared in the settlement, a declaration that the bank was guilty of breach of trust in paying over the proceeds to the settlor, and consequential relief. MORTON, J., decided in favour of the defendants, and made an order accordingly. E F G H

There are other facts in the case which might have given support to an argument that the first defendant had by her conduct precluded herself from making the present claim against the bank, but in the court below

and before us counsel for the bank stated that, if the infant's claim was held to be a good one, the bank did not desire to take the point that the first defendant was so disentitled to relief, and accordingly it is not necessary to set out the further facts which would have been relevant to its decision.

- A The short question which arises may be thus stated : Was there on June 27, 1927, when the bank handed over the proceeds of sale to the settlor, any existing trust in favour of, and enforceable by, the first defendant and the infant of which the bank had notice ? If the answer to this question is in the affirmative, the bank is liable to replace the money.
- B It is true that the bank never accepted the office of trustee under the settlement. The contemplated manner of its acceptance was by execution of the settlement, and by that alone, and such execution never took place. Nevertheless, the bank was holder of the stock, and, if a trust existed in regard to it, the bank had notice of that trust, and its duty would have been, if it did not itself accept the office of trustee, to transfer it to a trustee duly constituted, and to no one else. In order to answer the question propounded, it is necessary to examine the position as between the settlor, on the one hand, and the first defendant and the infant, on the other. There was no antecedent parol agreement. It was faintly suggested that such an agreement was to be found in the fact that the terms of the settlement were agreed in draft, but this is not enough. The parties clearly intended to be bound by the written instrument, and by that alone. The case in this respect falls within a familiar class. If the settlement had merely been in the form of an agreement under hand between the settlor and the first defendant for the creation of a trust, its non-execution by the first defendant would have prevented any obligation from arising, for there would have been no binding contract. The document, however, was under seal, and was executed and delivered by the settlor, not as an escrow or conditionally, but as his deed without any condition attached. It is clear that, where a party executes and delivers a deed in this way, and by that deed he is expressed to convey property or to bind himself by covenant, the deed is effective to convey the property and to bind the covenantor according to its terms, notwithstanding that the grantee or covenantee does not execute it : *Butler & Baker's Case* (1), *Cooch v. Goodman* (2), at p. 599, and *Morgan v. Pike* (3). The grantee can, if he pleases, disclaim the grant, in which case the property conveyed re-vests in the grantor. The covenantee can, if he pleases, refuse to accept the covenant, in which case the covenantor is released. In the present case, there can, of course, be no question of disclaimer, so far as the infant is concerned. If, upon the true construction of a deed unconditionally delivered, the grant is to become effective or the covenant binding only on condition that the grantee or covenantee executes it, non-execution by him will no doubt prevent the grant or the covenant from becoming effective. However, with all respect to those who think otherwise, I am unable to find any

such condition in the present case. No such condition is expressed, and I do not think it legitimate to imply one merely because the deed is expressed to contain covenants by the first defendant. The argument that such a condition ought to be implied appears to me to be in effect an attempt to construe the settlement in such a way as to get over the difficulty caused by its unconditional delivery by the settlor. The effect of conditional delivery is stated by LORD CRANWORTH in *Xenos v. Wickham* (4), at p. 323 :

... the efficacy of a deed depends on its being sealed and delivered by the maker of it ; not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been performed, but when the time has arrived, or the condition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow.

I do not find it legitimate to extract by implication a result in its practical consequences equivalent to those which flow from conditional delivery. An express provision to this effect would be a strange thing. If it were present, it would be necessary to give effect to it, but to imply such a provision in my humble judgment, would not be in accordance with sound principles of construction. It follows that, when the settlor executed the settlement, it became immediately effective, according to its terms, so far as the settlor was concerned. If the first defendant had thereupon attempted to enforce it before herself executing it, she no doubt must have submitted to be bound by the covenants on her part expressed to be contained in it. That, however, does not alter the fact that her failure to execute by itself did not have the effect of making the settlement inoperative as the settlor's deed.

The next matter for consideration is the construction of the settlement itself. If it were a mere agreement to create a trust, the infant as a volunteer could not, in any case, enforce it. Whether or not the first defendant ought also to be regarded as a volunteer is a question of some nicety, in view of the possible effect of the settlement upon her rights under the deed of 1923. However, I do not find it necessary to pursue this matter, since, in my judgment, the language of the settlement is sufficient, in the circumstances, to create an immediate and complete trust. If the proposed trust property had not been already vested in the bank, and the settlor had assigned it to the bank to hold upon the trusts of the settlement, an immediate and complete trust would have been created. Disclaimer or non-acceptance by the bank would not have affected this. The only consequence would have been that the property would have re-vested in the settlor subject to the trust : *Mallott v. Wilson* (5). In fact, however, the proposed trust property was already vested in the bank, and no words of assignment were necessary, nor would they have been suitable. Before the settlement was executed, the

equitable interest in the property belonged to the settlor. The language of the settlement was, in my judgment, effective to divest him of his equitable interest immediately upon its execution by him, and to vest it in the beneficiaries. Disclaimer or non-acceptance by the bank could not alter this fact. It would merely have necessitated the appointment of a new trustee. If the bank, with knowledge of the execution by the settlor, had thereupon refused to accept the trust, its duty would have been to keep the trust property in its hands pending the appointment of a new trustee. In *Donaldson v. Donaldson* (6), SIR W. PAGE WOOD, V.-C., said, at p. 718 :

- B The question is in every case, has there been a declaration of trust, or has the assignor performed such acts that the donee can take advantage of them without requiring any further act to be done by the assignor ; and, if the title is so far complete that this court is not called upon to act against the assignor, it will assist the donee in obtaining the property from any person who would be treated as a trustee for him.
- C The provisions of the settlement by which the trusts of the India Stock were declared appear to me to fall within this principle. I may refer in this connection to the judgment of SARGANT, J., in *Re Chrimes, Locovich v. Chrimes* (7).
- D Down to this point, I find myself in agreement with the conclusions of MORTON, J., I think that, immediately the settlor executed the settlement, a trust was completely constituted in favour of the first beneficiary and the infant, and the settlor's covenants became binding upon him at law. However, the questions remain whether, in the circumstances, the settlor was, at the relevant date, entitled to treat the settlement as no longer effective, and whether he was so entitled as against the first defendant alone, or as against both her and the infant. Although, as I have said, the settlement was not, upon its true construction, subject to any condition, it is, I think, clear that it was executed by the settlor upon the faith that the first defendant would execute it, which is a different matter altogether. That it was so executed appears to me to be shown by the very nature of the transaction which the settlement was intended to effect. The deed of 1923 was to be abrogated and all liability under it, both past and future, released by the first defendant. That deed in cl. 4 contained a provision for its abrogation by means of a unilateral act of the settlor in making an equal or greater provision for the first defendant. However, the method of securing its abrogation by means of an express release by the first defendant was a different one, and for obvious reasons was more satisfactory from the settlor's point of view, since no questions as to the adequacy of the new provision made for the first defendant could arise. For the same reason, a release was more effective, and less open to controversy, than a unilateral declaration by the settlor, such as was contemplated by cl. 5 of the deed of 1923. It was argued on behalf of the respondents and the judge appears to have held, that, in view of the provisions of cl. 4 of the deed of 1923, that deed was automatically abrogated as soon as the settlor executed the settlement,

so that execution by the first defendant was unnecessary for the purpose of getting rid of the deed of 1923. I cannot agree with this, for the reasons which I have already given. The settlor required a release, it was arranged that he should have a release, and, in my judgment, he executed the settlement of 1925 upon the faith that he would get a release. The nature of the settlement itself, moreover, made it clear to the first defendant that this was so, and I cannot accept the view that its execution by her was, or ought to be, regarded as a matter of indifference either to her or to the settlor. A

At the date when the proceeds of sale of the India Stock were paid over by the bank to the settlor, not only had the first defendant not executed the settlement, but also she had, to the knowledge of the bank, returned it to the settlor unexecuted, thus making clear her intention not to execute it. In these circumstances, it would be strange if the first defendant could now turn round and say that she is entitled as against the settlor, and, what is more, as against the bank, to treat the settlement as having been at that date still an effective document. The fact that the settlor executed the settlement upon the faith that the first defendant would execute it would, I think, be sufficient to bring into operation the equitable principle to which I am about to refer in the case of the infant. Quite apart from this, however, her action in returning the settlement unexecuted and the language of the letter of May 16, 1927, showed an intention on her part to disclaim the benefits, both of trust and covenant, given to her by the settlement, although she claimed the right to call for another settlement to take its place. B C D

The position of the infant is, of course, different, in that in his case no question of disclaimer can arise. In my opinion, however, his rights must stand or fall by the action of the first defendant. The provision made for the infant was made upon the faith that the settlement would be executed by the first defendant. I cannot see on what principle he can claim a benefit under a document which was executed upon the faith of a release being given to the settlor by the first defendant executing it in her turn. To hold otherwise would be to allow the infant to affirm part of the whole transaction and to disaffirm the rest. Moreover, if the first defendant, at a time when it was still open to her to do so, had attempted to enforce the settlement without having first executed it, she could only have done so, as I have already pointed out, by submitting to be bound by the covenants on her part expressed to be contained in it. The settlor would thus have obtained the benefit which he desired. If the infant alone, however, were now held to be entitled to enforce the settlement, the settlor would be deprived of this benefit. E F G H

Quite apart from these considerations, there is a principle of equity which was formulated by SIR GEORGE JESSEL, M.R., in *Luke v. South Kensington Hotel Co.* (8) in the following terms, at p. 125 :

It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind

in equity if the third refuses to execute, and consequently on that ground the deed could not have bound the two.

- It was argued that this principle is of a very limited application and is confined to two classes of case—namely, the case where one of two or more persons who together constitute a single party does not execute the deed, and the case of sureties. I do not agree. In my judgment, these are merely examples of a general rule which requires nothing but its own inherent reasonableness to justify it. It is true that the case of the infant does not fall precisely within the language used by SIR GEORGE JESSEL, M.R., since he was considering the case where the person seeking to enforce the deed was one of the other parties to it. Nevertheless, it appears to me that the principle must apply equally to a case such as the present, where a deed confers a benefit on a third person not a party to it and it appears upon the face of the deed that it was executed by the person providing the benefit upon the faith that the other party or parties to the deed would execute it. If the infant had been of full age, and had been named as a party to the settlement, the principle would, in the circumstances of this case, have applied even if he had himself executed it. I cannot see how the fact that he was not named as a party can make any difference, and his infancy clearly cannot alter the position in any way. The appeal is allowed, with costs here and below.

SCOTT, L.J. : The judgment of CLAUSON, L.J., and myself will be read by him.

- CLAUSON, L.J. : It is unnecessary for us to recapitulate the facts. The cardinal issue in the case is as to the result in law and equity of the execution by the settlor of the undated indenture executed by him in Aug., 1925, and sent on his behalf to the female defendant for execution by her, and ultimately returned by her unexecuted. We were informed by counsel on each side that the plaintiffs admitted in the court below that the indenture was executed by the settlor, and is his deed, and was completely delivered by him, and was not delivered in escrow, and we were accordingly asked to determine the rights of the parties on this footing, and, in so far as the admission is one of fact, we shall do so. The contention of the defendants is that, upon such delivery, and without more, the sum of £15,000 India 4½ per cent. stock, which up to that moment was held by the plaintiffs in trust for the settlor, became impressed with a trust in favour of the defendants. This contention the judge accepted as correct. The contrary contention may be put shortly thus. It may be said, in the first place, that, on the true construction of the indenture, no trust was to come into being except by the consensus of the settlor and the female defendant, and that, in the absence of the execution of the indenture by the female defendant, that consensus never existed. It may be said, in the second place, that the settlor executed the deed upon the faith that the female defendant would execute it, and that, as the female defendant never executed the

deed, and in fact returned it to the settlor unexecuted, the deed does not bind the settlor. If, on the true construction of the deed, it is intended to operate so as to create a trust by the unilateral act of the settlor, the defendant's contention must succeed, subject only to the question raised by the plaintiffs' second contention. A trust may undoubtedly be brought into being by such a unilateral act, as in the common case of a declaration of trust of property by the person in whom the property is vested at law. Equally, there can be no question but that it may be brought into being by a bilateral act, for a person in whom property is vested, whether at law or in equity, may agree with another that the property shall be held by himself (if the property is vested in him at law) or by his trustee (if the property is his only in equity) in trust for that other or for a third party. Equity will, in proper circumstances, give effect to such an agreement as creating a valid trust, but in such a case there must be an agreement in fact, and to establish the fact the consensus of the two parties must be shown. The intention of the one party to create the trust if the other party agrees to the creation will not, however formally declared, result in the creation of the trust where the agreement of the other party is not in fact brought about. It may be assumed that such a consensual creation of a trust might be achieved by a parol agreement, but, where the proposal made by the intending settlor is that the agreement shall be by deed and not otherwise, the beneficiary's consent must be expressed by deed.

In the present case, the evidence precludes the idea of a parol agreement, for two reasons. In the first place, the only offer by the would-be settlor was the invitation to the beneficiary to execute the deed, and, in the second place, even if there had been evidence of an offer to enter into a parol contract, there was no evidence of acceptance of it by the offeree. In these circumstances, it is essential to examine the indenture with a view to discovering whether, on its true construction, it was intended to have a unilateral operation, and, accordingly, to have effect whether or not the female defendant should concur in it by executing it, or whether it is to be construed as intended to operate as a consensual document, and thus to operate only if the female defendant concurs in it by executing it.

Apart from the admission by the plaintiffs to which we referred at the beginning of this judgment—to the effect that the indenture was executed by the settlor as his deed, and was delivered as a deed, and not as an escrow—we should have said, upon the evidence, that the legal nature of the document at the moment of its despatch by the intending settlor was that of a mere offer, but an offer which could be converted at will by the beneficiary into a concluded contract by her own execution of it. The nature of the instrument depends necessarily in part on questions of law—e.g., the correct interpretation of the document itself—and we cannot think that the admission of counsel was intended, or ought, to exclude from our consideration that element of the problem.

The testatum shows that the indenture is made in pursuance of (a) an agreement by the settlor to enter into the covenants thereafter contained, and (b) a further agreement between the settlor and the female defendant that, in consideration of the provision made by the indenture for her and for the infant, she is to release the settlor from his liability under the preceding and recited indenture of Feb. 1, 1923.

- A It is said by the defendants that, apart from any covenant or agreement by the female defendant, the operation of the indenture of Feb. 1, 1923, would, on the true construction of its terms, come to an end on the coming into operation of the indenture of 1925. Even if that be so (and it is by no means clear that it is so), it was quite open to the settlor to stipulate for a formal release, and it is clear that he did so stipulate. However, this contention in reality begs the question, by assuming that the 1925 instrument, unexecuted by the female defendant, was effective as a settlement within cl. 1 and 4 of the earlier deed, and this is precisely what, in our view, the 1925 instrument could not be until executed by her. Clause 1 of the deed creates the trust, and the crucial question is whether cl. 1 is intended to—or, indeed, can—on its true construction operate as though it were a unilateral declaration of trust by the settlor. In our judgment, it does not bear such a construction. Taken in conjunction with the recitals and the testatum and the remaining clauses of the deed, and in particular cl. 16 and 17, cl. 1 operates, in our view, to create a trust by the consensus of the settlor (who had dominion over the fund in equity) and the female defendant, her consensus in the creation of the trust, and the contemporaneous release of the pre-existing trust, being requisite in order to perfect the transaction, which appears on the face of the document to be the creation of a trust by way of supersession of a previous trust, such previous trust to be brought to an end by the concurrence of the female defendant in the deed. If this construction of the deed be correct, the non-execution by the female defendant leaves the deed wholly inoperative. The position is therefore analogous to that which arises when one party makes a written offer to the other party, and the latter does nothing more. In such cases, there is no acceptance, no consensus, and no legal result. There could not be a unilateral creation of trust if, as we think, the deed was, on its true interpretation, one which was not intended to operate unless and until executed by the other party. It follows necessarily, in our view, that the settlor intended his covenant to be conditional on execution, and to have no operation otherwise.

- H Taking this view of the construction of the deed, we find it unnecessary to consider whether, had the deed been intended to have a unilateral operation, the settlor could, in the circumstances, have obtained relief from the operation of the deed, on the principle recognised by SIR GEORGE JESSEL, M.R., in *Luke v. South Kensington Hotel Co.* (8)—namely, that, if one party to the knowledge of another party executes a deed on the faith that that other party will execute it, the deed will

be inoperative in equity as against the former party in the event of the latter party refusing to execute it. In our judgment, the appeal should succeed, with the result that the order of the judge will be discharged and that there will be judgment for the plaintiffs against the female defendant for £121 19s. 1d., and for their costs of the action. The counterclaim will be dismissed with costs. The female defendant must pay the costs of the appeal. A

Appeal allowed. Judgment for plaintiffs for £121 19s. 1d. and costs. Counterclaim dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Murray, Hutchins & Co.* (for the appellants); *W. R. Perkins* (for the respondent). B

[Reported by REGINALD TOWNSEND, Esq., Barrister-at-Law.]

THE GOVERNORS OF QUEEN ANNE'S BOUNTY v. TITHE REDEMPTION COMMISSION. C

[CHANCERY DIVISION (Morton, J.), July 13, 27, 1938.]

Ecclesiastical Law—Tithe rentcharge—Arrears—Limitation of time for recovery—Excluded period—Limitation period expiring before the commencement of excluded period—Tithe Act, 1936 (c. 43), ss. 1, 4 (1), 20. D

The Tithe Act, 1936, abolished tithe rentcharge on Oct. 2, 1936, but preserved the right to recover tithe rentcharge accrued due before that date, subject to the provision that after Apr. 1, 1937, arrears could only be recovered by the Tithe Commission. After that date no proceedings for arrears could be commenced by the Commission until the expiration of one month after the tithe-owner had given particulars of the arrears claimed to the tithe-payer and the Commission. The arrears recoverable are limited to two years by the Tithe Act, 1891. On Sept. 30, 1937, the plaintiffs posted to the Commission and to the tithe-payers particulars of arrears due on Oct. 1, 1935, and it was admitted that such notices were received on Oct. 1, 1937 and that the receipt on such date was in time for the purposes of the two-years' limitation prescribed by the Tithe Act, 1891, which period would expire at midnight Oct. 1-Oct. 2, 1937. It was also admitted that, upon such receipt on Oct. 1, 1937, the period of one month above referred to would commence immediately after midnight on Oct. 1-Oct. 2, 1937. By the Tithe Act, 1936, s. 10 (a), in the calculation of the two-years' limitation period, time after the service of the particulars by the tithe-owner during which proceedings cannot be commenced is to be excluded. The proceedings for recovery of the arrears were commenced in the county court on Nov. 2, 1937. It was contended that, although the period of one month commenced on Oct. 2, 1937, "time after" the service of the particulars began on Oct. 1, 1937, or, in the alternative, in calculating these times regard must be had to the exact time of service:— E F G

HELD: (i) the proceedings were out of time because the two years' period under the Tithe Act, 1891, ended on Oct. 1, 1937, and "time after" the service of the particulars did not commence until Oct. 2, 1937. The arrears, therefore, became irrecoverable before the excluded period began. H

(ii) the Tithe Act, 1936, s. 20 (10) (a) cannot be construed as referring to the exact time at which notices are served or proceedings begun, and the legislature did not thereby intend to deal with fractions of a day.

[EDITORIAL NOTE. The difficulties of the collection of tithe rentcharge have led tithe-owners to allow the greatest latitude possible to tithe-payers ; but, in the present instance, and upon the construction of the Act of 1936 adopted by the court, they have here miscalculated by a day. It is here held that it is necessary that the further period of one month, in the judgment called the "suspension period," shall commence before the expiration of the two-years' limitation period. It is apparently insufficient that the suspension period should begin at the moment the limitation period ends.

AS TO COMMENCEMENT OF A PERIOD OF TIME, see HALSBURY, 1st Edn., Vol. 27, Time, pp. 449, 450 ; paras. 888, 889 ; and FOR CASES, see DIGEST, Vol. 42, pp. 946-951, Nos. 190-238.]

Case referred to :

(1) *Goldsmiths' Co. v. West Metropolitan Ry. Co.*, [1904] 1 K.B. 1 ; 42 Digest 950, 237 ; 72 L.J.K.B. 931 ; 89 L.T. 428.

ADJOURNED SUMMONS for the determination of the question whether, upon the true construction of the Tithe Act, 1936, s. 20 (10) (a), the period (referred to as the suspension period) begins with the day on which, under sect. 20 (3) of the Act, the tithe-owner has given to the tithe-payer the notice referred to in the same subsection or with the hour of service of such notice or with the following day.

H. B. Vaisey, K.C., F. H. L. Errington and A. H. Armstrong for the plaintiffs.

The Attorney-General (Sir Donald Somervell, K.C.) and Hubert Hull for the defendants.

MORTON, J. : In order to render this question intelligible, and to explain why these proceedings were instituted, I must read certain sections of the Tithe Act, 1936, and state certain facts. Sect. 1 of the Act is in the following terms :

Subject to the provisions of this Act, all tithe rentcharge shall be extinguished on Oct. 2, 1936 (in this Act referred to as "the appointed day") and accordingly as from that day the land out of which any tithe rentcharge issued immediately before that day shall be absolutely discharged and freed therefrom.

It is to be observed that the tithe rentcharge which became payable on Oct. 1, 1936, or on any earlier date, is not extinguished by that section. Then sect. 4 (1) provides as follows :

There shall be established for the purposes of this Act a commission to be called the "Tithe Redemption Commission" (in this Act referred to as "the commission"), consisting of a chairman and not more than four other commissioners appointed by the Treasury after consultation with the Minister of Agriculture and Fisheries (in this Act referred to as "the Minister").

I now turn to sect. 20, and I shall first of all read subsects. (1) and (2) :

(1) The extinguishment by this Act of tithe rentcharge shall not affect any right or liability in respect of sums which became due on account thereof before the appointed day (in this Act referred to as "arrears"). (2) On Apr. 1, 1937, power to recover and give a discharge for arrears shall vest in the commission to the exclusion of any other person, and the subsequent provisions of this section shall have effect with respect to the recovery thereof on or after that date.

The result is that, on and after Apr. 1, 1937, any sums which became

due on account of tithe rentcharge before Oct. 2, 1936, could only be recovered by the commission. Subsect. (3) is as follows :

No legal proceedings for the recovery of arrears of a rentcharge shall be commenced or continued by the commission on or after the said Apr. 1 until one month after the person who would have been entitled to recover the arrears (in this section referred to as the "tithe-owner") has, by notice in writing served after that date, given to the person who for the purposes of an application for an order under the Tithe Act, 1891, s. 2, for the recovery of the arrears would be treated as the owner of the land out of which the rentcharge issued (in this section referred to as the "tithe-payer"), and to the commission, particulars in writing in the prescribed form of the arrears which the tithe-owner claims to be recoverable from the tithe-payer.

In my view, it is clear that the period of one month mentioned in this subsection does not begin to run until after the tithe-owner has given the prescribed notice in writing, both to the tithe-payer and to the commission. Nothing turns upon this in the present case, since the tithe-owners concerned in fact gave notice at the same time to the tithe-payers and to the commission. A more important question is at what point of time the period of one month begins, and when it ends. On this question, counsel for the plaintiffs and the defendants are agreed that the day on which the notice is given must be excluded from this period, in view of certain authorities, and, in particular, *Goldsmiths' Co. v. West Metropolitan Ry. Co.* (1). The result is that, in the case, for instance, of a notice given on Oct. 1, 1937, the period of one month would end at midnight on the night of Nov. 1—Nov. 2, 1937.

I think that at this point it is convenient to state some of the facts leading up to the present application. The plaintiffs were at all material times prior to Apr. 1, 1937, owners within the Tithe Act, 1936, s. 20 (3), of tithe rentcharge charged upon lands in many parishes in England. On Sept. 30, 1937, the plaintiffs sent by registered post to upwards of 1,000 tithe-payers notices in the prescribed form relating to arrears of tithe rentcharge which had become payable on Oct. 1, 1935, and which had not yet been paid. The reason why the notices were delayed so long was stated by counsel for the plaintiffs, and I entirely accept his statement. The reason for the delay is not, however, material for the purposes of the present case. The relevant question is : What is the effect of the delay ? It has been assumed for the purposes of this case that the notices so posted reached the tithe-payers on Oct. 1, 1937. On Sept. 30, 1937, notices in the prescribed form were also sent to the defendants, in accordance with sect. 20 (3). The result was that proceedings could not be commenced against the tithe-payers for recovery of the arrears in question until one month after service of the notices. As the notices were served on Oct. 1, 1937, it follows from what I have already said that proceedings against the tithe-payers could not be commenced until after midnight on the night of Nov. 1—Nov. 2, 1937. Sect. 20 (4), (5), (6), (7) gives the tithe-payer an opportunity of having his case referred to a committee called the Arrears Investigation Committee. I need not read these subsections, as not one of the tithe-payers

concerned took advantage of their provisions. Subsect. (8) is in the following terms :

A As respects any arrears as to which a tithe-payer does not claim a reference to the committee within one month after service on him of a notice giving particulars thereof served for the purposes of subsect. (3) of this section, or within such extended period as may have been allowed under subsect. (4) of this section, the commission shall at the expiration of that period, unless they are satisfied, after consultation with the tithe-owner, that the tithe-payer is not legally liable for the payment thereof, or that there is no reasonable prospect of the recovery thereof or of any part thereof, take all requisite steps, including if necessary the commencement or continuance of legal proceedings, for the recovery thereof, and pay to the tithe-owner a sum equal to the amount thereof in respect of which the tithe-payer has admitted or admits legal liability or the court has made or makes an order for recovery.

B As will appear later, this subsection is of some importance in the present case. I need not read subsect. (9), and I now turn to subsect. (10), which begins as follows :

The right to recover arrears vested in the commission by this section may be enforced in any manner in which the right of the commission to recover an instalment of an annuity may be enforced under sect. 16 of this Act.

C It is not necessary, for the purposes of this case, to state the manner in which the commission can enforce the right to recover arrears, beyond saying that, in the case of the arrears with which I am concerned, proceedings could be taken in the county court. Then follows proviso (a), upon which the decision in this case turns. It is as follows :

D Provided that : (a) the provisions of the Tithe Act, 1891, s. 10 (2) (which provides that a sum on account of tithe rentcharge shall not be recoverable under that Act unless proceedings for such recovery have been commenced before the expiration of two years from the date at which it became payable), shall have effect in relation to the recovery of arrears by the commission from a tithe-payer, so, however, that in reckoning the said period of two years' time after the tithe-owner has served a notice for the purposes of subsect. (3) of this section on the tithe-payer, during which legal proceedings may not, by virtue of this section, be commenced or continued, shall be excluded.

It is agreed by counsel on each side, in view of the *Goldsmiths' Co.* case (1), to which I have already referred, that, in reckoning the period of two years mentioned in this subsection, the date on which the arrears become payable must be excluded. The result is that, but for the portion of the proviso beginning with the words "so however that," the arrears which became payable on Oct. 1, 1935, would cease to be recoverable at midnight on the night of Oct. 1—Oct. 2, 1937.

G Now comes the conflict of view between the plaintiffs and the defendants. The plaintiffs contend that in the present case the "time after the tithe-owner has served a notice for the purposes of subsect. (3) of this section on the tithe-payer, during which legal proceedings may not, by virtue of this section, be commenced or continued"—which I shall call hereafter the suspension period—is a period of one month including Oct. 1, 1937, the day on which notices were served under subsect. (3). Alternatively, the plaintiffs contend that the suspension period is a period of one month beginning with the exact hour on Oct. 1, 1937, on which such notices were received by the tithe-payers. If either of these contentions is correct, the period of two years mentioned in the subsection did not expire at midnight on the night of Oct. 1—Oct. 2, 1937, since it is

necessary to exclude from that period either the whole of Oct. 1, 1937, or that portion of Oct. 1, 1937, which came after the hour at which the tithe-payers received the notices.

The defendants, on the other hand, contend that the suspension period does not begin until the day which immediately follows the day on which the notices are served—that is to say, in the present case, that the suspension period did not begin before midnight on the night of Oct. 1—Oct. 2, 1937. If this contention is correct, the arrears which became due on Oct. 1, 1935, became irrecoverable at midnight on the night of Oct. 1—Oct. 2, 1937, since the two-years' period expired at that moment.

I must now state the events which took place after the service of the notices on Oct. 1, 1937. On Nov. 2, 1937, the defendants, at the request of the plaintiffs, commenced proceedings in the county court for recovery of the arrears in question. On Feb. 11, 1938, the defendants sent to the plaintiffs a letter in the following terms :

I am directed to refer to the notices served by Queen Anne's Bounty under the Tithe Act, 1936, s. 20 (3), in respect of arrears of tithe rentcharge due on Oct. 1, 1935. The commission will not take steps for the recovery of arrears which are "irrecoverable" in the sense of sect. 20 (10) (a), and as you are aware they have been advised that there fall within this class of irrecoverable arrears all arrears of tithe rentcharge due on Oct. 1, 1935, in respect of which notices were served by the tithe-owner on the tithe-payer after Sept. 30, 1937, and for the recovery of which application had not been made by the tithe-owner to the county court prior to Apr. 1, 1937. It was only because your governors had been advised that notices served on tithe-payers on Oct. 1, 1937, protected those arrears from being irrecoverable, that the commission filed applications in the county court for their recovery in order not to deprive the Bounty of an opportunity of obtaining a judicial construction of the proviso referred to above. By a letter of Dec. 3, 1937, the Bounty were informed that the commission would afford every facility and would be prepared to co-operate with them in order that the issue should be determined by the High Court. Having regard to the time which has elapsed since the matter was first raised and to the desirability of terminating the present position, I have now to inform you that it is the intention of the commission to discontinue all the proceedings which have been commenced in the county court in respect of the arrears in question, unless the Bounty commence proceedings without undue delay to obtain a judicial construction.

As a result of that letter, the originating summons which is now before me was issued on Mar. 2, 1938. The position is that the defendants say : "The arrears in question are irrecoverable by reason of sect. 20 (10) (a) of the Act, and therefore we propose to discontinue the county court proceedings." At first sight, this contention would appear to be well-founded. The arrears in question became payable on Oct. 1, 1935, and proceedings for their recovery were not begun until Nov. 2, 1937. If one adds together the period of two years mentioned in subsect. (10) and the period of one month which has to be added thereto by the joint effect of subsects. (10) and (3), it would appear that the proceedings were begun one day too late. The plaintiffs, however, say that the proceedings were begun in time, that the arrears are not irrecoverable, and that the defendants are bound to continue the proceedings in view of the provisions of sect. 20 (8). The position is, therefore, that the parties are not agreed as to the true construction and effect of the latter part of sect. 20 (10) (a) of the Act. The point in issue is : When did the suspension

period begin? If it began before midnight on the night of Oct. 1—Oct. 2, 1937, the two-years' period did not expire at midnight on that night, and the arrears may be recoverable. If it did not begin before midnight on that night, the two-years' period expired before the suspension period began to run, and the arrears are not recoverable. I have arrived at the

A conclusion that the latter is the correct view, and that neither the whole nor any part of Oct. 1, 1937—the day on which the notices were served—falls within the suspension period.

In order to give a consistent and logical interpretation to sect. 20 (3) (10), I think that it is necessary to apply the same method of reckoning to the

B three periods which are mentioned in these subsections. These periods are (i) one month after the tithe-owner has, by notice in writing served after Apr. 1, 1937, given to the tithe-payer the prescribed particulars, (ii) two years from the date on which the arrears became payable, and (iii) time after the tithe-owner has served a notice. It is admitted that

C in reckoning the first period the day on which the notice was served must be excluded, and that in reckoning the second period the date on which the arrears became payable must be excluded. In view of this, I can see no sufficient reason why I should employ a different method in reckoning the third period.

D Mr. Vaisey and Mr. Errington put the case for the plaintiffs in two alternative ways. First, they contend that the day on which the notices were served is excluded for the purpose of computing the suspension period, but is included in the suspension period itself. I agree with the first part of this contention, but I cannot accept the second part, for the

E reason which I have already stated. Further, it seems to me an inaccurate use of language to describe the day on which the notice is served as being "time after the tithe-owner has served a notice." In the alternative, Mr. Vaisey and Mr. Errington put their argument in this way. They say that, by virtue of sect. 20 (3), no legal proceedings for the

F recovery of arrears can be commenced during a period beginning on, and including, Apr. 1, 1937, and ending one month after the prescribed notice has been served—that is, in the present case, ending at midnight on the night of Oct. 1—Oct. 2, 1937. Then they say that in the present case the suspension period begins with the hour on Oct. 1, 1937, at which the

G notice was served. Thus, they say, the two-years' period mentioned in the earlier part of the proviso had not expired when the suspension period began to run. They rely upon the word "time" in the latter part of subsect. (10) (a), and say that in this part of the proviso the legislature is dealing with hours or minutes, and not with days. I cannot accede to

H this contention. In the first place, it is only in a very limited class of cases that the law has regard to fractions of a day, and I do not think that the present case falls within that class. In the second place, I think that I should not be carrying out the accepted principles of construction of statutes if I failed to apply the same method of reckoning in the case of each of the three periods which I have already mentioned.

I have this further comment to make on the plaintiffs' alternative contention. It seems to me to involve the ascertainment of the exact time at which the notice was received by each tithe-payer on Oct. 1, 1937, and of the exact time at which proceedings were begun against such tithe-payer on Nov. 2, 1937. To give an instance, let me assume that the tithe-payer received the notice at 11 a.m. on Oct. 1, 1937. At that hour, A say the plaintiffs, there were still thirteen hours of the two years to run, and the suspension period began to run at that hour and lasted until midnight on Nov. 1—Nov. 2, 1937. Assuming that this is so, it would be necessary to see whether the remaining thirteen hours of the two years, which would begin to run at midnight on Nov. 1—Nov. 2, 1937, expired B before proceedings were begun. If, for instance, proceedings were begun at 2 p.m. on Nov. 2, they would be an hour too late. I cannot believe that the legislature intended to deal with fractions of days in subsect. (10), or that they intended to compel the court to embark on any such inquiry. For these reasons, I propose to declare that the period pre- C scribed in sect. 20 (10) as "time after the tithe-owner has served a notice for the purposes of subsect. (3) of this section on the tithe-payer during which legal proceedings may not, by virtue of this section, be commenced or continued," begins with the day immediately following the day on which, under sect. 20 (3) of the Act, the tithe-owner has given D to the tithe-payer the notice referred to in the same subsection.

This summons is a perfectly friendly proceeding, and the parties are two public bodies, both of whom desire enlightenment as to the construction and effect of a certain section of the Tithe Act. In the circumstances, I think it would be right if I made no order as to costs. E

Solicitors: *The Solicitor, Queen Anne's Bounty* (for the plaintiffs); *Solicitor to the Ministry of Agriculture and Fisheries* (for the defendants).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

PERRY v. CROYDON BOROUGH COUNCIL.

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), July 26, 1938.] G

Practice—Application to stay an action—Actions by several plaintiffs against one defendant—Present action based on negligence alone—Other actions based on negligence and breach of statutory duty—Whether present action should be stayed pending hearing of one test action—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 41 (a)—R.S.C., Ord. 49, r. 8. H

The present action was brought by the plaintiff claiming damages for the death of her husband, which was alleged to have been caused by the negligence of the defendants in supplying contaminated drinking water. Other actions were pending against the same defendants, but in some of them breach of statutory duty was alleged in addition to negligence. An application was made to stay the present action

pending the hearing of one of the other actions, which was to be treated as a test action :—

HELD : as the issues raised in the present action were not identical with those raised in the proposed test action—the result of which might depend solely on the issue of breach of statutory duty, the issue of negligence not being there material—no stay ought to be ordered.

A [EDITORIAL NOTE. In order that a case may be made a test case and other cases stayed pending its trial, it is necessary that its facts and the issues raised therein should be the same. If this is not so, the procedure of a test action is not available, but that will not necessarily prevent the consolidation of the actions.

AS TO STAY OF PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 69-71, paras. 113-115; and FOR CASES, see DIGEST, Practice, pp. 983-985, Nos. 5135-

B 5142. See also YEARLY SUPREME COURT PRACTICE, 1938, p. 1660.]

Cases referred to :

(1) *Barnes v. Irwell Valley Water Board*, [1937] 4 All E.R. 675; Digest Supp.; on appeal, [1938] 2 All E.R. 650.

(2) *Bennett v. Bury (Lord)* (1880), 5 C.P.D. 339; 9 Digest 514, 3370; 49 L.J.Q.B. 411; 42 L.T. 480.

(3) *Amos v. Chadwick* (1878), 9 Ch.D. 459; Digest, Practice, 983, 5136; 47 L.J.Ch. 871; 39 L.T. 50.

APPEAL by the plaintiff from an order of MACNAGHTEN, J., dated July 12, 1938.

D The plaintiff brought an action, based solely on negligence, against the defendants in respect of the death of her husband, alleged to have been caused by drinking contaminated water supplied by the defendants. Numerous other actions were pending against the same defendants, but in some of them the plaintiffs were ratepayers, and the actions **E** were, therefore, also based on breach of statutory duty. The present application was for a stay pending the hearing of one of the other actions, brought by Read, which had been selected as a test action.

Sir Patrick Hastings, K.C., and *J. P. Ashworth* for the appellant.

J. W. Morris, K.C., and *H. M. Pratt* for the respondents.

F *Hastings, K.C.* : There is no rule permitting an action to be stayed until after the hearing of another action. It is a matter of practice. Nothing that will be decided in the test action will be of any use to this plaintiff. In the test action, the cause of action is breach of a contractual liability, the plaintiff there being a ratepayer. A jury is the best tribunal **G** to assess damages for loss of expectation of life. When this application was before the judge, no order for directions had been made in Read's case. Since then, an order has been made for trial by judge alone. If the defendants win their action against Read, that will not help them against this plaintiff, as different points of law arise.

H *Morris, K.C.* : This is precisely the class of case where a stay is ordered : *Bennett v. Bury (Lord)* (2). In this case, there are three causes of action. In Read's case, there are the same three and one other. The case is within the Judicature Act, 1925, s. 41 (a). There would be a great saving of costs, and all the issues might be determined in the other action. The judge would be invited to decide all the

issues. Then probably the sole remaining issue in this case would be the amount of damages, and for that the plaintiff could get a jury. [Counsel referred to *Barnes v. Irwell Valley Water Board* (1) and *Amos v. Chadwick* (3).]

GREER, L.J. : We have come to the conclusion that in this case the judge, by the order that he has made, has produced a position of injustice towards Mrs. Perry by postponing her action until after the hearing of the other action in October next. She has in some respects the same causes of action as are alleged in an action which was brought, by a writ issued 6 days before she brought her action, by a gentleman named Read and an infant. In that action, a question is raised which does not appear to be raised in the action by Mrs. Perry, which has been stayed—namely, as to whether or not the respondent council were liable, by reason of an alleged breach of contract with a ratepayer and with those to whom they were under an obligation, as decided in *Barnes v. Irwell Valley Water Board* (1), which is adumbrated in the statement of claim in Read's case. No such allegation is made, or could be made, in Mrs. Perry's case, because her husband was a schoolmaster, and was not a ratepayer, and he got his infection, if his statement of claim is to be accepted, by going to a school where there was provided drinking-water which had been in fact contaminated. Though the negligence is the same, the position of Mr. Read and the position of Mrs. Perry, *vis-à-vis* their rights against the council, are quite different, because, for reasons which seemed to both parties sufficient, it was agreed that the Read action should be tried without a jury, with the result that, even on the questions of negligence, there is a possibility of an appeal on fact to this court, and, if this court gives leave, an appeal from this court to the House of Lords. In Mrs. Perry's case, she desires to have the opportunity of applying in chambers for an order that her case shall be determined by a jury, and we are told that it has become a very convenient and very common practice for orders to be made where there are two difficult questions of fact—namely, whether negligence is proved and the amount of the damages to be recovered if negligence has been proved. She desires to go on with her action, at any rate until all the issues are settled in her action, and to be enabled to make her application for trial by jury before it is too late. In these circumstances, the issues not being identical in both actions, we think that the judge was not entitled under the inherent jurisdiction of the court to make the order which he did. It is only in cases where the issues are identical, and where one case inevitably decides all the other cases, such as the cases to which MACKINNON, L.J., referred, where there were similar policies of insurance, where one is agreed by both parties to be a test action, or where there are similar contracts in the form agreed, as very often happens, by various associations, where the sole question is the meaning of a term in a special contract in a form which has been signed by, it

may be, 50 or 60 different plaintiffs, the sole question being the meaning of a particular clause. Those are cases like the insurance cases, in which it is proper, right and just that there should be a test action, and that other actions should be stayed until the hearing of the test action. Those cases have no application to a case like this, where the issue of

A negligence may be decided in one case by a judge and decided in another case quite differently by a jury, and where it may well be that the judge may say to himself: "I am sufficiently satisfied, on the question as between the ratepayer and the corporation, that the corporation are liable, and I do not find it necessary to take upon myself the burden of deciding the very difficult question of negligence." For these reasons, I think, on the ground expressed by LORD COLERIDGE, C.J., in *Bennett v. Bury (Lord)* (2), at p. 341, we ought to set aside this order and allow the appeal with costs.

C SLESSER, L.J.: I agree.

D MACKINNON, L.J.: I agree, but only upon the very narrow ground that the causes of action in Perry's case are not precisely the same as those in Read's case. For the application of this very sensible procedure, by which many actions are stayed pending the trial of one action, it is, I think, essential that the test action shall raise precisely the same cause of action as that sought to be stayed. I only say this because I should not, so far as I am concerned, desire that the result of this appeal should be any encouragement to other plaintiffs, who have received what I regard as the very sensible letter of the corporation of May 24, unnecessarily to refuse to accede to that, because, if in this case the causes of action in Perry's case had been precisely the same as those in Read's case, I should have thought that the order made by the judge

E was right, and, if in any other cases a similar application was made, and it was shown that either Perry's case or Read's case was precisely the same as that sought to be stayed, such an order, I should have thought, ought reasonably to have been made.

G SLESSER, L.J.: In order that there may be no misapprehension, perhaps I ought to say that, when I said that I agreed, I was agreeing for the reasons stated by MACKINNON, L.J. I would rather keep open the question whether the mere right to a jury as such gave a right to object to a stay in these cases. I had in mind rather the difference, to which MACKINNON, L.J., referred, of the causes of action. I would

H like to keep open the other question.

GREER, L.J.: I also want to qualify what I said by saying that what we have said in this case will have nothing to do with an application for consolidation, if such application is made. I am not expressing any

opinion about it, except that this decision does not prejudice any such application, if such an application may be properly made.

Appeal allowed without costs.

Solicitors : *Slaughter & May* (for the appellant) ; *Sharpe, Pritchard & Co.*, agents for *E. Taberner*, Town Clerk, Croydon (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

R. v. PHILIPS. R. v. QUAYLE.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Charles and du Pareq, JJ.), July 25, 27, 1938.]

Criminal Law—Preliminary hearing by justices—Committal for trial—Evidence—Co-defendant added after evidence given—Depositions read to witnesses and approved—Irregularity—Indictable Offences Act, 1848 (c. 42), s. 17—Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 2 (2).

The two prisoners, Q. and P., were tried upon an indictment containing 17 counts. The first and ninth count charged both with conspiracy to defraud, the eighth count charged Q. alone with obtaining credit by fraud, and the other counts contained joint charges against both. In the result Q. was acquitted on counts 1 to 8 and convicted on counts 9 to 17, and P. was convicted on all counts against him. The proceedings before the justices were commenced against Q. alone and were so continued for about 3 months, during which time 35 witnesses were called and examined. Their evidence related to counts 1 to 7 only. P. was then joined as a co-defendant and it became necessary to recall the witnesses. Upon the recall of each witness his deposition was read over to him, and he was asked whether it was correct. All answered in the affirmative. The following statement was then added to the deposition : " My deposition has been read over to me and it is correct." P. was then given an opportunity of cross-examining upon this summary statement.

HELD : (i) the procedure adopted before the justices was prejudicial to the accused person, and, however convenient, was irregular and unlawful.

(ii) when justices commit on several charges, the committals are several and distinct, and, if one is bad, the others are not necessarily invalidated. The conviction of P. on counts 9 to 17 must, therefore, stand.

[EDITORIAL NOTE. The law requires that when evidence is given against any person, he shall have a full opportunity of testing it by cross-examination. A full opportunity is not given unless the defendant hears the question asked, the answer of the witness and has the opportunity of observing the demeanour of the witness in the box. For this reason the shortened form of procedure here adopted by the justices is held to be irregular, and the committal based upon it unlawful.]

AS TO EVIDENCE BEFORE JUSTICES ON CHARGE OF INDICTABLE OFFENCE, see HALSBURY, Hailsham Edn., Vol. 9, pp. 106, 107, para. 138 ; and FOR CASES, see DIGEST, Vol. 14, pp. 192-194, Nos. 1720-1734.]

Cases referred to :

- (1) *R. v. Gee*, *R. v. Bibby*, *R. v. Dunscombe*, [1936] 2 K.B. 442 ; [1936] 2 All E.R. 89 ; Digest Supp. ; 105 L.J.K.B. 739 ; 155 L.T. 31 ; 25 Cr. App. Rep. 198.
- (2) *Ex p. Bottomley*, [1909] 2 K.B. 14 ; 14 Digest 194, 1734 ; 78 L.J.K.B. 547 ; 100 L.T. 782.

APPEALS against conviction at the Central Criminal Court upon the ground that the committal for trial was unlawful by reason of the defective procedure before the justices. The facts are fully stated in the judgment.

Garth Moore for the appellants.

A *R. E. Seaton* for the Crown.

LORD HEWART, L.C.J. [delivering the judgment of the court]: These appellants, Richard James Philips and Frederick Quayle, were tried before the commissioner at the Central Criminal Court on an indictment which contained 17 counts. The first and ninth counts charged both appellants with conspiracy to defraud, the eighth count charged Quayle alone with obtaining credit by fraud in incurring a certain debt, and the remaining counts charged both appellants jointly with obtaining credit by fraud in incurring certain other debts, and with obtaining goods by false pretences. At the trial, counsel for the appellant Philips moved on behalf of his client to quash the indictment, on the ground that the proceedings before the committing justices were so defective, by reason of non-compliance with the Indictable Offences Act, 1848, s. 17, that there was no lawful committal for trial within the meaning of the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2). The commissioner ruled against this submission on the part of the defence, and the trial proceeded, with the result that Quayle was acquitted on counts 1 to 8 and convicted on counts 9 to 17, and Philips was convicted on each of the counts against him. Thereupon Quayle was sentenced to 10 months' imprisonment and Philips to 3 years' penal servitude. Both appellants appealed to this court against their convictions. The sole ground of the appeal was the alleged irregularity of the proceedings before the justices, which, it is argued, made the proceedings at the Central Criminal Court a nullity so far as Philips was concerned, and had consequences so prejudicial to Quayle that the conviction recorded against him ought not to stand.

The facts as to the procedure adopted by the committing justices were not in dispute. Quayle was brought before the justices on or about Dec. 25, 1937, and proceedings were continued against him alone until Mar. 28, 1938, when Philips was brought before the justices as a co-defendant with Quayle. Meanwhile, 35 witnesses had been called and examined. Their evidence had been taken in a regular manner, in the presence of Quayle. When Philips was brought before the court, it became necessary to re-call these 35 witnesses, in order that they might repeat their evidence, which incriminated Philips as well as Quayle. The evidence of these 35 witnesses related to the charges which were subsequently embodied in counts 1 to 7, inclusive. Instead of examining each witness anew in the presence of Philips, the justices took a course which it was thought would result in a saving of time. Each witness's deposition was read over to him and he was then asked whether it was

correct. The answer was always in the affirmative, so that there appeared at the end of each witness's deposition the signed statement "My deposition has been read over to me and it is correct." The appellant Philips was then given the opportunity, such as it was, of cross-examining the witness whose evidence he had heard given in this summary and compendious form. We have no doubt that this procedure, however convenient it may have seemed to be, was irregular and contrary to law. Mr. Garth Moore, in his able argument on behalf of the appellants, relied upon the decision of this court in *R. v. Gee* (1). We are of opinion that in the present case the irregularity was at least as serious as that which the court then regarded as sufficiently grave to invalidate the committal. The terms of the Indictable Offences Act, 1848, s. 17, are imperative, and, if they are complied with, the accused person hears the witness give his evidence, so that he is able to object to any question that may be put improperly and to see that the oral evidence is recorded in writing, with accuracy and fairness. This opportunity was denied to Philips, who was indeed placed in a position even less favourable than that of the appellant in *R. v. Gee* (1). Counsel for the Crown referred us to the decision in *Ex p. Bottomley* (2). It is to be observed, however, first, that the question there before the court was whether a magistrate ought to be compelled by *mandamus* to hear a case in a particular manner—a question giving rise to considerations very different from any with which we are now concerned—and, secondly, that the course which the magistrate was proposing to take in *Bottomley's* case (2) did not involve the examination of witnesses in the absence of the persons accused. No case was cited to us which, in our view, would justify us in holding that the terms of the section were complied with, or that the irregularity can be overlooked, and we are bound to hold, following the decision in *R. v. Gee* (1), that, so far as concerns the charges set out in counts 1 to 7 inclusive, the committal of Philips was a nullity. It was said at the bar that the practice which was adopted by the magistrates in the present case is common, if not general. We cannot, however, regard this fact, if fact it be, as a reason for approving or condoning an irregularity which may well be prejudicial to an accused person.

In the circumstances, we think it right that the conviction of Philips on counts 1 to 7 should be quashed. We see no reason, however, why his conviction on counts 9 to 17 should not stand. It was argued that a great deal of evidence had been called to support the first seven counts, and that Philips had thus been prejudiced. It was, however, frankly conceded by Mr. Garth Moore that all this evidence was relevant to the charges contained in counts 9 to 17 on the issue of intent to defraud, and, inasmuch as Philips had, in the circumstances, ample notice that this evidence would be called, his only grievance is that he has been convicted on counts 1 to 7 and 9 to 17 when he should have been convicted only on those counts which were properly triable—namely, counts 9 to 17. It was further argued that the committal must be regarded

as one, and indivisible, but, in our view, when magistrates commit, as they did here, on several charges, the committals are several and distinct, and, if one is bad, the others are not necessarily invalidated. That this is so is plain from the language of the Indictable Offences Act, 1848, s. 25, when it is remembered that each charge relates to a separate indictable

A offence.

The conviction of Philips on counts 9 to 17 must stand, but, as it is reasonable to suppose that a lighter sentence would have been imposed upon him if he had been convicted on 9 counts instead of 16, we think it fair that a sentence of 20 months' imprisonment with hard labour

B should be substituted for the sentences which were passed upon him.

We can find no ground for saying that Quayle has suffered in any way through the irregularity of the procedure before the justices. So far as he was concerned, that procedure was quite regular. All the evidence called at the trial, in so far as it affected him at all, was undoubtedly

C admissible against him, and would have been equally admissible against him if he had been tried alone. It may be added that, on the only

counts as to which difficulty has arisen, the verdict in his case was "Not guilty." His appeal must therefore be dismissed. With regard

D to the case of Philips only, no leave was given in his case. Nevertheless,

as he has to some extent succeeded in his appeal, we think that the time during which he has been in prison as a person awaiting appeal will count towards the fulfilment of his sentence.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellants); *Solicitor to the Metropolitan Police* (for the Crown).

E [Reported by REGINALD TOWNSEND, Esq., Barrister-at-Law.]

HAILE SELASSIE v. CABLE & WIRELESS, LTD.

F [CHANCERY DIVISION (Bennett, J.), **March 1, 2, 23, July 27, 1938.**]

Action—Parties—Foreign sovereign—De jure sovereign—Right of action accrued when also de facto sovereign—Action commenced after another sovereign recognised as de facto sovereign.

G During 1934 and 1935, certain moneys became due to the plaintiff as part of the public revenue of Ethiopia under a contract made between the Director-General of Posts, Telegraphs and Telephones of that country and the defendants, an English company. At that time the plaintiff was both the *de facto* and the *de jure* government of Ethiopia. In May, 1936, the Italian Government by proclamation annexed the Empire of Ethiopia, and in Dec., 1936, the British Government recognised the Italian Government as the *de facto* government of Ethiopia, but the plaintiff is still recognised by the British Government as the *de jure* government of that country. The writ in the present action, claiming the moneys which were admittedly due under the above contract to the government of Ethiopia, was issued on Jan. 4, 1937. The only question for decision was whether in the circumstances the plaintiff, as the *de jure* sovereign of Ethiopia, had still a right to recover the moneys :—

H HELD : as it was a question of title to property in England, the enforcing of the right in no way depended on *de facto* authority in

Ethiopia, and the plaintiff, as the *de jure* sovereign, was the proper person to enforce such a right in the English courts.

[EDITORIAL NOTE. The recent cases which have dealt with *de facto* and *de jure* authority have been concerned with the validity of acts committed within the territory of the *de facto* jurisdiction. The present case raises a question which is said to be quite different. The defendants were an English company, and the moneys due under the contract were, therefore, property locally situate in England. The plaintiff was still recognised by the English Government as the *de jure* government of Ethiopia. For these reasons, it is held that the plaintiff is still the proper person to sue for these moneys in the English courts. It will, of course, be noticed that the title to such moneys accrued to the plaintiff while he was still the *de facto* sovereign of Ethiopia.

AS TO ACTIONS BY AND AGAINST FOREIGN SOVEREIGNS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 27-29, para. 30; and FOR CASES, see DIGEST, Vol. 1, pp. 45-50, Nos. 354-409.]

Cases referred to :

- (1) *U.S.A. v. McRae* (1869), L.R. 8 Eq. 69; 20 Digest 271, 303; 38 L.J.Ch. 406; 20 L.T. 476.
- (2) *Quinn v. Leatham*, [1901] A.C. 495; 30 Digest 183, 504; 70 L.J.P.C. 76; 85 L.T. 289.
- (3) *Aksionairnoye Obschestvo A.M. Luther v. Sagor (James) & Co.*, [1921] 3 K.B. 532; 11 Digest 536, 387; 90 L.J.K.B. 1202; 125 L.T. 705.
- (4) *Bank of Ethiopia v. National Bank of Egypt & Liguori*, [1937] Ch. 513; [1937] 3 All E.R. 8; Digest Supp.; 106 L.J.Ch. 279; 157 L.T. 428.
- (5) *Banco de Bilbao v. Sancha*, [1938] 2 K.B. 176; [1938] 2 All E.R. 253; Digest Supp.
- (6) *U.S.A. v. Wagner* (1867), 2 Ch.App. 582; 1 Digest 45, 357; 36 L.J.Ch. 624; 16 L.T. 646.

ACTION AND COUNTERCLAIM. This case was heard by BENNETT, J., on Mar. 1, 2, 23, 1938, when he held that the right of the plaintiff to recover in this action could not be determined without determining whether the claim put forward on behalf of the King of Italy was well-founded. All further proceedings in the action were thereupon stayed. The Court of Appeal reversed the decision of BENNETT, J., (p. 384, *ante*) and the case was then remitted to BENNETT, J., for decision.

Andrew Clark for the plaintiff.

H. Wynn Parry, K.C., H. G. Robertson and *Patrick Browne* for the defendants.

BENNETT, J.: The plaintiff, His Majesty Haile Sellassie I, is the Emperor *de jure* of Ethiopia, recognised as such by the government of His Majesty King George VI. Throughout 1934 and 1935, and during the early part of 1936, the plaintiff was the Emperor of Ethiopia *de facto* as well as *de jure*. In 1934 and 1935, letters passed between the Director-General of Posts, Telegraphs and Telephones of Ethiopia and the defendants which established a contract between them for the transmission of telegraph messages between Great Britain and a state radio-telegraphic station at Addis Ababa, the capital city of Ethiopia. The Director-General entered into this contract as the Minister of, and agent

for, the plaintiff as Emperor of Ethiopia. At the end of 1935, moneys were due from the defendants (an English limited company) under it. The moneys so due were not the private moneys of the plaintiff, but were part of the public revenues of Ethiopia. If, on Jan. 1, 1936, it had been necessary to take proceedings in this country to recover these moneys, A the proper person to sue for the recovery of them would have been the plaintiff.

The writ in the action was issued on Jan. 4, 1937, and by it the plaintiff claimed an account of what was due under the said contract, and payment of what should be found due on taking such account. At the B trial, it was agreed between the parties that the sum due under the contract of Dec. 31, 1935, was £10,613 11s. 3d. This agreement having been reached, an order for an account became unnecessary. The only question to be decided was, and is, whether the plaintiff is entitled to judgment for the agreed sum. The defendants have never disputed, C and do not now dispute, their liability to someone. They wish to pay what they owe, but, having regard to the matters which I am about to state, they doubt whether they can safely pay the plaintiff.

In Oct., 1935, war broke out between Italy and Ethiopia, and an Italian army invaded Ethiopia. On May 2, 1936, the plaintiff left D Ethiopia and came to England, where he has since lived. Early in May, 1936, Addis Ababa was occupied by Italian troops. In the same month, the Italian government by proclamation annexed the Empire of Ethiopia to the Italian Crown. The relationship between the government of this country and the plaintiff and the Italian government E respectively appears from three certificates issued on behalf of the Secretary of State for Foreign Affairs to the solicitors for the parties to this action.

The relevant facts certified seem to me to be the following: (i) His Majesty's government recognises His Majesty Haile Sellassie I as *de jure* F Emperor of Ethiopia; (ii) Dr. A. W. C. Martin is accorded recognition in the capacity of Envoy Extraordinary and Minister Plenipotentiary from His Majesty the Emperor of Ethiopia at the Court of St. James; (iii) His Majesty's government has not recognised the Italian annexation of Ethiopia *de jure*; (iv) His Majesty's government does recognise the G Italian government as the government *de facto* of virtually the whole of Ethiopia; (v) the Italian government has been so recognised since the second half of Dec., 1936.

As I have said, the defendants have always been, and still are, ready and willing to pay the sum they owe to anyone who is entitled to receive H it, but a claim has been made to it on behalf of His Majesty the King of Italy. I will read the letters which have passed between the defendants and the Italian Embassy in London with reference to the matter. On Jan. 22, 1937, the defendants wrote this letter to the Italian Ambassador in London:

Your Excellency, On the 8th inst. on behalf of Cable and Wireless, Ltd., the writer

had the pleasure of an interview with Signor Cassardi at your Embassy and informed him that Cable and Wireless, Ltd., had been served with a writ issued by Lion Vainqueur de la Tribe de Juda Haile Sellassie Premier Elu du Seigneur Empereur d'Ethiopie claiming an account in respect of the charges of the radio-telegraphic service between England and Ethiopia, and payment of the amount found due under such account. The writ of summons in these proceedings was shown to Signor Cassardi, who in response to an inquiry as to the attitude of your government stated that he did not know what attitude your government was likely to take but thought that it was probable that your government would claim the amount due from Cable and Wireless, Ltd. A copy of the writ is enclosed herewith. Cable and Wireless, Ltd., is ready and willing to render its account and make payment to whatever party may be lawfully entitled and will be most grateful if, in order to assist in regularising and clarifying the position, you are able to state whether your government now makes claims to the money in question or is prepared to disavow the assertion of any such claim. A

That letter was replied to on behalf of the Italian Ambassador on Feb. 2, 1937 : B

In your letter n. TM/E 4. of Jan. 22 last, concerning certain amounts due from the Cable and Wireless, Ltd., to the ex-Ethiopian government in respect of charges of the radio-telegraphic service between England and Ethiopia, you kindly stated that your company "is ready and willing to render its account and make payment to whatever party may be lawfully entitled." You went on to say that Cable and Wireless, Ltd., would "be most grateful if in order to assist in regularising and clarifying the position" this Embassy were able to state whether the Italian government "now makes claims to the money in question." I am now directed to inform you that the reply to the latter query is in the affirmative. C

On Feb. 18, the defendants replied to the Ambassador :

The letter of the 2nd inst. from the First Secretary of the Italian Embassy was duly received and it is noted that the Italian government makes claim to the moneys due from Cable and Wireless, Ltd., in respect of the radio-telegraphic service between England and Ethiopia. In view of the fact that these moneys are already the subject of an adverse claim in the proceedings in the action referred to in my letter to your Excellency of Jan. 22 last, I am now directed to inquire whether the Italian government is willing to submit the determination of the question as to what party is entitled to the money to the decision of the English courts in such proceedings or itself to commence proceedings in this country against Cable and Wireless, Ltd., for the maintenance of its claim. D

To that letter came back a reply on Apr. 14 :

In reply to your letter T.M.E.4 of Feb. 18 last addressed to H.E. the Italian Ambassador in which you make further inquiries concerning certain moneys due from Messrs. Cable & Wireless, Ltd., in respect of the radio-telegraphic service between England and Ethiopia, I am instructed to request you to refer to the letter of this Embassy dated Feb. 2 N.384 and to state that this Embassy has nothing to add to its contents. The Italian government claims such moneys and is not prepared to admit in any circumstances that its rights in making such claim are in any way in doubt. E

On Apr. 27, the defendants answered that letter :

We are in receipt of the letter addressed to us by the Secretary of the Italian Embassy and dated the 14th inst. The claim of the Italian government to the moneys in question has already been noted by us, but the existence of the adverse claim mentioned in our letter to Your Excellency of Jan. 22 last renders it necessary to obtain the decision of the English courts as to which of the claimants is entitled to the moneys. The submission of such question for determination by the courts does not involve the admission by the Italian government which you mention in your letter under reply, nor any admission. The position is that, unless the Italian government is willing to have its claim submitted to the courts, judgment in the proceedings now pending may be given in its absence compelling us to make payment to the plaintiff to the exclusion of your government. F

To that letter on June 18 the Embassy replied :

In reply to your letter of Apr. 27 ult. (your Refer. TM/AS/E.4) I am instructed to say that the Italian government have no cause to modify the statements made to G

you in previous letters. I am to add that whether or not a judgment in the proceedings in this country (proceedings in which the Italian government see no reason to take part) should result in your being compelled to make any payment, the Italian government will notwithstanding consider themselves entirely free to claim from you the moneys in question at such time, in such manner and in such circumstances as they will consider suitable.

- A So that correspondence closed. These letters make it plain to a lawyer that the defendants were placed in a difficult situation. Since the Italian government are a foreign sovereign authority, they cannot be brought before an English court by interpleader proceedings. The defendants have to choose between paying the plaintiff and running the risk of the Italian government hereafter establishing that the money is owing to them, or resisting the plaintiff's claim in these proceedings by setting up by way of defence the title of the Italian government to the money the plaintiff seeks to recover. They have elected to take the latter course, and have resisted the plaintiff's claim on the grounds pleaded in paras. 3A, 3B, of their amended defence, which are as follow :

- C 3A. His Majesty Haile Sellassie left Addis Ababa and his former Empire of Ethiopia on or about May 1, 1936, and has never since returned thereto by reason of the conquest thereof by the military forces of the King of Italy which are the armed forces of a hostile power referred to in para. 4 of the statement of claim. On or about May 9, 1936, the King of Italy and the Italian government by proclamation annexed the said Empire of Ethiopia and since the said date have been or become and now are the sovereign head and government thereof and in control thereof. By reason of the premises the alleged cause of action of His Majesty Haile Sellassie has passed to and become vested in the King of Italy and the Italian government. 3B. Under the constitution of Ethiopia the sovereign power over the Empire of Ethiopia and all public rights appertaining thereto were vested in the Emperor of Ethiopia as a corporation sole or alternatively in the natural person who is for the time being the Emperor of Ethiopia. The claim in this action is in respect of a public right appertaining to the sovereign power of the Empire of Ethiopia and was by virtue of the recognition in Dec., 1936, by His Majesty's government of the government of Italy as the *de facto* government of Ethiopia suspended or alternatively transferred to the King of Italy as the sovereign head of the Italian government.

At the trial, Mr. Parry, for the defendants, relied almost entirely upon the second of the two pleas.

- F The question to be decided may, I think, be stated in these words : Does the fact that the Italian government has been, and is recognised by the British government as, the *de facto* government of Ethiopia vest in the Italian government the right to sue for and recover a judgment in an English court for a debt formerly due to, and recoverable by, the plaintiff as the sovereign authority of Ethiopia, the debt being due to the plaintiff as Emperor of Ethiopia, and the British government recognising the plaintiff as the *de jure* Emperor of Ethiopia ? The defendants contended that the question was settled in their favour by authority, and they relied on three reported cases. The first was *U.S.A. v. H McRae* (1), a decision of SIR W. M. JAMES, V.-C. In that case, the suit arose out of transactions entered into during the war between North and South in the United States of America, a war which broke out in 1861. It was started by a bill in equity, issued after the war was terminated, by the United States of America suing as plaintiffs against the defendant. The facts were that a rebellious government calling itself the Government

of the Confederate States had been established in the southern part of the United States of America. For this government the defendant had acted as agent in Liverpool, and in that capacity he had received contributions from subscribers to a loan to this government. The purpose of the action was to make the defendant liable for all the contributions he had received. The United States of America had repudiated all liability A to repay the moneys borrowed by the Government of the Confederate States. The bill was filed at a time when the plaintiffs ruled throughout the territory of the United States of America and when the Confederate Government had no longer any existence. The question discussed was what was the footing upon which the defendant was B liable to account. SIR W. M. JAMES, V.-C., was willing to order an account to be taken, as it would be taken between the Government of the Confederate States on the one hand, and the defendant, as agent for such government, on the other, on the plaintiffs submitting to pay what, on the footing of that account, might be found due from them. C The plaintiffs refused to take an order for an account on this footing, and SIR W. M. JAMES, V.-C., dismissed the bill. The purpose of his judgment was to establish that the plaintiffs' rights against the defendant were as successors to the Government of the Confederate States, and that they could have an account on that footing only. The defendants D rely on a passage in the judgment of SIR W. M. JAMES, V.-C., at p. 75. They say that it states a proposition of English law which rules the present case in their favour. The passage is as follows :

I apprehend it to be the clear public universal law that any government which *de facto* succeeds to any other government, whether by revolution or restoration, E conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever may be the nature or origin of the title of such displaced power. Any such public money in any treasury, any such public property found in any warehouses, forts, or arsenals, would, on the success of the new or restored power, vest *ipso facto* in such power ; and it would have the right to call to account any fiscal or other agent, or any debtor or accountant to or of the persons who had exercised and had ceased to exercise the authority of a government, the agent, F debtor, or accountant having been the agent, debtor, or accountant of such persons in their character or pretended character of a government.

I agree that it does contain a statement which, if a statement of the law of England applicable to the facts of the present case, would be an authority which would bind me to decide the case in the defendants' G favour. But is it such an authority ? I desire to refer to the opinion of the EARL OF HALSBURY, L.C., in *Quinn v. Leathem* (2), at p. 506 :

... there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be H expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides.

In *U.S.A. v. McRae* (1), SIR W. M. JAMES, V.-C., was not considering which of two claimants, one being a *de jure* sovereign and the other a

de facto sovereign, was entitled to recover property in the jurisdiction of this court, the title to which had at one time been vested in the *de jure* sovereign. No such question was in issue or discussed. No such question could, or did, arise for discussion or decision. In these circumstances, having in mind the words of LORD HALSBURY, L.C., I cannot regard the passage in question as an authority upon the question which arises for decision in the present action.

The next case relied on was *Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.* (3), a decision of the Court of Appeal. I think that the only point established by the decision in that case is that, when the government of this country has recognised that some foreign government is *de facto* governing some foreign territory, the law of England will regard the acts of the *de facto* government in that territory as valid, and will treat them with all the respect due to the acts of a duly recognised foreign sovereign state. It is clear, I think, that the acts so treated are acts in relation to persons or property in the territory which the authority is recognised as governing in fact. It was not suggested in that case, nor was anything said in it which supports the view, that, upon or in consequence of such recognition, a title to property in this country vests in the *de facto* government, or that a title vested in a displaced government is divested. In my judgment, *Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.* (3) is not an authority which supports the defendants' pleas.

The last case cited is of importance because it is concerned with the Italian conquest of Ethiopia and the recognition of the Italian government as the *de facto* government of Ethiopia. It is the *Bank of Ethiopia v. National Bank of Egypt & Liguori* (4), which was decided by CLAUSON, L.J., when a judge of first instance. The question to be decided in that case was whether the Bank of Ethiopia, a company incorporated by Ethiopian law, had been dissolved, or had otherwise ceased to exist by force of a decree promulgated in Ethiopia by the Italian government when governing that territory *de facto*. CLAUSON, J., as he then was, following and applying *Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.* (3), held that the bank was dissolved by the decree. It had been suggested in argument, on behalf of the Bank of Ethiopia, that there was some limitation upon the sovereignty of the *de facto* government arising out of the recognition of His Majesty Haile Sellassie as the *de jure* sovereign of Ethiopia, and in disposing of that argument the judge said, at p. 522 ([1937] 3 All E.R. at p. 13) :

It was then sought, as I understood, to argue that the recognition of some measure of sovereignty *de jure* in the fugitive Emperor logically led to the denial of full sovereignty to the *de facto* government: and it was, as I understood, suggested that there existed this limitation on the acts of the *de facto* government which are to be recognised as internationally valid, that they must be acts which are strictly necessary for preserving peace, order and good government within the area controlled by the *de facto* government. This seems to me to be entirely inconsistent with the authorities to which I have already referred, and in principle to be fallacious. The recognition of the fugitive Emperor as a *de jure* monarch appears to me to mean nothing but this, that while the recognised *de facto* government

must for all purposes, while continuing to occupy its *de facto* position, be treated as a duly recognised foreign sovereign state, His Majesty's government recognises that the *de jure* monarch has some right (not in fact at the moment enforceable) to reclaim the governmental control of which he has in fact been deprived. Where, however, His Majesty's government has recognised a *de facto* government, there is, as it appears to me, no ground for suggesting that the *de jure* monarch's theoretical rights (for *ex hypothesi* he has no practical power of enforcing them) can be taken into account in any way in any of His Majesty's courts.

A

On this passage the defendants based an argument to the effect that the plaintiff has no enforceable rights as sovereign *de jure* whilst there is another government recognised as the *de facto* government of the country of which he is recognised as the sovereign *de jure*, and that, since the money sought to be recovered in this action is public money belonging to the State of Ethiopia, the plaintiff cannot recover it, but that the Italian government can.

B

In my judgment, the passage relied on by the defendants is no authority whatever for the proposition for which it is sought to use it, and the last sentence of the passage I have read from the judgment shows that it is not such an authority. The judge was concerned to demonstrate that the plaintiff had no governmental control of any kind in Ethiopia, and gave as his reason that the plaintiff had no means of enforcing control there. He was not considering or deciding questions of title to property in this country, where, if the plaintiff has a title, that title can be enforced. Both *Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.* (3) and *Bank of Ethiopia v. National Bank of Egypt & Liguori* (4) were considered by the Court of Appeal in the recent case of *Banco de Bilbao v. Sancha* (5). The judgment of the court was delivered by CLAUSON, L.J., who summarises the principles laid down in them in the following terms, at pp. 195, 196 ([1938] 2 All E.R. at p. 260):

C

D

E

... this court is bound to treat the acts of the government which His Majesty's government recognise as the *de facto* government of the area in question as acts which cannot be impugned as the acts of an usurping government, and conversely the court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government be recognised by His Majesty's government as the *de jure* government of the area, as a mere nullity, and as matters which cannot be taken into account in any way in any of His Majesty's courts.

F

This passage seems to me to make it plain that what has been decided in *Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.* (3) and *Bank of Ethiopia v. National Bank of Egypt & Liguori* (4) has reference exclusively to the acts of a *de facto* government and a *de jure* government, both recognised as such by His Majesty's government and both claiming to have jurisdiction in the same area with reference to persons and property in that area. The principle is that the courts of this country will recognise and give effect to the acts of the former in relation to persons and property in the governed territory, and will disregard and treat as a nullity the acts of the latter. The present case is not concerned with the validity of acts in relation to persons and property in Ethiopia. It is concerned with the title to a chose in action—a debt—recoverable in England, and, having considered all the cases cited to

G

H

me in argument, I have come to the conclusion that the point is not covered by English judicial authority.

I have to decide whether it is the law of England that the plaintiff, recognised by His Majesty's government as the Emperor *de jure* of Ethiopia, has lost the right to recover the debt in suit in this country because the country in which he once ruled has been conquered by Italian arms and because His Majesty's government recognises that that country, or the greater part of it, is now ruled by the Italian government. It is unfortunate, I think, that the question has to be decided by a judge, for, in deciding it, it is impossible to avoid deciding upon a claim made by a foreign sovereign state not a party to the proceedings. For these reasons, I shall say as little as possible. My judgment is in favour of the plaintiff.

I will first read a passage from the judgment of LORD CAIRNS, L.J., in *U.S.A. v. Wagner* (6), at p. 593 :

It was contended then, that when a monarch sues in our courts, he sues as the representative of the state of which he is the sovereign ; that the property claimed is looked upon as the property of the people or state ; and that he is permitted to sue, not as for his own property, but as the head of the executive government of the state to which the property belongs ; and it was contended, in like manner, that when the property belongs to a republic, the head of the executive, or in other words the president, ought to sue for it. This argument, in my opinion, is founded on a fallacy. The sovereign, in a monarchical form of government, may, as between himself and his subjects, be a trustee for the latter more or less limited in his powers over the property which he seeks to recover. But in the courts of Her Majesty, as in diplomatic intercourse with the government of Her Majesty, it is the sovereign, and not the state, or the subjects of the sovereign, that is recognised. From him, and as representing him individually, and not his state or kingdom, is an ambassador received. In him individually, and not in a representative capacity, is the public property assumed by all other states, and by the courts of other states, to be vested. In a republic, on the other hand, the sovereign power, and with it the public property, is held to remain and to reside in the state itself, and not in any officer of the state. It is from the state that an ambassador is accredited, and it is with the state that the diplomatic intercourse is conducted.

I regard this statement as authority for the proposition that, when the liability to pay the debt in suit arose, the right to sue for it and to recover it was vested in the plaintiff. I ask myself why the facts that the Italian army has conquered Ethiopia and that the Italian government now rules Ethiopia should divest the plaintiff of his right to sue. The only reason can be, I suppose, that the money is not the plaintiff's own money, and that it is a sum which he is under some obligation to spend for the benefit of the people of Ethiopia, an obligation he cannot now fulfil. There is, I think, a clear answer to this suggestion. I think it undesirable that I should state it. I hold that nothing has happened to divest the title formerly vested in him, and that he is entitled to judgment for the sum agreed between the parties as the sum due from the defendants on Jan. 1, 1936.

Judgment for the plaintiff.

Solicitors : Wordsworth, Marr Johnson & Shaw (for the plaintiff) ; Bircham & Co. (for the defendants).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

POTELIAKHOFF v. TEAKLE.

[COURT OF APPEAL (Greer, Slessor and MacKinnon, L.JJ.), July 18, 1938.]

Gaming and Wagering—Gaming debt—Cheque in payment dishonoured—Agreement to pay by instalments—Undertaking not to give publicity by suing for debt—Only one instalment paid—Whether agreement not to bring an action which cannot succeed is good consideration for a fresh promise to pay a gaming debt. A

The defendant had given the plaintiff a cheque for £74 in respect of a gaming debt, and the cheque was dishonoured. The plaintiff threatened to bring an action, whereupon the defendant, in order to avoid any publicity, agreed to pay £11, and the balance in monthly instalments. No payment except the first payment of £11 was made, and the plaintiff brought the present action to recover the balance :— B

HELD : as the threatened action was one which could not have been successful, being one in respect of a gaming debt, the agreement not to bring it was no consideration for the defendant's fresh promise to pay the debt. The avoidance of publicity necessary to support a new consideration does not refer to the publicity resulting from the bringing of an action in the courts. C

[EDITORIAL NOTE. The principle of *Hyams v. Stuart King* (1) is restricted to the case where the defaulter obtains the benefit of the creditor's refraining from publishing the default. There is not a sufficient consideration to support a new promise to pay where the creditor merely gives the debtor further time, and the words "publishing the default" mean publication by posting at Tattersalls and the like, and not publication by bringing an action in the courts. D

AS TO FRESH PROMISE FOR NEW CONSIDERATION, see HALSBURY, Hailsham Edn., Vol. 15, pp. 476, 477, para. 873 ; and FOR CASES, see DIGEST, Vol. 25, pp. 400-403, Nos. 54-70.] E

Cases referred to :

- (1) *Hyams v. Stuart King*, [1908] 2 K.B. 696 ; 25 Digest 401, 58 ; 77 L.J.K.B. 794 ; 99 L.T. 424.
 - (2) *Chapman v. Franklin* (1905), 21 T.L.R. 515 ; 25 Digest 402, 65.
 - (3) *Goodson v. Baker* (1908), 98 L.T. 415 ; 25 Digest 401, 57.
 - (4) *Hyams v. Coombes* (1912), 28 T.L.R. 413 ; 25 Digest 403, 70.
 - (5) *Burrell & Son v. Leven* (1926), 42 T.L.R. 407 ; Digest Supp.
 - (6) *Wade v. Simeon* (1846), 2 C.B. 548 ; 12 Digest 195, 1542 ; 15 L.J.C.P. 114 ; 6 L.T.O.S. 346.
- F

APPEAL from a decision of His Honour JUDGE DALE at the Birmingham County Court, dated Mar. 8, 1938. The plaintiff was the proprietress of a gambling club. The defendant paid her a cheque for £74 in respect of a gaming loss, the cheque being subsequently dishonoured. The plaintiff threatened to bring an action to recover this sum, whereupon the defendant, who was anxious to avoid any publicity, in consideration of the plaintiff not bringing the threatened action, agreed to pay the £74 by a payment of £11 down and the remainder by monthly instalments. Except for the £11, no payment was made, and the present action was brought to recover the balance. G H

C. Gallop for the appellant.

F. Ashe Lincoln for the respondent.

Gallop : The fresh consideration in this case was the promise not to sue. The plaintiff now is suing, so there was no consideration, and the original position is restored. Once it comes to the knowledge of the court that a matter is a gaming transaction, the court must take the point. In *Hyams v. Stuart King* (1), the plaintiff bound himself to

- A abstain from a course of action that he might legally have pursued. Here the position is different, as the plaintiff could not have brought an action on this dishonoured cheque. This was merely forbearing to sue on a gaming transaction. The plaintiff knew she had no cause of action. [Counsel referred to *Hyams v. Coombes* (4), *Burrell & Son v. Leven* (5) and *Wade v. Simeon* (6).]

Lincoln : There was good consideration here, because the plaintiff did not believe that she could not sue on this cheque. She thought that she could sue on the cheque, although she knew that she could not sue on the debt. The benefit to the defendant was the absence of

- C publicity. He had an overdraft, and did not want his bank manager to know that he was gambling. The basis of the decision in *Hyams v. Stuart King* (1) was forbearance to expose. If that forbearance to expose is effected by failure to bring an action, that is good consideration. *Gallop* was not called on in reply.

- D
GREER, L.J. : This case is quite clear. It is clear beyond all doubt that the county court judge made a mistake in law in allowing this defence. I agree entirely with what was said by FARWELL, J., when he was giving judgment in *Hyams v. Stuart King* (1), at p. 725 :

- E The alleged consideration for the special contract is therefore— (1.) giving time ; (2.) refraining from publishing the defendant's default. Now the first is in my opinion no consideration at all ; to give time for a payment that can at no time be enforced is nothing at all. But the second has been held by DARLING, J., to be sufficient. I do not propose to go through the cases which have already been exhaustively dealt with by SIR GORELL BARNES, P., with whose judgment I agree, but I propose to consider the question on principle.

- F Looking through the judgment of SIR GORELL BARNES, P., I find that there is nothing inconsistent with the view expressed by FARWELL, L.J. There are several passages which appear to be in agreement. In referring to *Chapman v. Franklin* (2), SIR GORELL BARNES, P., said at p. 703 :

- G . . . but it would seem from the report that both LORD ALVERSTONE, L.C.J., and KENNEDY, J., thought that an agreement to exercise forbearance not merely to sue, but to forbear doing something else to the detriment of the debtor, would have amounted to good consideration.

I look upon that passage as meaning that, in the view of SIR GORELL BARNES, P., it would not be sufficient to say that there was an agree-

- H ment to exercise forbearance. Then he says, at pp. 703, 704 :

I notice that, on the evidence as reported, there was nothing to show anything more than an agreement not to sue for a time. There may have been a fear on the part of the defendant that if he did not pay he might be declared a defaulter ; but I find no evidence of any agreement between the parties that the plaintiff would not declare the defendant a defaulter, and unless there was such an agreement there would be no consideration to support the alleged promise, and the decision could not be supported.

He is there referring to *Goodson v. Baker* (3). As it is not possible to find a fresh consideration for the payment of a debt which could not successfully be sued upon, in this particular case the plaintiff herself has said at the trial :

Gambling club running 6 years. Honest people don't plead Gaming Act. I thought he would pay if I sued him on the cheque. A

She meant by that : " Although he was not liable in law to pay, I thought that he would pay rather than allow the action to go for trial." From that, it seems to me quite clear that there is no evidence of any fresh consideration, other than the consideration which was given in law—considerations for security given under the Gaming Act, which are void, inadequate and insufficient to support a claim for the compromise of an action where there is no reasonable ground to suppose that, on the true facts, that action would succeed. I agree with the view expressed by the two courts of first instance in *Hyams v. Coombes* (4) and *Burrell & Son v. Leven* (5). This appeal must be allowed with costs. B
C

SLESSER, L.J. : I am of the same opinion. The county court judge states in his judgment that the cheque was given by the defendant to the plaintiff in respect of a gambling debt, and I think that it is quite clear from the evidence of the plaintiff that she knew that the Gaming Act, if it had been pleaded, would have been an answer to her claim, for she states : " Honest people don't plead Gaming Act." The judge goes on to say that she threatened to bring the action to expose what she alleged was the dishonesty of the defendant—not to recover her money, but to expose him. To avoid this, the defendant said he would pay £74. He agreed to pay £11 forthwith, and the balance in monthly instalments within a year. On that, the judge has come to the conclusion that the defendant agreed to pay this £74 in instalments in order to avoid publicity, and has, I think, misdirected himself in thinking, therefore, that the case fell within the principle of *Hyams v. Stuart King* (1), where the avoidance of publicity was taken to be a good consideration. The class of case with which *Hyams v. Stuart King* (1) is dealing, however, is not the case where there is an agreement for forbearance to sue on a void contract and the further consideration that, if there is a suit, there may be an exposure in the court as a consequence of the suit and the pleading of the Gaming Act. It is a case dealing with the publicity which will be given by posting at Tattersalls and the like. D
E
F
G

To my mind, the judges in *Hyams v. Stuart King* (1) make that distinction very clear. SIR GORELL BARNES, P., after reviewing *Goodson v. Baker* (3), which, he points out, is insufficiently reported, says, at p. 704 : H

... I find no evidence of any agreement between the parties that the plaintiff would not declare the defendant a defaulter, and unless there was such an agreement there would be no consideration to support the alleged promise, and the decision could not be supported.

In other words, he is pointing out that in *Goodson v. Baker* (3) the real

basis of that decision was in relation to publicity threatened altogether outside the question of a mere forbearance to sue.

There has been pointed out by GREER, L.J., the passage where FARWELL, L.J., deals with the various considerations as to giving time and refraining from publishing the defendant's default—that is, giving
A time before action brought—and he goes on to say at p. 725 :

Now the first is in my opinion no consideration at all ; to give time for a payment that can at no time be enforced is nothing at all.

Those words are entirely consistent with *Wade v. Simeon* (6), where
TINDAL, C.J., says, at p. 564 :

B By demurring to that plea, the plaintiff admits that he had no cause of action against the defendant in the action therein mentioned, and that he knew it. It appears to me, therefore, that he is estopped from saying that there was any valid consideration for the defendant's promise. It is almost *contra bonos mores*, and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of
C action. In order to constitute a binding promise, the plaintiff must show a good consideration, something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be, if he has no cause of action : and beneficial to the defendant it cannot be ; for, in contemplation of law, the defence upon such an admitted state of facts *must* be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain.

D That passage, which, as I say, is supported not only in the case to which I have referred but also in all the other cases which proceed on the same principle, seems to me to establish beyond question that a mere forbearance to sue at the debtor's request is no sufficient consideration in a Gaming Act case to support a new promise.

E
MACKINNON, L.J. : I agree. *Hyams v. Stuart King* (1) is simply a decision that, in the facts in that case, the defendant promised upon a good consideration to pay a certain sum of money. In this case, the defendant promised to pay a certain sum of money, but the plaintiff
F cannot allege that there was any good consideration for that promise. The only consideration which she can suggest is some undertaking by her to abstain from suing him upon a cause of action. The principle in *Hyams v. Stuart King* (1) is not one which it is desirable to extend, and I am quite clear that this case does not fall within that principle.

G *Appeal allowed with costs.*

Solicitors : *Rising & Ravenscroft*, agents for *H. E. Wynschenk & Needham*, Birmingham (for the appellant) ; *Samuel Sebba* (for the respondent).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

**KAWASAKI KISEN KABUSHIKI KAISHA v.
BANTHAM S.S. CO., LTD.**

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), **July 22, 1938.**]

Shipping—Charterparty—Hire—Payment in advance—Hire calculated on deadweight—Hire not due until deadweight communicated to charterers.

A
B
C
A charterparty provided that the charterer should pay for the use and hire of the ship 3s. 9d. per ton deadweight per calendar month, commencing from the day of her delivery, payment to be made in London in cash monthly in advance, and made provision for day-to-day payments for the last half-month. Delivery was to count from 7 a.m. on the working day following that on which written notice of readiness to load had been given before 4 p.m., but, if required by charterers, the loading was to commence at once, such time to count as hire. The ship arrived at the port of delivery on the morning of Apr. 13, 1937, and the charterers at once sent an expert on board to certify the amount of bunkers and fresh water on board, and to pass the vessel as fit to load. The certificate was given at 3 p.m. on Apr. 13, and loading then commenced. On Apr. 15, notice of readiness to load was given, and in the afternoon of that day the London agents of the charterers tendered a cheque for the first month's hire, but this was refused, on the ground that it was out of time, and the vessel was withdrawn from the service of the charterers:—

D
HELD: since the amount of the hire was dependent on the deadweight capacity, the payment did not become due until that was communicated by the owners, who had had possession of the ship throughout, to the charterers, who could not be expected to know it.

Decision of BRANSON, J. ([1938] 1 All E.R. 571) affirmed.

EDITORIAL NOTE. This decision confirms the extension of the principle that has been recognised in the case of repairs by the landlord of premises. The landlord is not liable for failure to repair until he has received notice of want of repair. In the present case a payment had to be made by one party which was dependent upon a calculation to be made from facts wholly within the knowledge of the other party. In such a case payment is not due until the facts are communicated by the latter party. Stated generally, the principle is that a forfeiture cannot be insisted upon based upon a knowledge of facts known to the party claiming the forfeiture, but quite unknown to the party against whom it is claimed.

AS TO TIME CHARTERS, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 104, 105, para. 183; and FOR CASES, see DIGEST, Vol. 41, pp. 356-358, Nos. 2051-2073.]

Cases referred to:

- (1) *Re Tyrer & Co. & Hessler & Co.* (1902), 86 L.T. 697; 41 Digest 363, 2112.
- (2) *Murphy v. Hurly*, [1922] 1 A.C. 369; 31 Digest 317, 4588; 91 L.J.P.C. 116; 127 L.T. 49.
- (3) *Tredway v. Machin* (1904), 91 L.T. 310; 31 Digest 346, 4890.

G
H
APPEAL from a decision of BRANSON, J., dated Feb. 3, 1938, and reported [1938] 1 All E.R. 571. In a time charterparty, the hire of the vessel was to be determined upon the following calculation: 3s. 9d. per ton on deadweight as ascertained on delivery from builders' yard British sterling per calendar month, commencing on and from the day of her delivery. The payment of such hire was to be made in London in cash monthly in advance.

A. T. Miller, K.C., and *C. T. Miller* for the appellants, the owners.

Sir Robert Aske, K.C., and *W. L. McNair* for the respondents, the charterers.

- GREER, L.J. : This is a case arising out of the obligations with regard to a charterparty between the charterers and the shipowners. The judge has held that the principle which has been mainly applied in cases between landlord and tenant is not confined to those cases, and may be used for the purpose of determining the issues which arose in
- A** this case. I regard the decision of the arbitrators as meaning that, inasmuch as they decided against the point raised by the shipowners, they must have come to the conclusion—and it is involved in their award—that in fact the charterers did not know the deadweight of the vessel, and, as I believe to be the fact, that they had had no opportunity
- B** of ascertaining it. The charter was not a demise of the ship. The undertaking of the charterers was fulfilled by loading the ship at the port of loading. They had no right to board the ship or to send a surveyor on board to calculate what her deadweight was at the time when she was delivered by the shipbuilders to the shipowner. The
- C** material clause in the charterparty is cl. 5. The charterparty commences :

This charterparty made and concluded . . . between Bantham Steamship Co., Ltd., owners of the good steamship Nailsea . . . (to be named) . . . of about 545,429 cubic ft. grain capacity and estimated about 8,950 tons deadweight capacity . . . (actual deadweight and cubic to be ascertained on delivery from builders' yard).

- D**
- There has been no evidence that the charterers were present at the time when the ship was delivered from the builders' yard, and there has been no evidence that they ever had any other opportunity of ascertaining what the actual deadweight was, but, on the other hand, the shipowners
- E** being throughout in possession of their ship, they were in a position to know that. The judge was entitled to come to the conclusion that he did—namely, that the shipowners, being in sole possession of the ship, and being alone in possession of what information they had received from the shipbuilders at the time when the ship was delivered to them
- F** (which was about six months before the charterparty began), were under an obligation—similar to that of a landlord—to give to the charterers information which it was within their power to possess before they enforced their rights to forfeit the charterparty. They did not do so, and, not having done so, the shipowners failed to fulfil that which
- G** they had to perform before the charterparty came into force.

- We have not thought it necessary to hear Sir Robert Aske in regard to the other points with which the judge dealt, and we are not deciding any point except the one which has been raised by Mr. A. T. Miller. It may possibly be that the respondents could have defended the decision
- H** of the judge on grounds other than those which were given by the judge, but we do not deal with them, and they are open, if the case goes beyond this court, to whomsoever then argues the case on behalf of the respondents. There can be no doubt from the cases which have been referred to—*Re Tyrer & Co. & Hessler & Co.* (1), *Murphy v. Hurly* (2) and *Tredway v. Machin* (3), which was referred to by several of the judges

in *Murphy v. Hurly* (2)—that the principle is not confined to cases between landlord and tenant. It depends upon there being an implied term in every contract that, where one of the parties has the means of knowledge and the other party has not the means of knowledge, there should be, before a forfeiture is insisted upon, disclosure of that information by the party who knows to the party who does not know. For these reasons, I think that this appeal must be dismissed, with costs. A

SLESSER, L.J.: I agree. *Tredway v. Machin* (3) is a case of a landlord and tenant, but the general observation of SIR RICHARD HENN COLLINS, M.R., seems to be in point here. He says, at p. 311: B

Now, the law upon the subject has been repeatedly laid down and stated. The landlord is not liable unless there is a contract by him to keep the premises in repair; and he is not liable even in that case unless he has had express notice of the want of repair. That rule rests upon the principle that the landlord is not the occupier of the premises, and has no means of knowing what is the condition of the premises unless he is told, because he has no right of access to the demised premises, whereas the occupier has the best means of knowing of any want of repair. C

In *Murphy v. Hurly* (2), LORD ATKINSON speaks in the same way, at p. 383: D

These authorities, I think, establish that the duty of the tenant to give notice springs from the special knowledge of the need of repairs which his occupancy of the demised premises is presumed to give him, coupled with the state of ignorance of that need in which the absence of such occupancy is presumed to leave the landlord. D

Applying those principles to this case, it seems to me that, on the facts as stated in the case, there is to be presumed a knowledge of the dead-weight in the hands of the owners of this vessel, but that there is no reason to presume anything but ignorance of the amount of the scale upon which the price is to be fixed in the minds of the charterers, who have not, at the time of the delivery of the vessel, any right or any opportunity—unless they happen by accident, so to speak, to have the knowledge presented to them, or come by it—to know that which it is essential to know in order that they may discharge their obligations under the charterparty. It seems to me that the reported cases relating to landlord and tenant, the principles of which, as GREER, L.J., has said, have been applied to many other relationships, must result when applied here in the conclusion which has found favour both with the arbitrators and with the judge—namely, that this is one of those cases where the special knowledge must be presumed to be with the owner, and not with the charterer. I agree, therefore, that this appeal fails. E F G

MACKINNON, L.J.: I agree, and I do not think that I can usefully add anything. H

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Ince, Roscoe, Wilson & Glover*, agents for *Allen Pratt & Geldard*, Cardiff (for the appellants); *Thomas Cooper & Co.* (for the defendants).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

SAMMUT AND ANOTHER v. STRICKLAND.

[PRIVY COUNCIL (Lord Maugham, L.C., Viscount Sankey, Lord Atkin, Lord Wright and Sir Sidney Rowlett), **June 21, 23, 30, 1938.**]

Privy Council—Malta—Right to legislate in colonies—Settlements—Ceded territories—Cession by general consent of inhabitants—Royal prerogative—British Settlements Act, 1887 (c. 54), s. 6—Foreign Jurisdiction Act, 1890 (c. 37), s. 1.

In 1813 the sovereignty of the island of Malta passed to the British Crown, and in 1921 letters patent were issued by His Majesty establishing in Malta a legislature to deal with local matters. Subsequently, in July, 1936, the Malta (Letters Patent) Act was passed, providing that the letters patent of 1921 should have effect as if there were thereby reserved to His Majesty full power to revoke or amend any or all of their provisions by any further letters patent. In 1936, the letters patent of 1921 were revoked by letters patent of Aug. 12, 1936, and art. 15 thereof empowered the governor to make laws for the peace, order and good government of Malta. The respondent imported into Malta certain articles of the value of 3s. 9d. suitable for use in connection with Coronation festivities, and under protest paid a duty on these articles exacted by the first appellant, a collector of customs, under the Temporary Additional Duties Ordinance, 1936 (No. 27 of 1936), enacted by the governor of Malta under the powers conferred on him by the letters patent of Aug. 12, 1936. The respondent instituted proceedings against the first appellant and the Governor (the second appellant) for the refund of the duty so paid, contending that there was no power in the Crown on that date to confer on the governor the power of making laws in the exercise of which Ordinance No. 27 was made and promulgated by him. The contention of the respondent was founded on the proposition that the prerogative of the Crown so to legislate for the government of a possession was restricted to cases where the possession was acquired either by conquest or by cession, the meaning of the word "cession" being restricted so as to exclude a voluntary cession by the general consent of the people, and, further, that, whenever responsible government was conceded by the Crown to a colony or possession, the royal prerogative to legislate by letters patent or orders in council came to an end, unless a special reservation had been made in the grant:—

HELD: (i) there was no authority for the division of ceded territories into two classes, those acquired by an act of cession from some sovereign power and those ceded by the general consent of the people. The Crown had no prerogative right to legislate in the case of settlements, but the principle which excluded settlements from the royal prerogative had no application to cases where there had been a cession in the popular sense, whether with or without the assent of the inhabitants, and there was no valid ground for the distinction suggested between the case of Malta and other cases of cession.

(ii) there was no valid ground, either on principle or on authority, for holding that the royal prerogative had been so far extinguished when the letters patent were issued in 1921 that, after they were revoked, the prerogative did not exist. The right of the Crown to legislate in relation to local matters was doubtless suspended while the letters patent were in force, but there was nothing in the instrument granting the powers to preclude the exercise of the royal prerogative as soon as the letters patent in that respect ceased to be in force.

[EDITORIAL NOTE. In conquered or ceded countries, which, at the time of their acquisition, had laws of their own, the Crown has power to alter or change those laws. It is here suggested that there is a distinction between countries ceded by

a sovereign power and those ceded by the general consent of the people. This distinction is here held not to exist.

AS TO CONQUERED OR CEDED COLONIES, see HALSBURY, Hailsham Edn., Vol. 11, p. 11, para. 12; and FOR CASES, see DIGEST, Vol. 17, pp. 457-460, Nos. 243-284.]

Cases referred to:

- (1) *Campbell v. Hall* (1774), 1 Cowp. 204; 17 Digest 414, 5. A
- (2) *Abeysekera v. Jayatilake*, [1932] A.C. 260; Digest Supp.; 101 L.J.P.C. 40; 146 L.T. 193.
- (3) *Re Natal (Lord Bp.)* (1865), 3 Moo. P.C.C.N.S. 115; 17 Digest 467, 325; 12 L.T. 188.
- (4) *A.-G. for British Honduras v. Bristowe* (1880), 6 App. Cas. 143; 17 Digest 415, 11; 50 L.J.P.C. 15; 44 L.T. 1. B
- (5) *Re Southern Rhodesia*, [1919] A.C. 211; 17 Digest 415, 7; 88 L.J.P.C. 1; 119 L.T. 689.
- (6) *Kielley v. Carson* (1842), 4 Moo. P.C.C. 63; 17 Digest 416, 15.
- (7) *Re Athlumney, Ex p. Wilson*, [1898] 2 Q.B. 547; 42 Digest 702, 1191; 67 L.J.Q.B. 935; *sub nom. Re Athlumney (Lord), Ex. p. Wilson v. Hasluck*, 79 L.T. 303. C

APPEAL from a judgment of the Court of Appeal of Malta (SIR A. MERDIECA, C. J., ROB. F. GANADO and PROFESSOR E. GANADO), dated Mar. 4, 1938, reversing a judgment of the Civil Court of Malta, First Hall (DR. L. A. CAMILLERI), dated Oct. 11, 1937. D

The Attorney-General (Sir Donald Somervell, K.C.), Kenelm Preedy and John Foster for the appellants.

A. Berriedale Keith and Cyril Salmon for the respondent.

Attorney-General: Malta was acquired by cession. [Counsel then dealt with the history of the island from the sixteenth century down to the Treaty of Paris, 1814.] The rights of the Crown to legislate for the government of territory acquired by cession are plain. The Letters Patent Act, 1936, incorporated the power of revocation into the letters patent of 1921, and prevented them from divesting the Crown of its power to legislate by order in council. [Counsel referred to *Campbell v. Hall* (1), *Abeysekera v. Jayatilake* (2) and *Re Natal (Lord Bp.)* (3).] E

Berriedale Keith: There is a distinction between persons conquered and those who come forward and voluntarily accept the jurisdiction of the Crown. Malta was acquired by compact or voluntary agreement, and is not subject to the legislative power of the Crown by order in council or by letters patent. Legislation for the island must be through a representative legislature. Sect. 15 of the letters patent of Aug. 12, 1936, under which "the Governor may make laws for the peace, order and good government of Malta," is wholly *ultra vires*, and, even if it should be held that such power was acquired by usage or otherwise, by the constitution of 1921 such power as regards non-reserved matters was surrendered, and has not been revived. In any event, Ordinance No. 27 of 1936, which imposes taxation and does not deal with a reserved matter, is null and void. [Counsel referred to *A.-G. for British Honduras v. Bristowe* F

G

H

(4), *Re Southern Rhodesia* (5), *Kielley v. Carson* (6) and *Re Athlumney, Ex p. Wilson* (7).]

Salmon followed.

Attorney-General was stopped while replying.

The judgment of their Lordships was delivered by LORD MAUGHAM,
A L.C.

LORD MAUGHAM, L.C. : This is an appeal from a judgment of His Majesty's Court of Appeal of Malta delivered on Mar. 4, 1938, reversing the judgment given on Oct. 11, 1937, by the Civil Court of Malta, First
B Hall.

The appeal raises the question of the validity of a customs duty imposed under an ordinance made by the Governor of Malta—namely, the Ordinance No. 27 of 1936. The respondent, who was the plaintiff in the action, raised the question by importing certain articles of the
C value of 3s. 9d. suitable for use in connection with Coronation festivities. The appellant, Edgar Sammut, a collector of customs, exacted a duty on these articles in terms of the Ordinance 27 of 1936. This duty was paid under protest, and, on Apr. 21, 1937, the action was commenced. The trial judge decided that the ordinance was valid, but the decision of the
D Court of Appeal was to the contrary effect. Hence the present appeal.

The nature of the dispute can be shortly stated. It was admitted by counsel for the respondent in his argument that the island of Malta (which for the present purpose includes Gozo) became a British possession in 1813 in circumstances which their Lordships will consider in a
E little more detail later. In 1849, 1887, and 1903 certain limited rights of administration were conferred on the inhabitants by letters patent and orders in council made by the Crown. In 1921, letters patent (to be called for convenience the principal letters patent) were issued by His Majesty, dated Apr. 14, 1921, establishing in Malta a legislature consisting of a senate and legislative assembly to deal with local matters.
F The material section (sect. 41) conferring the legislative powers on the senate and legislative assembly began in the following terms :

It shall be lawful for us and our successors, by and with the advice and consent of the senate and legislative assembly, subject to the provisions of these our letters patent, to make laws, to be entitled " Acts," for the peace, order and good government of Malta, with the following limitations, namely, that the said power to make
G laws shall not extend to matters (hereinafter referred to as reserved matters) touching the public safety and defence of our Empire and the general interests of our subjects not resident in Malta, or touching the general interests of our subjects resident in Malta and the preservation and continuance of peace, order, and good government therein in the event of such interests and such peace, order, and good government being endangered, or the carrying on of responsible government under
H these our letters patent being prejudiced, by reason of any grave emergency which the Secretary of State shall be satisfied has arisen and continues to exist within the island, and (without prejudice to such general limitation) shall not extend to the following matters in particular or any of them.

There followed a description of some 17 matters which were so reserved. They included merchant shipping, external trade, immigration, coinage, and the appointment and remuneration of judges of the superior courts

and the removal of such judges. Any law passed by the legislature had to be presented for His Majesty's assent to the Governor, and express provisions were contained in relation to that assent and to the power of the Crown to disallow any law within one year from the date of the Governor's assent thereto. By sect. 68 there was reserved to the Crown :

full power and authority from time to time to revoke, alter, or amend sect. 41 and all other provisions relating to reserved matters or Imperial property and interests, and also sects. 40, 56, 57, and 63 [of the letters patent as the Crown might think fit].

Further, there was reserved to the Crown by the section :

full power and authority from time to time to amend sect. 41 so as to provide that the establishment, discipline, control and administration of the police or any particular matter relating to the subjects aforesaid or any of them [should be a reserved matter].

Sect. 40 related to the matter of language, sect. 56 to religious tolerance, sect. 57 (like sect. 40) to the matter of language, and sect. 63 to the payment out of the Consolidated Revenue Fund of Malta of the reserved Civil List (which provided for Imperial services and the judiciary). Except as above stated, the letters patent did not contain any clause enabling the King to revoke or amend the same.

It should be noted that under sect. 41 the limitations on the power to make laws related to matters touching (amongst other things) the general interests of subjects resident in Malta, and to the carrying on of responsible government under the letters patent in the event of such interests and peace, order and good government being prejudiced by reason of any grave emergency which might exist in the island, and that all provisions relating to "reserved matters" could be revoked, altered or amended. As regards the reservations, they were so extensive that the following description of them given in ANSON'S LAW AND CUSTOMS OF THE CONSTITUTION, 4th Edn., Keith, Vol. 2. Part II, p. 74, a work of high authority, seems to be correct :

Malta, acquired by cession, was long governed under a Crown Colony *régime*, but in 1921 on the analogy of the new Indian Constitution a complex system of dyarchy was introduced.

Separate letters patent, also dated Apr. 14, 1921, were issued constituting the office of Governor and Commander-in-Chief. These were amended by subsequent letters patent, dated Aug. 9, 1930. In that year, the Crown, acting under sect. 41 (above stated), and on the view of the Secretary of State that there was a grave emergency, suspended the full operation of the constitution. After an inquiry by a Royal Commission, and subject to certain alterations by letters patent not material to the present purpose, responsible government as regards local matters was restored by the Crown in 1932. Doubts as to the validity of certain letters patent relating to Malta, subsequent to those above referred to, were removed by the (Imperial) Act of 1932. These letters patent and the Malta (Temporary Government) Order in Council, 1930, were declared

to have been validly passed, and to have been within the powers reserved to His Majesty. If any vestige of doubt could previously have existed as to the validity of the principal letters patent—and, in the view of their Lordships, there was none—it was removed by this Act.

A In 1933, it was again considered necessary by the Crown to suspend the Constitution of Malta, and the existing Ministers were removed from office by the Governor. Doubts seem to have arisen as to the validity of this proceeding, and the Malta (Letters Patent) Act, 1936, was passed, and received the royal assent on July 14, 1936. By sect. 1 of this Act, it was provided as follows :

B The Malta Constitution Letters Patent, 1921, shall notwithstanding any limitation imposed by sect. 68 thereof, have effect as if there were thereby reserved to His Majesty full power to revoke or amend by any further letters patent any or all of the provisions of the Malta Constitution Letters Patent, 1921, as subsequently amended.

C By the letters patent of Aug. 12, 1936, His Majesty revoked the principal letters patent, and made provision for the government of Malta, including the exercise of legislative powers by the Governor under sect. 15 thereof. The section is in these terms :

The Governor may make laws for the peace, order, and good government of Malta.

D By sect. 17, there was reserved to the Crown the concurrent right, with the advice of the Privy Council, from time to time to make laws for the peace, order, and good government of Malta. The repeals included several letters patent which were revoked without prejudice to anything lawful done thereunder. The letters patent providing for the government of Malta and so repealed were the following : (i) the Malta Constitution Letters Patent (the principal letters patent) ; (ii) the Malta Constitution (Amendment) Letters Patent, 1933 ; (iii) the Malta Constitution (Amendment) Letters Patent, 1934 ; (iv) letters patent dated Mar. 18, 1936. Three letters patent constituting the office of Governor and Commander-in-Chief of Malta were also repealed—namely, letters patent respectively dated Apr. 14, 1921, Aug. 9, 1930, and Aug. 16, 1934.

F The Governor then purported by Ordinance 27 of 1936 to impose customs duties on certain foreign articles imported into Malta, and it is not disputed that that ordinance was within the powers purported to be conferred on the Governor by the letters patent of Aug. 12, 1936. It is, however, contended by the respondent that there was no power in the Crown on that date to provide by orders in council or by letters patent for the government of Malta, or to confer on the Governor any power of making laws, except, it may be, in respect of the matters reserved to the Crown under the express provisions of the principal letters patent. It is not in dispute that those letters patent were validly revoked under the express power of revocation resulting from the provision of the Malta (Letters Patent) Act, 1936. s. 1, and the effect of the contention of the respondent, if correct, is that, since Aug. 12, 1936, Malta has been devoid of any legislative body. The question how far and to what extent certain

of the provisions of the letters patent of Aug. 12, 1936 (on this hypothesis), may be valid, as having been issued under the powers reserved by the principal letters patent and by the Malta Constitution Act, 1932, has not been investigated before their Lordships.

The judge in the First Hall (DR. L. A. CAMILLERI), after a careful consideration of the arguments, decided in favour of the appellants. A He held (i) that Malta must be regarded as a colony acquired by cession, (ii) that a ceded colony is by common law prerogative of the Crown, subject to legislation by order in council or letters patent, (iii) that, the revocation of the principal letters patent of 1921 not being in dispute, the rights of the Crown as regards legislation reverted to the position B which had existed immediately prior to the principal letters patent being issued, and (iv) that, as the result of the revocation, the royal prerogative as regards legislation was fully restored, and that the letters patent of Aug. 12, 1936, were accordingly valid. The action was, therefore, dismissed with costs. C

In the Court of Appeal, a different view was taken. First, they were of opinion that Malta was not acquired by the Crown by cession, but by "compact" between the inhabitants and the Crown. Secondly, they held, nevertheless, that, by "uniformity of usage" from 1836, if not before, the Crown had acquired the right of legislating for the inhabitants D of Malta, and accordingly the contention that the Crown never had the right of legislating for Malta by letters patent prior to 1921 was rejected. Thirdly, they held, on the authority of *Campbell v. Hall* (1), that, by the grant of representative institutions by the principal letters patent, without reserving a power of revocation, the royal prerogative was E irrevocably surrendered. Fourthly, they held that the revocation of the principal letters by virtue of cl. 1 of the Malta (Letters Patent) Act, 1936, was insufficient to restore the prerogative right to legislate, or to confer a new right, since that clause did not contain any words conferring a right to legislate after the revocation. Finally, the court held that, the royal F prerogative which existed prior to 1921 having been acquired as a title only by usage, it "evidently lapsed with the enactment of autonomy and cannot be revived." The appeal was accordingly allowed, and judgment was given in favour of the appellant. There was no order as to costs. G

Before their Lordships, the respondent not only supported the contentions on which the Court of Appeal decided the case, but also further argued (i) that the title of the Crown to Malta did not rest on cession, but "on the voluntary acceptance by the people of Malta (allied with the Crown against France which had acquired sovereign authority), of H British protection, and later of formal sovereignty"; (ii) that such an acquisition of sovereignty conferred on the Crown no constitutional authority to legislate or to impose taxation; (iii) that the exercise of rights by the Crown involving power to legislate and tax was in law a mere usurpation; (iv) that in any case the effect of the principal letters

patent was to extinguish all legislative and taxation authority, except in regard to those matters specially reserved ; and (v) that power to restore authority to the Crown in non-reserved matters could thereafter be granted only by Parliament.

A It should be observed at the outset that the question as to the extent of the royal prerogative in the case under consideration is a pure question of English common law, upon which the principles of Roman law, which were invoked in the Court of Appeal, could have very little influence. The sovereignty of Malta admittedly passed to the Crown not later than 1813. It is material to consider the circumstances in which this event
B took place in order to determine the extent of the royal prerogative at that time. The Maltese people are not unnaturally proud of their early history, and of the fact that the title of the Crown to Malta is, as has been truly said, " the very reverse of a right of conquest." It is not necessary to recapitulate the known historical documents, which are set out in
C great detail in HARDMAN'S HISTORY OF MALTA. It is sufficient to say that their Lordships for the present purpose are content to accept the elaborate statement of the position of Malta in the British Empire contained in the judgment of the Court of Appeal of Malta, delivered in *Strickland v. Galea* on June 22, 1935, and cited in the judgments of the trial judge
D and of the Court of Appeal in the present case. Whatever may have been the juridical position in the period prior to 1813, when Malta was successively in the possession of the Order of the Knights of St. John of Jerusalem, of the first French Republic (1798), of a number of victorious co-belligerents assisting the insurgent Maltese, of the King of the Two
E Sicilies, of Great Britain (1801), of the Knights of St. John, and again of Great Britain, it is certain that in 1813 a decisive step was taken when Sir Thomas Maitland, on his arrival as Governor in Malta, published a declaration in the name and on behalf of King George III to the effect that the King had determined :

F henceforth to recognise the people of Malta and Gozo as subjects of the British Crown and as entitled to its fullest protection.

To this was added the assurance that the King's intention was :

G to secure to the Maltese, in the fullest manner, the free exercise of their religion, to maintain their ecclesiastical establishment, to introduce such ameliorations in the proceedings of the courts of law as would secure to everyone the certainty of speedy and effective justice, and to make such improvements in the laws themselves as past experience or change of circumstances might render necessary and advisable.

It may be noted that the last sentence certainly gives no support to the view that there was a promise, still less " a pact," which would involve
H the grant of representative institutions with substantial law-making powers to the Maltese people. It must be borne in mind that the population of the island was only that of a moderate town in England, that its size is about that of the Isle of Wight, and that its people, however brave, could not have hoped to resist without assistance the attack of a first-rate power. It is clear that as a whole they welcomed the declaration, though

at this date Great Britain was still engaged in a life-and-death struggle with Napoleon, and the Battle of Leipzig had not yet been fought. A year later, the Treaty of Paris (1814) was signed, recognising the British claims as regards Malta, and that treaty was ratified by the Congress of Vienna in 1815. Ever since that time, Malta has been occupied by British troops, and there has been a Governor in control, appointed from Great Britain. It has become a British fortress of great strategical importance, a station for troops, and a first-class harbour for naval and civil purposes. It seems to their Lordships that counsel for the respondent was acting wisely when he admitted without hesitation that since 1813 the sovereignty of the island had been in the Crown, and when he said little or nothing in support of the contention set forth in the respondent's case to the effect that the subsequent exercise of rights on behalf of the Crown was in law a usurpation.

What, then, was the true nature of the title of the Crown to the sovereignty of Malta? In answering this question, it is important to bear in mind that we are considering a matter of substance rather than one of names or labels. The contention of the respondent on this part of the case is founded on the proposition that the prerogative of the Crown to legislate by orders in council and letters patent for the government of a possession (using the word in the widest sense) is restricted to cases where the possession was acquired either by conquest or by cession, but the word "cession" is employed by the respondent in this connection in a limited sense, so as to exclude a voluntary cession by the general consent of the people. This involves the division of ceded territories into two classes—those acquired by an act of cession from some sovereign power and those ceded by the general consent or desire of the inhabitants. Their Lordships must observe that there seems to be no authority in any case or recognised textbook on constitutional law for this distinction. The leading writers have always divided the possessions of the Crown outside the United Kingdom into those acquired by conquest, by cession, and by settlement. The statute law of this country has naturally been based on the same view. The British Settlements Act, 1887, s. 6, defines "British settlement" for the purposes of the Act as meaning:

any British possession which has not been acquired by cession or conquest, and is not for the time being within the jurisdiction of the legislature, constituted otherwise than by virtue of this Act or of any Act repealed by this Act, of any British possession.

The Foreign Jurisdiction Act, 1890, s. 1, confers on the Crown in divers foreign countries jurisdiction:

in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.

It can with difficulty be supposed that the legislature in these uses of the word "cession" was employing it as referring only to a limited class of cessions. Moreover, the Act of 1887 (sects. 2 and 5) empowered Her

Majesty in Council in the widest terms to make laws and to make, alter, and revoke orders for the purposes of the Act in every settlement. If the contention as to the limited meaning of the word "cession" is correct, it would seem to follow that British possessions acquired by voluntary cession, being therefore "British settlements," are in several respects

A in a position as between themselves and the Crown less advantageous than that of possessions acquired by a formal cession from some independent sovereign, with or without the consent of the people. It seems clear to their Lordships that in both these Acts the legislature is using the word "cession" as including cases of voluntary cession.

B The textbooks also use the word in the wider and general sense. The passage already cited from ANSON, 4th Edn., Keith, Vol. 2, Part II, p. 74, is an example (see also *ibid.*, p. 64), and others could be found in the same work. It is needless to multiply instances, for, until the present case, no one seems to have distinguished or divided cessions to the

C Crown in the way suggested. In HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 11, Dominions, Colonies and Possessions, p. 11 (see also Vol. 6, p. 477) will be found a list of 18 possessions of the Crown acquired by cession, including cases of cession by tribal chiefs. Also, it is to be noted that the learned author states that :

D Malta must be regarded as a cession.

It may be said with truth that cases of voluntary cession—that is, cession otherwise than from a sovereign power—are rare, and it is urged that the case has been neglected by textbook writers and not noticed

E by the legislature. It seems right, therefore, to consider whether there is anything to support the respondent's contention on this point, based on the principle of constitutional law formulated in the general proposition that the Crown, by virtue of the royal prerogative (apart from the effect of the British Settlements Act, 1887), is *prima facie* entitled to legislate

F for possessions acquired by conquest or cession, but is not so entitled in the case of settlements. The line of distinction here has always been based on the circumstance that English settlers, wherever they went, carried with them the principles of English law, and that English common law necessarily applied, in so far as such laws were applicable to the con-

G ditions of the new colony. The Crown clearly had no prerogative right to legislate in such a case. Where, however, the territory was acquired by cession or conquest, more particularly where there was an existing system of law, it has always been considered that there was an absolute power in the Crown, so far as was consistent with the terms of cession

H (if it was a case of that kind), to alter the existing system of law, though until such interference the laws remained as they were before the territory was acquired by the Crown : see BLACKSTONE'S COMMENTARIES, 21st Edn., Vol. 1, pp. 107, 108. It may be noted that the learned author refers to "conquered or ceded colonies" without any suggestion that the case of voluntary cession requires separate consideration. It seems to

their Lordships to be reasonably plain that the principle which excluded cases of settlement from the royal prerogative has no application to cases where there has been a cession in the popular sense, whether with or without the assent of the inhabitants, and that there is no valid ground for the distinction suggested between the case of Malta and other cases of cession.

There remains, however, a second point which was strongly argued on behalf of the respondent. It may be stated as follows. If the Crown by an exercise of prerogative has conferred representative institutions on the inhabitants of a territory which has been acquired by the Crown, without, however, reserving, in addition to a power of revoking the letters patent or the order in council, a power of resuming the royal prerogative of legislation, is it within the power of the Crown after the revocation to legislate for the territory? The contrary is contended on behalf of the respondent. It is suggested as a general proposition that, whenever responsible government is conceded by the Crown to a colony or possession, the royal prerogative to legislate by letters patent or orders in council comes to an end and is irrevocably lost or surrendered by the Crown, unless a special reservation is made in the grant. It may be stated at once that there is no authority for this view, and that the statements in the textbooks relied on in support of it are capable of a different meaning. The case relied on is the well-known decision of *Campbell v. Hall* (1), where LORD MANSFIELD, C.J., delivered the judgment, and this authority must now be considered. It related to the island of Grenada, taken by the British arms in open war from the French king, and surrendered upon capitulation. Letters patent dated Mar. 26, 1764, commissioned General Melville as Governor of Grenada. He was given power to set up a legislature as specified in a previous proclamation under the Great Seal, dated Oct. 7, 1763, whereby (*inter alia*) the King had empowered and directed the government of Grenada by letters patent under the Great Seal to summon general assemblies of the representatives of the people of Grenada so soon as the circumstances of the colony would allow, and with their consent to make laws for the public peace, welfare, and good government of the colony and its inhabitants. There had also been a second proclamation of Mar. 26, 1764, containing a recital of a survey of the islands and their division into allotments, as an invitation to purchasers to come in and take up properties on terms specified in the proclamation. After these three instruments had been published—namely, on July 20, 1764—letters patent were issued purporting to impose by virtue of the royal prerogative a duty of $4\frac{1}{2}$ per cent. on all sugars exported from the island, in lieu of certain duties previously levied by the French king. The question was whether these letters patent were valid. LORD MANSFIELD, C.J., in delivering judgment, said that, upon full consideration, the court was of opinion that, before the issue of the letters patent of July 20, 1764, the King had precluded himself from the exercise of a legislative authority over the island of Grenada. He then

proceeded to consider the terms of the two proclamations, and, after this examination, said, at p. 213 :

A We therefore think, that by the two proclamations and the commission to Governor Melville, the King had immediately and irrevocably granted to all who were or should become inhabitants, or who had, or should acquire property in the island of Grenada, or more generally to all whom it might concern, that the subordinate legislation over the island should be exercised by an assembly with the consent of the Governor and Council, in like manner as the other islands belonging to the King.

He added, at p. 213 :

B . . . through the inattention of the King's servants, in inverting the order in which the instruments should have passed [in issuing the letters patent of July 20, 1764, after the proclamation instead of before] the last Act is contradictory to, and a violation of the first, and is, therefore, void.

C It is plain that this authority is dealing only with a case where the Crown, after having granted representative institutions to the colony, was purporting to exercise by royal prerogative a concurrent right of legislation, though no such right had been reserved. Indeed, LORD MANSFIELD, C.J., found that there was language to be found in the letters patent confirming the proclamations showing that no such concurrent power was being reserved.

D It seems to their Lordships that this case in no way tends to support the respondent's present contention, and, with all respect to the Court of Appeal, they are unable to agree with their statement that it is an established constitutional principle, based on *Campbell v. Hall* (1), that, the grant of representative institutions once made, the Crown is immediately and irrevocably deprived of its right to legislate by letters patent or orders in council, unless there is an express reservation of a right to that effect. The true proposition is that, as a general rule, such a grant, without the reservation of a power of concurrent legislation, precludes the exercise of the prerogative while the legislative institutions continue to exist. Nor is it in doubt that a power of revoking the grant must be reserved or it will not exist. The statements made in the textbooks, based on the authority of *Campbell v. Hall* (1), properly understood, do not go beyond the decision, since they are not dealing with the hypothesis that the grant of representative institutions has been lawfully revoked.

E The Court of Appeal, however, lay stress upon an argument based upon what they call :

G the general and constant rule followed in the issue of instruments granting representative government to colonies and other possessions whenever it is meant to preserve the royal prerogative.

H There are, it is said, two reservations, (i) a reservation of full power to make laws as may seem necessary and so that such laws shall be of the same force and effect as if the grant has not been made, and (ii) a power to revoke, alter, or amend the grant. It is desirable to set out an example of the usual form of such reservations, taking it from the Malta Letters Patent of 1903 :

We hereby reserve to ourselves, our heirs and successors, our undoubted right,

power and authority to make, by and with the advice of our Privy Council all such laws for the peace, order and good government of Malta, as to us our heirs and successors may seem necessary, and all such laws shall be of the same force and effect in Malta as if these letters patent had not been made. And we do hereby reserve to ourselves our heirs and successors full power and authority from time to time to revoke, alter or amend these our letters patent as to us or them shall seem meet.

There can be no doubt as to the meaning and effect of the second reservation. The Crown by virtue of it can curtail or extend the powers of the legislative body entrusted with law-making or administrative duties by the instrument in which the reservation is found. Since all such powers could be annulled, it is clear that there is no limit to the right of curtailing or extending the powers, and in effect this preserves the prerogative of making laws by alteration or amendment of the letters patent while they are still, at least to some extent, in force. It is urged that, if once they are revoked, the Crown no longer has any right to make laws for the possession in question, unless the first reservation has been inserted as well as the second. It seems to their Lordships that this is a misapprehension as to the object of the first reservation. It is not dealing mainly, if at all, with the reservation of a prerogative right after the letters patent have been revoked, but with the reservation of a concurrent right from the start to legislate for the peace, order, and good government of the possession while the letters patent are in full force. This is plain from the context, and from the phrase that the laws so made shall be of the same force "as if these letters patent had not been made." It may be added that there is a cogent reason for holding that the reservation has no application to the case where there has been a complete revocation of the letters patent, because that would appear to postulate a reliance on a clause contained in the instrument after the instrument itself had been annulled.

Their Lordships for these reasons have come to the conclusion that neither the authority of *Campbell v. Hall* (1), nor the textbooks on constitutional law, nor the argument based on the forms in use by the Crown in granting representative government to colonies and other possessions, can be relied on as tending to establish the proposition that, after the revocation of the principal letters patent on Aug. 12, 1936, the Crown was divested of all legislative authority in regard to Malta, except perhaps in regard to matters expressly reserved by the principal letters patent. The problem which arises is to be solved by a consideration of the surrounding circumstances, some of them special to Malta as a fortress, by a careful examination of the nature of the matters which were entrusted in 1921 to the senate and legislative assembly of Malta, and of those matters which were reserved to the Crown as touching the public safety and defence of the Empire, and the general interests of the King's subjects visiting or resident in Malta, and by asking the question whether it should be inferred that, if the letters patent were revoked, the inhabitants of Malta were to be left without a legislature and without means of raising a revenue for essential local purposes unless and until

- Imperial Parliament should intervene. There might be matters urgently calling for the local administration of a Governor long before an Act of Parliament could be passed. Above all, it seems very unlikely that, on instituting a complex system of diarchy by letters patent, it could have been intended that, if that part of the law-making and administrative power which was being confided to a representative body came to an end, the Crown would be left in the enjoyment of truncated and mutilated powers, and with no means of providing for the peace, order, and good government of Malta. For these reasons, their Lordships have come to the conclusion that there is no valid ground, either on principle or on authority, for holding that the royal prerogative had been so far extinguished, when the principal letters patent were issued in 1921, that, after they were revoked, the prerogative did not exist. The right to legislate in relation to local matters was doubtless suspended while the letters patent were in force for the reason indicated by LORD MANSFIELD, C.J., in the passage already quoted—namely, that so to legislate would be “contradictory to and a violation” of the instrument granting the powers. However, there is nothing in it to preclude the exercise of the royal prerogative as soon as the letters patent in that respect cease to be in force.
- It is proper to add that their Lordships have considered the effect of the British Settlements Act, 1887, but, for the reasons given, there seems to be no good ground for holding that Malta has not been acquired “by cession or conquest.” Malta is therefore not within the definition of British settlement contained in sect. 6 of that Act. On the grounds above stated, their Lordships thought it right humbly to advise His Majesty to allow the appeal and to restore the order of the judge in the First Hall. They also followed the course as to costs adopted by the Court of Appeal, and for like reasons they made no order as to the costs of the appeal.
- Appeal allowed. No order as to costs.*

Solicitors: *Burchells* (for the appellants); *Blount, Petre & Co.* (for the respondent).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

SWAIN v. SOUTHERN RAILWAY CO.

[KING'S BENCH DIVISION (Humphreys, J.), **February 1, 2, June 15, July 27, 30, 1938.**]

- Highways—Repair—Bridge carrying road over railway—Liability of railway company for non-feasance—Extent of liability to repair—Railways Clauses Consolidation Act, 1845 (c. 20), s. 46.*
- Public Authorities—Limitation of actions—Whether railway company a public authority—Public Authorities Protection Act, 1893 (c. 61), s. 1.*

The plaintiff, a steam-crane driver, in proceeding to his work on his bicycle, had to cross a bridge belonging to the defendant company. The road over it, and the approach thereto, were alleged to be in

a bad state of repair, there being several potholes and a rut, about 2 ft. from the near side, several inches deep in some places, extending a number of yards from the crown of the bridge down the incline, and said to have been caused in the course of time by rainwater. The plaintiff's machine got into the rut and he was thrown to the ground and suffered severe injuries to his head. It was found as a fact that the accident was caused by the want of repair of the road over the bridge. The claim was based on negligence, nuisance, and breach of the statutory duty of the defendants to maintain the road on the bridge and the approach thereto. The bridge had been constructed by the defendants' predecessors under the South Western Exeter Extension Act, 1856, incorporating the Railways Clauses Consolidation Act, 1845. It was contended on behalf of the defendants (i) that the defendants were in a position similar to that of a highway authority, and were not liable for non-feasance; (ii) that they were entitled to the benefit of the Public Authorities Protection Act, 1893; (iii) that they were only liable, if at all, to maintain the road over the bridge for the purposes of the traffic using the road in the year in which it was constructed:—

HELD: (i) by the Railways Clauses Consolidation Act, 1845, s. 46, the company were liable for non-feasance as well as misfeasance.

(ii) a railway company is not a public authority within the meaning of that term as used in the Public Authorities Protection Act, 1893, s. 1.

(iii) the road was in fact in a condition which would have been dangerous to traffic as it was at the date at which the bridge was constructed; but the duty of a railway company under the Railways Clauses Consolidation Act, 1845, s. 46, is to maintain the bridge and its approaches in the state they are when constructed in accordance with that section, and that necessarily implies an absence of dangerous ruts.

[EDITORIAL NOTE.] The duty of a railway company to maintain a road over a bridge is here distinguished from the similar duty of a local authority. The railway company on the one hand are liable for non-feasance, but, on the other, they are only liable to maintain the road as originally constructed, despite the fact that the general traffic of the district has altered. There is a further point, quite apart from the foregoing, and that is whether a railway company is a public authority within the meaning of the Public Authorities Protection Act, and, in this matter, the opinion voiced in *A.-G. v. Margate Pier & Harbour Co. of Proprietors*, [1900] 1 Ch. 749, that the protection of the Act does not extend to companies working for a profit, is confirmed.

AS TO LIABILITY TO REPAIR ROADWAY OVER BRIDGE, see HALSBURY, Hailsham Edn., Vol. 16, pp. 407, 408, para. 574; and FOR CASES, see DIGEST, Vol. 26, pp. 580-582, Nos. 2709-2719.

AS TO PARTIES WITHIN PROTECTION OF THE PUBLIC AUTHORITIES PROTECTION ACT, see HALSBURY, Hailsham Edn., Vol. 26, pp. 290-293, para. 610; and FOR CASES, see DIGEST, Vol. 38, pp. 102-106, Nos. 732-758.]

Cases referred to:

- (1) *Guilfoyle v. Port of London Authority*, [1932] 1 K.B. 336; Digest Supp.; 101 L.J.K.B. 91; 146 L.T. 91.
- (2) *Pictou Municipality v. Geldert*, [1893] A.C. 524; 26 Digest 400, 1252; 63 L.J.P.C. 37; 69 L.T. 510.
- (3) *Bradford Corp'n. v. Myers*, [1916] 1 A.C. 242; 38 Digest 110, 784; 85 L.J.K.B. 146; 114 L.T. 83; *affg.*, [1915] 1 K.B. 417.
- (4) *The Ydun*, [1899] P. 236; 38 Digest 101, 727; 68 L.J.P. 101; 81 L.T. 10.
- (5) *Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G.*, [1915] A.C. 654; 26 Digest 581, 2716; 84 L.J.K.B. 907; 112 L.T. 826; *reversg.*, [1914] 3 K.B. 1.

- (6) *A.-G. v. Great Northern Ry. Co.*, [1916] 2 A.C. 356; 26 Digest 582, 2719; 85 L.J.Ch. 717; 115 L.T. 235.
- (7) *Young v. Davis* (1863), 2 H. & C. 197; 26 Digest 398, 1241; 9 L.T. 145.
- (8) *Gibson v. Preston Corpn.* (1870), L.R. 5 Q.B. 218; 26 Digest 357, 834; 39 L.J.Q.B. 131; 22 L.T. 293.
- A (9) *Cowley v. Newmarket Local Board*, [1892] A.C. 345; 26 Digest 400, 1251; 62 L.J.Q.B. 65; 67 L.T. 486.
- (10) *Sydney Municipal Council v. Bourke*, [1895] A.C. 433; 26 Digest 400, 1254; 64 L.J.P.C. 140; 72 L.T. 605.
- (11) *Lancashire & Yorkshire Ry. Co. v. Bury Corpn.* (1889), 14 App. Cas. 417; 26 Digest 586, 2776; 59 L.J.Q.B. 85; 61 L.T. 417; *affy.* (1888), 20 Q.B.D. 485.
- B (12) *The Danube II*, [1921] P. 183; 38 Digest 103, 741; 90 L.J.P. 314; 125 L.T. 156.
- (13) *Betts v. Metropolitan Police District Receiver & Carter Paterson & Co., Ltd.*, [1932] 2 K.B. 595; Digest Supp.; 101 L.J.K.B. 588; 147 L.T. 336.
- (14) *London & North Eastern Ry. Co. v. North Riding of Yorkshire County Council*, [1936] A.C. 365; [1936] 1 All E.R. 692; Digest Supp.; 105 L.J.Ch. 133; 154 L.T. 409.
- C (15) *R. v. High Halden (Inhabitants)* (1859), 1 F. & F. 678; 26 Digest 353, 789.
- (16) *Manchester Corpn. v. Audenshaw Urban Council & Denton Urban Council*, [1928] Ch. 763; Digest Supp.; 97 L.J.Ch. 276; 139 L.T. 509.
- (17) *Dublin United Tramways Co. v. Fitzgerald*, [1903] A.C. 99; 43 Digest 344, 37; 72 L.J.P.C. 52; 87 L.T. 532.

D

ACTION for damages for negligence, or, alternatively, for breach of statutory duty. The facts are fully set out in the judgment.

J. Lhind Pratt for the plaintiff.

J. G. Trapnell, K.C., and *A. T. Denning, K.C.*, for the defendants.

- E *Trapnell, K.C.*: The railway company is in the same position as that of the surveyor of highways, whose duties and liabilities were transferred to its predecessor in title by the 1856 Act, which incorporated the Railways Clauses Consolidation Act, 1845, ss. 46, 65. It is not liable for non-feasance. A member of the public has no right of action.
- F The remedy for non-repair is a fine, as provided by sect. 65. Commonly, the public authorities, by arrangement with the companies, take over the railway's liabilities to maintain the road over a bridge. It would be a curious position if the highway authority were held to be liable for non-feasance in respect of the road over the bridge while not being so
- G liable for the rest of the road. If the company is held bound to repair the road, the liability must be limited to the traffic requirements at the date at which the railway was built. The defendants are entitled to the benefit of the Public Authorities Protection Act. They are a public authority so far as the road is concerned. It is the failure to carry out
- H their alleged statutory duty which is complained of here. As far as the road is in question, the position of the company is not analogous to that of the corporation in *Bradford Corpn. v. Myers* (3), where the corporation sold coke to customers. [Counsel referred to *Guilfoyle v. Port of London Authority* (1), *Young v. Davis* (7), *Gibson v. Preston Corpn.* (8), *Cowley v. Newmarket Local Board* (9), *Sydney Municipal*

Council v. Bourke (10), *Lancashire & Yorkshire Ry. Co. v. Bury Corpn.* (11), *Bradford Corpn. v. Myers* (3), *The Danube II* (12), *Betts v. Metropolitan Police District Receiver & Carter Paterson & Co., Ltd.* (13), *Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G.* (5), *A.-G. v. Great Northern Ry. Co.* (6), *London & North Eastern Ry. Co. v. North Riding of Yorkshire County Council* (14), *R. v. High Halden (Inhabitants)* (15) and *Manchester Corpn. v. Audenshaw Urban Council & Denton Urban Council* (16).]

Pratt : For years past, actions have been constantly brought against tramway companies.

HUMPHREYS, J. : That is because the companies put down something which is really not part of the road.

Pratt : The evidence was that the rut was the result of the reconstruction of the original road by the railway company. In the cases cited, the duties of the surveyor of highways had been transferred to other similar authorities. In the present case, the true construction of the statute is that it does impose an obligation—the repair. The position is quite different from that in public authority cases. A railway company is a commercial undertaking. The court is being asked to extend the doctrine of non-feasance to a small portion of the road over an artificial structure. The obligation to maintain the road put on the railway company does not make it a road authority. The Public Authorities Protection Act is in very wide terms. The courts have sought to cut down its scope. There must be both a statutory and a public duty. The Act applies only to bodies which discharge public duties, and has never been applied to a railway company, which is a trading corporation. [Counsel referred to *Pictou Municipality v. Geldert* (2), *The Ydun* (4) and *Dublin United Tramways Co. v. Fitzgerald* (17).]

Trapnell, K.C., in reply.

HUMPHREYS, J. : In this case, the plaintiff, a steam-crane driver, was cycling to work on the morning of Aug. 7, 1936, by way of a road which is carried over the railway-line belonging to the defendants by means of a bridge. After passing over the bridge itself, he was continuing down the approach, where the road slopes downwards, when the wheel of his bicycle got into a rut variously described as from 6 ins. to 9 ins. wide and 3 ins. to 3½ ins. deep. He was thrown from his machine, and suffered very serious injuries. He brought his action against the railway company for damages for negligence, or, in the alternative, for breach of statutory duty. The evidence was heard by me at Exeter on Feb. 2, 1938, when I found as a fact that the plaintiff's injuries were caused solely by the failure on the part of the person upon whom fell the duty of repairing the road to maintain the road in a reasonable condition for the use of ordinary traffic. I assessed the damages at £1,590. For general convenience, the further hearing was adjourned to London.

On June 15, Mr. Trapnell, for the defendants, submitted three grounds upon which he contended that no liability attached to his clients. It was agreed that the rut in question occurred at a point where the road, which is a public highway, was repairable by the defendants. It was so repairable by virtue of the Railways Clauses Consolidation Act, 1845, s. 46, which had been incorporated with the special Act of 1856 which dealt with this part of the defendants' undertakings, the terms of which were not otherwise relevant to the question for my decision. Sect. 46 reads as follows :

B And with respect to the crossing of roads, or other interference therewith, be it enacted as follows : 46. If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided ; and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company.

C Mr. Trapnell's first point was that sect. 46 did no more than transfer from the surveyor of highways to the railway company the duty of maintaining the road so as to constitute the railway company *ad hoc* the surveyor of highways. He argued that, as the surveyor of highways admittedly would not be liable to an action for damages for negligence D where the failure to repair amounted to non-feasance, the railway company were in the same position.

It is unnecessary again to refer to the various authorities upon the subject of the non-liability for non-feasance of a public road authority. In a case which came before me in 1932, and which was cited to me in E the course of the argument in the present case—namely, *Guilfoyle v. Port of London Authority* (1)—I had to consider those authorities, and I then expressed the opinion that the law upon the subject might be taken as being contained in the judgment of the Privy Council delivered by LORD HOBHOUSE in *Pictou Municipality v. Geldert* (2), at p. 527 :

F It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shown that the legislature has used language indicating an intention that this liability shall be imposed.

I see no reason to alter the view there expressed. The history of what the G learned editor of SALMOND ON TORTS refers to as "this unsatisfactory exemption from liability" is, I think, accurately stated in SALMOND ON TORTS, 9th Edn., at p. 298 :

H At common law the duty of repairing highways rested upon the inhabitants of the parish, and was enforceable by way of indictment only, and not by way of action at the suit of an individual, even though he had suffered special damage. Nor would an action lie against a surveyor of highways appointed under statutory provisions, it being held that the legislature did not intend to subject the surveyor, who was only the agent of the parish in this matter, to a liability from which the parish itself was free. Finally, when the care of highways was transferred by statute to corporate local authorities, the same rule of exemption was applied to them.

I take that as a history of the matter. The doctrine is not one which

I think the courts should be astute to extend. It appears to me that there is a great difference between the transference from one public road authority to another of the liability to repair a highway, and the duty of maintaining a bridge and the approaches thereto imposed upon a railway company as a term of their being allowed to interfere with an existing highway for the purposes of their undertaking. In my opinion, A the language of sect. 46 does indicate, in the words of LORD HOBHOUSE, "an intention that this liability shall be imposed." I think that that point fails.

Mr. Trapnell's next point is that the Public Authorities Protection Act, 1893, applies to this case to protect his clients, since the action was not commenced within six months next after the act, neglect or default complained of, as required by that statute in the cases to which it applies. B The answer made by Mr. Pratt is that the statute does not apply. It is clear, I think, that something more has to be shown upon the part of a defendant who desires to invoke the protection of the statute than that C he is acting under statutory duties or powers. The duty must be something which can be properly described as a public duty to be performed by a public authority: see *Bradford Corpn. v. Myers* (3), particularly the passage in the opinion of LORD BUCKMASTER, L.C., at p. 247. The statute is one the proper application of which has caused considerable D difficulty to the courts, but I can find nothing in any of the judgments to which I have been referred which would suggest that such a concern as a railway company is within the protection of the Act. Mr. Pratt referred me to a *dictum* in the considered judgment of SIR F. H. JEUNE, P., in *The Ydun* (4), at p. 239, to the effect that a railway company would E not be held to be a public authority performing a public duty within the meaning of the Act. In the absence of authority, I am not prepared to hold that the statute applies in this case.

Mr. Trapnell's third point is of a different character. He argues that the liability of the railway company cannot amount to more than a F liability to maintain the bridge and the road in a condition suitable for such traffic as existed in 1856, the date of the special Act, and he suggested that bicycles were unknown in 1856. I am far from being satisfied that bicycles of some sort were not to be found on the roads in 1856, but I do not think that the point can be decided upon any G such ground. To a considerable extent I accept and agree with Mr. Trapnell's legal proposition. The duty thrown upon the railway company by the Railways Clauses Consolidation Act, 1845, s. 46, differs from the general obligation of a county authority to keep a highway in such a condition that it can carry, not only the traffic of the period H at which it was made, but also heavier traffic coming into existence subsequently: *Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G.* (5) and *A.-G. v. Great Northern Ry. Co.* (6). What the railway company have to do is to maintain the bridge and the approaches in the state in which they are when they have been

constructed in accordance with the section. That, in my opinion, involves that the road must be maintained so as to be safe for ordinary traffic, from which it follows that the road must have a reasonably level surface, and must be free from such ruts as may be a source of danger to the light, as well as to the heavy, traffic in existence in 1856.

- A It appears to me to be largely a question of fact in each case. So far as it is a question of fact, I am satisfied that the state of this road on Aug. 7, 1936, was such that it would have been dangerous to the light, narrow-tyred vehicles of an earlier day, such as the gig or the dog-cart, and was certainly not maintained in the state in which it was
- B when made in or about 1856. For these reasons, I direct that judgment be entered for the plaintiff for £1,590.

Solicitors: *Hancock & Willis*, agents for *Cecil Forward*, Axminster (for the plaintiff); *H. L. Smedley*, Solicitor to the Southern Railway Co. (for the defendants).

C [Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Considered. CHESINGTON DEVELOPMENT CO., LTD. v. SURREY BOROUGH COUNCIL. [1948] 1 All E.R. 876.

ATTORNEY-GENERAL (AT THE RELATION OF THOMAS)
v. BARNES BOROUGH COUNCIL AND RANELAGH
D CLUB, LTD.

[CHANCERY DIVISION (Luxmoore, J.), July 11, 12, 28, 1938.]

Town and Country Planning—Agreement restricting planning in lieu of scheme—Agreement alleged to have been with a committee of local authority —Power of local authority to delegate to committee—Agreement relating to planning, development or user, but alleged to be more favourable to land-owner than draft scheme—Whether interim development order required—Town and Country Planning Act, 1932 (c. 48), ss. 34, 48, 54—Local Government Act, 1933 (c. 51), s. 85.

- F In 1935 and 1936, a local authority for the purposes of the Town and Country Planning Act, 1932, entered into two agreements with a club with regard to the development of its property situate in its area. In 1938, a ratepayer of the borough instituted these proceedings claiming that each of the two agreements was *ultra vires* the borough council on the grounds (i) that the agreements resulted from the delegation by the council of powers conferred on it by the Town and Country Planning Act, 1932, to a joint committee which, it was alleged, was constituted by the council under the power conferred on it by sect. 48 of the Act of 1932, but without regard to, and in contravention of, the provisions of that section; (ii) that the agreements, which purported to have been entered into by the council in exercise of the powers conferred on it by sect. 34 of the Act of 1932, were not in fact authorised by that section, because neither agreement restricted the planning, development or use of the land in question in the manner contemplated according to a true construction of the section, but were in fact permissive, because the club, by reason of the agreements, was in a position to plan, develop and use its land in a manner more favourable to the club than was provided in the draft planning scheme proposed to be adopted by the council, and without making application for an interim development order, as required by the Act, if the club should desire to plan, develop or use its land before any planning scheme should come into operation; (iii) that the agreement of 1935 contained provisions which
- G
- H

could not have been incorporated in a planning scheme under the Act of 1932, and was therefore unauthorised under the provisions of sect. 34. There was no dispute of fact, and counsel for the parties agreed that the agreement of 1936 must stand or fall with the agreement of 1935 :—

HELD : (i) the council had not appointed a committee either under sect. 48 of the Act or at all, as alleged, nor had it delegated any of its powers under the Act of 1932. The agreement of 1935 was submitted to, and approved by, the council, and sealed by the mayor on the authority of a resolution of the council. It was by virtue of this resolution alone that the agreement was entered into, and its execution was not in any sense the act of any committee. The council had delegated to the town-planning scheme clauses sub-committee the final settlement of three subsidiary matters referred to in the resolution, and they were authorised to make such a delegation by the Local Government Act, 1933, s. 85. A

(ii) upon a true construction of sect. 34 of the Act of 1932, the council, as an authority under the Act, had at all material times power to enter into an agreement with the club restricting the future planning, development or use of its land, provided that such restrictions were such as might be dealt with by or under a scheme under the Act of 1932. B

(iii) the provisions in the agreement of 1935 restricting the planning, development and use of the club's land were real restrictions on the future planning and development of the land the subject-matter of the agreement. All the provisions of the agreement of which complaint was made were such as could be properly included in a planning scheme. C

[EDITORIAL NOTE.] The facts of this case were before the court in another proceeding which is reported at p. 226, *ante*. The principal contention here is that the agreement provided for a scheme of planning more favourable than that in a planning scheme which had been drafted but not passed through all its stages. The restrictions, however, placed on the owner by the agreement were such as might properly be incorporated in a scheme, and the fact that they might be considered to be more favourable to the owner than those in a draft scheme did not invalidate the agreement. The Town and Country Planning Act, 1932, s. 34, where it refers to conditions restricting the planning of property, does not mean that a local authority can only enter into an agreement with an owner placing greater restrictions upon development by the owner than a draft scheme does. D

AS TO PLANNING AGREEMENTS WITH OWNERS, see HALSBURY, Supp., Public Health, paras. 1043-1050; and FOR CASES, see DIGEST, Supp., Public Health, Nos. 670a, 670b.] E

Cases referred to : F

(1) *Re Forsey & Hollebone's Contract*, [1927] 2 Ch. 379; 40 Digest 82, 634.

(2) *Markham v. Derby Corpn.*, [1935] Ch. 320; Digest Supp.; 104 L.J.Ch. 108; 152 L.T. 416.

ACTION by the Attorney-General on the relation of a ratepayer of the defendant borough for (i) a declaration that the appointment by the first-named defendants, the Barnes Borough Council, in or about the month of May, 1935, of five representatives, to constitute, with four representatives of the second-named defendants, the Ranelagh Club, Ltd., a joint committee to make and/or negotiate an agreement under the Town and Country Planning Act, 1932, s. 34, was *ultra vires* the first-named defendants; (ii) a declaration that all acts done by the said joint committee, and all acts of the first-named defendants founded thereon, were *ultra vires*; (iii) a declaration that the making of an agreement, dated Aug. 1, 1935, between the first-named defendants and the second-named defendants was *ultra vires* the first-named defendants; G

(iv) a declaration that the making of an agreement, dated May 24, 1936, between the first-named defendants and the second-named defendants was *ultra vires* the first-named defendants; and (v) a declaration that the first-named defendants were not bound by either of the said agreements.

- A *Hon. Sir Stafford Cripps, K.C., and Eric Blain* for the plaintiffs.
Cyril Radcliffe, K.C., and Wilfrid M. Hunt for the first defendants.
Sir Patrick Hastings, K.C., and J. H. Stamp for the second defendants.

Cripps, K.C.: The agreement of 1935 is *ultra vires* and invalid, as the procedure leading up to the agreement is contrary to the provisions of the Town and Country Planning Act, 1932, and the agreement has incorporated provisions, and is made for a purpose, contrary to the provisions of the Act.

- B *Radcliffe, K.C.*: The agreement of 1935 was sealed by the mayor under the authority of the resolution passed by the whole council at a full meeting on July 31, 1935. The council has power under the Local Government Act, 1933, s. 85, to appoint committees, and in virtue of this power the town-planning clauses sub-committee has acted, and this is the only delegation of authority which the council has made, and is one which is in its power so to do. This sub-committee having reached
- C a conclusion on the various matters with which it was empowered to deal regarding the agreement, with the authority of the council, the seal has been affixed to the agreement. [Counsel referred to *Re Forsey & Hollebone's Contract* (1) and *Markham v. Derby Corpn.* (2).]

- D *Hastings, K.C.*: No evidence has been produced in support of the
- E allegation that the agreement imposes less restriction on the land than does the relevant planning scheme. This agreement clearly falls within sect. 34 of the Act.

Stamp followed on the same side.

Cripps, K.C., in reply.

- F
- LUXMOORE, J.: The Barnes Borough Council (hereinafter referred to as "the council") is a local authority for the purposes of the Housing and Town Planning Acts, 1909 to 1922, the Town Planning Act, 1925, and the Town and Country Planning Act, 1932. The council has entered
- G into two agreements with Ranelagh Club, Ltd. (hereinafter called "the club"), with regard to the future development of property belonging to the club and situate within the Borough of Barnes (hereinafter called "the borough"). The area of this property, which has sometimes been referred to as Barn Elms Park, is approximately 106½ acres. The first
- H of these agreements is dated Aug. 1, 1935, and the second, which is expressed to be supplemental to the first, is dated Jan. 24, 1936. This action was instituted on Feb. 2, 1938, against the mayor, aldermen and burgesses of the borough by His Majesty's Attorney-General, at the relation of a ratepayer of the borough, claiming that each of the two agreements is *ultra vires* the council, and is therefore unenforceable and

void. The grounds on which this claim is put forward are three. First, it is said that the agreements resulted from the delegation by the council of powers conferred on it by the Town and Country Planning Act, 1932 (hereinafter called "the Act of 1932"), to a joint committee which, it is alleged, was constituted by the council under the power conferred on it by sect. 48 of the Act of 1932, but without regard to, and in contra-
 vention of, the provisions of that section. Secondly, it is said that the agreements, which purport to have been entered into by the council in exercise of the powers conferred on it by sect. 34 of the Act of 1932, are not in fact authorised by that section, because neither agreement restricts the planning, development or use of the land in question in the manner contemplated, according to the true construction of the section, but is in fact permissive, because the club is, by reason of the agree-
 ments, in a position to plan, develop and use its land in a manner more favourable to the club than is provided in the draft town-planning scheme proposed to be adopted by the council, and without making application for an interim development order, as required by the Act, if the club should desire to plan, develop or use its land before any town-planning scheme should come into operation. Thirdly, it is said that the agree-
 ment of Aug. 1, 1935, contains provisions which could not have been incorporated in a town-planning scheme under the Act of 1932, and is therefore unauthorised under the provisions of sect. 34. The writ and subsequent proceedings were amended by the joinder of the club as a party defendant, pursuant to an order dated Feb. 21, 1938. No oral evidence was adduced at the hearing, there being no dispute of fact. The questions which arise for decision fall to be decided upon a considera-
 tion of the relevant documents, the facts thereby disclosed, and the relevant sections of the Act of 1932.

The material facts are as follow. On Sept. 11, 1923, the council by resolution of that date decided to prepare a town-planning scheme in pursuance of the Housing and Town Planning Act, 1919, s. 42, with reference to the areas situate wholly within the urban district of the borough. On Feb. 24, 1924, the council resolved that the draft provisional statement required by the Housing and Town Planning Acts, 1909 to 1919, should be provisionally approved, and that, after the advertisements and notices required by the Acts had been given, the draft should be submitted to the council for final approval. However,
 on Nov. 8, 1927, the council decided to prepare a further town-planning scheme, then referred to as the Barnes Town-planning Scheme No. 2.

On Apr. 8, 1924, the preliminary statement and Map No. 2 referred to in such statement were adopted by the council. The property of the club was included in the said preliminary statement and Map No. 2 as an area having a density of 12 houses to the acre. On Feb. 9, 1932, the council resolved among other things that the property belonging to the club which is referred to in the minutes of the meeting of the council as Barn Elms Park should be zoned as a residential area with 8 houses

- to the acre, but that, notwithstanding the fact that such property had been zoned for residential purposes, every endeavour should be made at the appropriate time to secure it as a public open space. On Apr. 12, 1932, the council resolved that the Town-planning Schemes No. 1 and No. 2 should become one scheme, to be known as Barnes Town-planning
- A Scheme "A," and that the draft of such scheme, which had been prepared by the town-planning committee of the council, should be adopted, and that the map marked No. 3 to which the draft scheme referred should be signed and certified by the clerk to the council. The draft scheme and the Map No. 3 were duly signed and certified in accordance
- B with the last-mentioned resolution, and include the property belonging to the club as an area in which the average number of dwelling-houses to the acre is not to exceed 8, and the draft scheme also provides that the character of the buildings which might be erected on the property of the club (a) without the council's consent, are dwelling-houses and
- C residential buildings, and (b) with the council's consent, are buildings other than dwelling-houses and buildings for noxious trade or industry, while buildings for noxious trade or industry are prohibited. On Feb. 14, 1934, the council resolved that the Town-planning Scheme "A" should be amalgamated with another proposed town-planning scheme
- D under consideration by the council and known as Scheme No. 3.

- On Nov. 9, 1934, the council resolved that 19 named persons who were members of the council should constitute a town-planning committee, the duties of such committee being to consider and advise the council on all questions that might arise with reference to the Barnes
- E Town-planning Scheme. On Dec. 12, 1934, the council appointed five named members of the council who were also members of the town-planning committee to be a sub-committee to be known as the town-planning scheme clauses sub-committee, while on the same date the council resolved to apply to the Minister of Health for authority to
- F dispense with the preliminary statement for Scheme No. 3 and to proceed direct to the preparation of a draft scheme for the whole of the areas comprised in town-planning Scheme "A" and Scheme No. 3. It was further resolved that, to facilitate the combining of the schemes in one scheme for the whole of the borough, application should be made to the
- G Minister of Health under the Town and Country Planning (General Transitional) Order, 1933, to extend the time for the preparation, adoption and approval of the combined scheme. It is agreed that the necessary authority and extension of time were given by the Minister of Health. On Jan. 8, 1935, the town-planning scheme clauses sub-
- H committee resolved that the club should be approached with reference to the property of the club being scheduled to the proposed town-planning scheme as a private or public open space, as proposed in the resolution of the council of Feb. 9, 1932, to which I have already referred. After Jan. 8, 1935, the town-planning scheme clauses sub-committee from time to time met representatives of the club. There are in existence

documents which refer to these meetings as meetings of a joint committee of the council and the club. As a result of these meetings, the town-planning scheme clauses sub-committee reported to the council that the zoning of the property of the club as a public or private open space without the full acquiescence of the club would be too large a matter for the council, and that the club would not acquiesce in such zoning. The sub-committee further reported that certain proposals for the future development of the property of the club had been placed before the sub-committee, and that it had been suggested that at the outset a small committee of the council should co-operate with a small committee of the club as a joint committee. It is to be noted that nothing is said as to the precise constitution of such a joint committee, nor as to its personnel. A B

On May 20, 1935, at a special meeting of the council, which had been convened by a notice to consider and to take any action necessary upon a report of the town-planning scheme clauses sub-committee regarding a proposed development of the property of the club, the council resolved that the town-planning scheme clauses sub-committee be authorised to continue their negotiations with the club, and report to the town-planning committee in due course. As a result of the discussions between the town-planning scheme clauses sub-committee and the representatives of the club subsequent to the resolution of the council of May 20, 1935, it was agreed that a memorandum should be prepared with regard to the future development of the property of the club. In due course a memorandum was prepared, and was subsequently submitted to the council. On June 12, 1935, the council resolved that authority should be given for the preparation, in conjunction with the club, of detailed proposals for consideration by the council, with a view to the property of the club being ultimately town-planned in accordance with the terms of the said memorandum. At a meeting of representatives of the council and of the club on June 25, 1935, it was suggested that the most appropriate method of dealing with the questions arising between the council and the club would be for an agreement to be entered into between the council and the club under sect. 34 of the Act of 1932, and a draft of such an agreement was prepared and discussed. The draft agreement was further discussed between the representatives of the council and the club subsequent to June 25, 1935, and on July 31, 1935, the council resolved that, pursuant to sect. 34 of the Act of 1932, the council should enter into an agreement with the club relating to the property of the club embodying the provisions contained in the draft agreement which had been submitted to the meeting, subject to questions respecting (a) the area permitted to be built on, (b) the height of buildings, and (c) flood-protection, being negotiated by the town-planning scheme clauses sub-committee, with power to that sub-committee to settle, and that, on the said agreement being completed, the property of the club should be included in the council's draft town-planning scheme, subject to the C D E F G H

terms of the said agreement, and that the mayor be thereby authorised to affix the corporate seal to the agreement. Subsequent to the resolution of the council, the town-planning scheme clauses sub-committee on July 31, 1935, after negotiation with the representatives of the club, agreed with regard to the matters referred to in the resolution of the council.

On Aug. 1, 1935, the mayor, in pursuance of the resolution of July 31, 1935, affixed the seal of the corporation to the agreement which had been submitted to the council on that date, with such alterations as had been agreed upon by the town-planning scheme clauses sub-committee and the representatives of the club in pursuance of the resolution of the council of July 31, 1935, to which I have already referred.

It is not necessary to refer to the actual terms of the agreement in considering the first point—namely, whether the execution of the agreement resulted from an improper delegation by the council of its powers under the Act of 1932 to a committee purporting to be constituted under sect. 48 of that Act, but not in fact constituted in accordance with the requirements of that section.

Sect. 48 provides as follows :

(1) A local authority . . . may, subject to the provisions of this section, appoint a committee for any of the purposes of this Act, which, in the opinion of the authority, would be better regulated and managed by means of a committee, and may delegate to the committee, with or without restrictions or conditions as they think fit, any of their powers under this Act except the power of levying a rate or borrowing money . . . (2) A committee appointed under this section shall consist of such number of persons as the appointing authority think fit, but at least three-fourths of the members of the committee shall be members of the appointing authority.

The resolution relied on by the plaintiffs as constituting the committee under sect. 48 is that dated May 20, 1935, to which I have already referred. In terms it is a resolution that :

The town-planning scheme clauses sub-committee be authorised to continue their negotiations with the club and report to the town-planning committee in due course.

Before this date, it is not suggested that the council had purported to appoint any committee under the said section, nor has my attention been called to any subsequent resolution of the council purporting to make any such appointment. I am at a loss to understand how the resolution of May 20, 1935, can be construed as constituting a committee either under sect. 48 or at all, for it does not purport to make any appointment. Even if this difficulty could be surmounted, I find it impossible to read the resolution as a delegation by the council of any of its powers under the Act of 1932. The agreement of Aug. 1, 1935, was submitted to, and approved by, the council, and the seal of the council was affixed to it by the mayor by the authority of a resolution of the council. It was by virtue of this resolution alone that the agreement was entered into, and its execution was not in any sense the act of any committee. It is true that the council delegated to the town-planning scheme clauses sub-committee the final settlement of the three matters referred to in

the council's resolution of July 31, 1935, but no question is raised with regard to the propriety of this delegation, nor could such question properly be raised with regard thereto, for the council were authorised to make such a delegation by the Local Government Act, 1933, s. 85. It was suggested in argument that, because the proposal that the planning, development and user of the land belonging to the club should be the subject-matter of an agreement between the council and the club under sect. 34 was first suggested by the town-planning scheme clauses sub-committee and the representatives of the club, and a draft of such agreement was prepared and its terms provisionally agreed before the draft was submitted to the council, there must have been some delegation by the council of its powers. It is difficult to appreciate any solid foundation for this argument. A consideration of the relevant resolutions leaves no doubt in my mind that no committee was ever appointed by the council, and, further, that no power to enter into any agreement under sect. 34 was ever delegated by the council to any committee or other body. The decision to enter into the agreement in question was plainly the decision of the council. The fact that the council gave its town-planning scheme clauses sub-committee power to agree the precise terms with regard to the three subsidiary matters already mentioned has no material bearing on this point. For these reasons, I have no hesitation in holding that the first ground on which the validity of the agreement of Aug. 1, 1935, is challenged fails.

The remaining questions require a consideration of sect. 34 of the Act of 1932 and of the terms of the agreement itself. Sect. 34 provides as follows :

(1) Where any person is willing to agree with any such authority as is mentioned in subsect. (2) of this section that his land, or any part thereof, shall, so far as his interest in the land enables him to bind it, be made subject, either permanently or for a specified period, to conditions restricting the planning, development, or use thereof in any manner in which those matters might be dealt with by or under a scheme [under the Act], the authority may, if they think fit, enter into an agreement with him to that effect, and shall have power to enforce the agreement against persons deriving title under him in the like manner and to the like extent as if the authority were possessed of, or interested in, adjacent land and as if the agreement had been entered into for the benefit of that adjacent land.

In the present case, the council are such an authority as is mentioned in the section. *Prima facie*, the words of the section are wide enough to authorise the council to agree with any person (which description includes a corporate body like the club) ready to restrict his right to plan or to develop his property, or to restrict its future use in any manner which might be provided for by or under a scheme under the Act, without the adoption of any scheme or the necessity for invoking the powers of the Act with regard to the making of a town-planning scheme. If this be the true construction of the section, then, subject to a consideration of the terms of the agreement of Aug. 1, 1935, it would appear that the council were fully justified in entering into the agreement. The agreement, if considered apart from the provisions of the draft scheme

approved by the council, is obviously one which restricts the club in the future planning, development and use of its property. It is said, however, that, on its true construction, the section relates only to cases where the land to be dealt with is already included in a provisional town-planning scheme and the owner of such land is willing to enter into restrictions in addition to those included in the provisional scheme. Sir Stafford Cripps' main argument in support of the view that the section ought not to be construed in the natural sense of the words used was that an authority might, by entering into an eleventh-hour agreement with an owner of land proposed to be included in a town-planning scheme, prevent other persons interested in and affected by such a proposal from objecting to the terms of the agreement. He also argued that, having regard to the provisions of the proposed town-planning scheme, the agreement of Aug. 1, 1935, was not in fact a restrictive agreement, but was entered into for the purpose of enabling the club to develop its land without the necessity of obtaining any interim development order, and from this point of view the agreement, instead of being restrictive, was permissive.

It is plain from a consideration of the Town Planning Acts that, until a town-planning scheme is made—that is, until the final approval of the Minister of Health has been obtained and the scheme has been submitted to Parliament—all land proposed to be included in a proposed town-planning scheme is free from restriction, and an owner of land which is proposed to be included in a proposed town-planning scheme is free to do what, as owner, he wishes in relation to the planning, development and use of his land, and no one can stop him from so doing. It is true that an owner who, after the date when it is proposed to prepare a town-planning scheme affecting his land, builds upon it in any manner not in accordance with the scheme ultimately made can be compelled, when the scheme has become binding, either to pull down any buildings so erected or to make them conform to the requirements of that scheme. This circumstance, however, does not constitute any restriction on the owner's rights while the proposed scheme is in the making and before it has become binding. If authority is needed for this view, it is to be found in *Re Forsey & Hollebone's Contract* (1) and *Markham v. Derby Corpn.* (2). Further, it is to be observed that, until a town-planning scheme becomes binding, its actual terms are in a state of fluidity, and are subject to consideration and alteration over what may be a long period of time. For this reason, it seems difficult to compare the terms of a proposed town-planning scheme with the terms of an actual agreement with a view to ascertaining whether the restrictions imposed by the latter are greater or less than those which may ultimately be imposed by a town-planning scheme, when made.

It seems to me to be plain that power to enter into an agreement which is to become binding immediately on an owner of land entering into it, and to be enforceable against him and his successors in title without the

necessity of invoking the procedure necessary to make a binding town-planning scheme, is a beneficial power, so far as the authority desirous of entering into such an agreement is concerned, and I am unable to appreciate the argument that the legislature cannot have intended to confer such a power on an authority because the authority might in some circumstances use the power improperly for the purpose of conferring A
on a particular owner, or particular owners, terms more favourable than those conferred on another owner, or other owners. It is not suggested that the council in the present case has acted with any impropriety, but, if such a case should arise, the courts would have ample power to prevent the perpetration of any such impropriety. B

I have been unable to find anything, either in the scheme or the Act of 1932 or in any of its provisions, which can legitimately be used to cut down the generality of the words of sect. 34, or to restrict their meaning in the manner suggested on behalf of the plaintiff. I therefore hold that, upon the true construction of the section, the council as an authority under C
the Act has, and had at all material times, power to enter into an agreement with the club restricting the future planning, development or use of its land, provided that such restrictions are such as may be dealt with by or under a scheme under the Act of 1932.

The second ground relied on by the plaintiff in support of his plea— D
that the agreement of Aug. 1, 1935, is *ultra vires* the council, and void and unenforceable—in my opinion also fails.

It remains to consider the last ground relied upon by the plaintiff—namely, that the agreement of Aug. 1, 1935, contains provisions which would not have been included in a scheme under the Act of 1932. The E
agreement of Aug. 1, 1935, provides, by cl. 2, that the club, in consideration of the covenants on the part of the council thereafter contained, agrees with the council that the estate (that is to say, the 106½ acres of land belonging to the club situate within the borough of Barnes) shall, subject to the provisions of cl. 4, be permanently subject F
to the conditions restricting the planning, development and use thereof contained in sub-cll. (ii) to (x), inclusive, of that clause. A perusal of these sub-clauses can, I think, leave no doubt in the mind of the reader that the provisions contained in them are in substance and in fact real restrictions on the future planning and development of the land G
the subject-matter of the agreement. It was argued by Sir Stafford Cripps, on behalf of the plaintiff, although there is no plea to that effect in the pleadings, that the agreement contained certain provisions which could not properly be included in a town-planning scheme made under the Act of 1932. The provisions on which he relies are those which H
provide for the reference to arbitration of disputes which may arise between the council and the club with regard to matters arising in respect of the general lay-out plan of the estate, other than a portion of it referred to as the central area, being the plan to be prepared by the club as provided in cl. 2 (ii) (a); the general lay-out plan of the central

area to be prepared by the club as provided by cl. 2 (vi) (g); and the variation in, or the extension of, the terms of the agreement in the event of either the council or the club requesting such variation or extension to meet unforeseen circumstances, or any alteration in the conditions from time to time prevailing (see cl. 4 (a) of the agreement).

- A** The provisions with regard to arbitration are to be found in cl. 4 (b). This clause provides that all such disputes as I have mentioned are to be referred to the decision of the Minister of Health for the time being, or of a person nominated by him, but the parties may agree to submit any dispute to a tribunal to be constituted in the manner provided by
- B** Part I of the Fourth Schedule to the Model Town and Country Planning Clauses, issued by the Minister of Health, dated Jan., 1935, or, if the Minister of Health refuses to act or to nominate any such person as aforesaid, then the matters in dispute are to be submitted to such tribunal.
- C** Quite apart from any question under the Act of 1932, the general lay-out plans must necessarily conform to the provisions of the agreement with regard to planning, development and user, and the reference to arbitration is nothing more than machinery for obtaining a plan in accordance with the agreement, and cannot, in my opinion, be open to
- D** objection. In the same way, the provisions with regard to the variation or extension of the agreement to meet unforeseen or altered circumstances appear to me to be unobjectionable when it is remembered that sect. 34 provides that any agreement entered into under it may be permanent or for a specified period, and that sect. 40 of the Act provides
- E** that disputes arising under a town-planning scheme may be referred either to the Minister or to an arbitrator to be agreed by the parties or appointed by the Minister. In my judgment, all of the provisions of which complaint is made can properly be included in a town-planning scheme. For the reasons I have stated, I hold that the agreement of Aug. 1, 1935,
- F** is not *ultra vires* the council, but is valid and binding on the parties to it.

- It will be observed that I have not referred to the terms of the supplemental agreement of Jan. 24, 1936. The reason why I have not done so is that counsel for the parties agreed that the supplemental agreement must stand or fall with the agreement of Aug. 1, 1935. No reference was
- G** made to it at the hearing, nor was my attention called to any of its terms. I understand that its only purpose is to effect an extension of certain time-limits fixed by the agreement of Aug. 1, 1935. In the result, the action fails with regard to both agreements, and must be dismissed.

Action dismissed. The relator to pay the costs of both the defendants.

- H** Solicitors: *Joynson-Hicks & Co.* (for the plaintiffs); *Arthur C. Fox*, Town Clerk to the Barnes Borough Council (for the first defendants); *Elvy Robb & Co.* (for the second defendants).

HEROD v. HEROD.

Observation of SIR BOYD MERRIMAN, P., at p. 729, *applied*. RICHARDS v. RICHARDS. [1952] 1 All E.R. 1384.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir BOYD MERRIMAN, P.),

July 1, 14, 15, 28, 1938.]

Divorce—Desertion—Petitioner's adultery—Effect on deserting spouse's mind—Continuance of desertion—Discretion—Matrimonial Causes Act, 1937 (c. 57), ss. 2 (b), 4.

Upon a petition for divorce by a husband upon the ground that his wife had deserted him without cause for a period of at least three years immediately preceding the presentation of the petition, it appeared that the husband had been guilty of adultery during practically the whole of the statutory period. There was no evidence that the wife was aware of the adultery:—

HELD: there was no authority binding on the court which established that desertion was necessarily terminated as a matter of law when a spouse committed adultery after he or she had been deserted, regardless of the question whether the deserter knew of the adultery or whether it had any influence on his or her conduct. Under the statutory jurisdiction, adultery by the petitioner committed after desertion by the respondent did not necessarily terminate that desertion. It was merely a discretionary bar, and, in the circumstances of the present case, a decree *nisi* ought to be granted.

[EDITORIAL NOTE. It has been established by authority in Australia and New Zealand that adultery committed during the period of desertion is a just cause or excuse for the deserting spouse to keep away, even if he or she is unaware of the adultery. The Scots law has allowed divorce upon the ground of desertion for nearly four centuries, and, although it does not admit adultery as a bar to relief in the case of a suit founded on adultery, it is an absolute bar where the suit is founded on desertion. While these matters are duly weighed in the judgment herein, it would seem that the guiding principle of English law is that, whereas the Ecclesiastical Courts insisted upon a party coming into court with clean hands, the statutory jurisdiction has been marked by a divergence from the principles of the Ecclesiastical Courts, and adultery by the petitioner does not terminate the desertion by the respondent.

AS TO DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-659, paras. 963-970; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2974-2999.]

Cases referred to:

- (1) *Douglas v. Douglas* (1903), 23 N.Z.L.R. 584; 27 Digest 322, case s.
- (2) *Mackenzie v. Mackenzie*, [1895] A.C. 384; 27 Digest 322, 3008.
- (3) *Cook v. Cook*, [1934] S.A.S.R. 298.
- (4) *Gilbert v. Gilbert*, [1937] S.A.S.R. 79.
- (5) *Gray v. Gray*, [1925] Q.S.R. 166.
- (6) *Hopkins v. Hopkins*, [1936] V.L.R. 218; Digest Supp.
- (7) *British Columbia Electric Ry. Co., Ltd. v. Loach*, [1916] 1 A.C. 719; 36 Digest 117, 781; 85 L.J.P.C. 23; 113 L.T. 946.
- (8) *Weld-Blundell v. Stephens*, [1920] A.C. 956; 36 Digest 126, 337; 89 L.J.K.B. 705; 123 L.T. 593.
- (9) *Frowd v. Frowd*, [1904] P. 177; 27 Digest 556, 6106; 73 L.J.P. 60; 90 L.T. 175.
- (10) *Oldroyd v. Oldroyd*, [1896] P. 175; 27 Digest 277, 2480; 65 L.J.P. 113; 75 L.T. 281.
- (11) *Synge v. Synge*, [1901] P. 317; 27 Digest 375, 3631; 70 L.J.P. 97; 85 L.T. 83.
- (12) *Jackson v. Jackson*, [1924] P. 19; 27 Digest 308, 2852.
- (13) *Pulford v. Pulford*, [1923] P. 18; 27 Digest 307, 2846; 92 L.J.P. 14; 128 L.T. 256.

- (14) *Thomas v. Thomas*, [1924] P. 194 ; 27 Digest 315, 2925 ; 93 L.J.P. 61 ; 130 L.T. 716.
- (15) *Bowron v. Bowron*, [1925] P. 187 ; 27 Digest 561, 6168 ; 94 L.J.P. 33 ; 132 L.T. 773.
- (16) *Jones v. Newtown & Llanidloes Guardians*, [1920] 3 K.B. 381 ; 27 Digest 76, 601 ; 89 L.J.K.B. 1161 ; 124 L.T. 23.
- A (17) *Edgington v. Fitzmaurice* (1885), 29 Ch.D. 459 ; 15 Digest 990, 11,069 ; 65 L.J.Ch. 650 ; 53 L.T. 369.
- (18) *Symons v. Symons*, [1897] P. 167 ; 27 Digest 364, 3490 ; 66 L.J.P. 81 ; 77 L.T. 142.
- (19) *Hunter v. Hunter*, [1905] P. 217 ; 27 Digest 481, 5103 ; 74 L.J.P. 157 ; 93 L.T. 451.
- B (20) *Hale v. Hale* (1915), 32 T.L.R. 53 ; 27 Digest 362, 3464.
- (21) *Blandford v. Blandford* (1883), 8 P.D. 19 ; 27 Digest 338, 3175 ; 52 L.J.P. 17 ; 48 L.T. 238.
- (22) *Otway v. Otway*, *Otway v. Otway & Hoffer* (1888), 13 P.D. 141 ; 27 Digest 368, 3539 ; 57 L.J.P. 81 ; 59 L.T. 153.
- (23) *Everett v. Everett & McCullum*, [1919] P. 298 ; 27 Digest 368, 3540 ; 88 L.J.P. 130 ; 121 L.T. 503.
- C (24) *Drummond v. Drummond* (1861), 2 Sw. & Tr. 269 ; 27 Digest 336, 3158 ; 30 L.J.P.M. & A. 177 ; 4 L.T. 416.
- (25) *Brooking-Phillips v. Brooking-Phillips*, [1913] P. 80 ; 27 Digest 369, 3560 ; 82 L.J.P. 57 ; 108 L.T. 397 ; *affg.* S.C. *sub nom.* *P. v. P.* (1912), 107 L.T. 721.
- D (26) *Auld v. Auld* (1874), 1 R. (Ct. of Sess.) 1015 ; 27 Digest 430, case c.
- (27) *Hunter v. Hunter* (1883), 11 R. (Ct. of Sess.) 359 ; 27 Digest 332, case 3121 i.
- (28) *Scott v. Scott* (1908), S.C. 1124 ; 16 S.L.T. 272.
- (29) *Gilfillan v. Gilfillan*, [1931] S.L.T. 454.
- (30) *Bowman v. Bowman* (1866), 4 Macph. (Ct. of Sess.), 384.
- (31) *Mulherron v. Mulherron*, [1923] S.C. 461 ; 27 Digest 308, case 2849 iii.
- E (32) *Woodhouse v. Woodhouse*, [1936] S.C. 523 ; S.L.T. 184.
- (33) *Gibson v. Gibson* (1894), 21 R. (Ct. of Sess.) 470.
- (34) *Murray v. Murray* (1894), 21 R. (Ct. of Sess.) 723.
- (35) *Harriman v. Harriman*, [1909] P. 123 ; 27 Digest 321, 2995 ; 78 L.J.P. 62 ; 100 L.T. 557.
- (36) *Thomas v. Thomas*, [1924] P. 194 ; 27 Digest 315, 2925 ; 93 L.J.P. 61 ; 130 L.T. 716.
- F

HUSBAND'S UNDEFENDED PETITION for dissolution of marriage on the ground of desertion for at least three years immediately preceding the presentation of the petition. The petitioner asked for the discretion of the court to be exercised in his favour with regard to adultery committed by him during the period of the alleged desertion, thus raising a question of law whether a deserting spouse could be said to continue to desert after adultery had in fact been committed by the other spouse. On July 1, 1938, the court, after hearing the evidence, ordered an adjournment of the case for legal argument by the King's Proctor.

S. E. Karminski for the petitioner.

The Attorney-General (Sir Donald Somervell, K.C.) and H. W. Barnard for the King's Proctor.

SIR BOYD MERRIMAN, P. : This is a husband's petition for divorce under the Supreme Court of Judicature (Consolidation) Act, 1925,

s. 176 (b), as amended by the Matrimonial Causes Act, 1937, s. 2, on the ground that his wife has deserted him without cause for a period of at least three years immediately preceding the presentation of the petition. The petition, which was filed on Jan. 24, 1938, includes a prayer for the exercise of the discretion of the court in favour of the petitioner, notwithstanding his own adultery. A

From a statement lodged in accordance with the Matrimonial Causes Rules, 1937, r. 28 (1), which the husband put in evidence in open court at the hearing, it appears that, from Feb. 9, 1934, to Dec. 23, 1937, when the association was broken off in view of this petition, he has committed adultery with his housekeeper, whom he desires to marry in the event of his obtaining a decree of divorce. From this statement of the facts, which I accept as correct, it follows that the petitioner has been living in adultery during practically the whole of the statutory period, and, indeed, this adulterous association had already begun before the statutory period. From the husband's evidence, it appeared that the wife herself had confessed to an adulterous association, but that, either because of the expense attached to the necessary investigations or because of a promise to his wife, or for both reasons, the husband deliberately abstained from basing his petition on this ground. The husband's deliberate election to found his petition solely on the ground of desertion raises the question whether a petitioner who has committed adultery since the commencement of the alleged desertion—and, in particular, during the three years immediately preceding the presentation of the petition—is precluded in law from alleging that he or she has been deserted without cause for the statutory period, or whether the law is that it depends upon the circumstances of the case whether such adultery is a defence to the charge of desertion or is merely a matter for the exercise of the discretion of the court. B C D E

As the question is one of general importance, which affects a considerable number of pending petitions, I took the course, after hearing the evidence, of referring the matter to the King's Proctor under the Judicature (Consolidation) Act, 1925, s. 181 (1). The result is that I have had the advantage of hearing arguments by the Attorney-General and Mr. Barnard for the King's Proctor, and by Mr. Karminski for the petitioner, and I am very much obliged to counsel for their assistance. G H

The question is a difficult one. That this is so will be understood from the fact that in the Commonwealth of Australia, where for some years Acts similar to that which I am considering have been in force, there has been an acute conflict of judicial opinion, culminating in a recent decision of the High Court of Australia dismissing a petition on the ground that the adultery of the petitioner was an absolute bar. When I add that it is quite plain that in Scotland, where divorce for desertion has been the law for nearly four centuries, the petitioner could not possibly succeed on the facts of this case, and that in this country any petition based on the principles and rules of the Ecclesiastical Courts must also

fail, while, under the purely statutory jurisdiction of the court, the point has never been the subject of direct decision, the difficulties do not diminish. Moreover, as all the arguments led to the same conclusion, I am not confident, even now, that I have not overlooked some point vital to a correct determination of the matter.

- A** I find the facts to be as follow. The parties were married on Apr. 6, 1912. In 1916, the wife confessed to having committed adultery, which the husband condoned. They lived together until Aug., 1927. From 1924 onwards, the wife, who used to go out to dances with her husband, admitted that she was interested in another man, and intimated to her husband that if he did not like the way she was conducting herself he "could clear out." This, however, he refused to do. In Aug., 1927, the wife left the matrimonial home in Nottingham, ostensibly for a short holiday, but never returned. She wrote to the husband, saying that she did not love him and that she was never coming back. Moreover, she left the child of the marriage, then 9 years old, with the husband. He next saw her in 1932, when they met by accident in Nottingham. The husband suggested their coming together again. The wife said: "Definitely never. I have got someone else." They met, with reference, I understand, to the child, on several occasions between 1932 and 1937. On one of these occasions, the wife admitted that she was living in a house in Nottingham, and told her husband that a named man was keeping her, though he was not actually living with her at that house. At the last of these meeting, in Nov., 1937, the husband told the wife that he intended to file a petition for divorce on the ground of desertion as soon as the new Act came into force. He also told his wife that he had a housekeeper whom he wished to marry. He did not tell his wife that he had been committing adultery with this woman. Her comment was: "It is time you had a little happiness. I wish you luck." She begged him to keep out of the case the name of the man whom she had mentioned.

- E** I have no reason to suppose that, if the question had been asked, the husband would have had any hesitation in telling his wife the real nature of his relations with his housekeeper, but I am satisfied that the question was not asked because the wife was completely indifferent on the subject. That this remained her attitude, even when she was served with the petition, which, as I have said, contained a prayer for discretion, is clear from her answer to the process server when she was asked whether she would care to make any statement as to her reason for deserting her husband. Her reply was: "Only that I found someone that I liked better, and I shall never go back to him again." Although this case is undefended, the point of law which emerges from the husband's own evidence requires the same consideration as if it had been put forward as an answer to the petition, and, although I see no reason to doubt the husband's evidence, and have found the facts accordingly, it must be understood that the King's Proctor has appeared only to assist the

court on the question of law, and is in no way precluded from making such inquiries into the facts as he may think necessary in the ordinary course of his duties.

The contention against the right of the petitioner to obtain a decree is that, however much the gravity of the offence may be mitigated by the circumstances, adultery committed by a petitioner during the period, however prolonged, after the respondent has wilfully withdrawn from co-habitation is an absolute answer to the allegation that "desertion without cause" subsists at any time thereafter, and this whether or not the fact is known to the respondent and whether or not it has any influence on his or her conduct. It is also contended that, in such circumstances, it follows that the question of exercising discretion in favour of the petitioner cannot arise. This view of the matter is conveniently stated in the judgment of WILLIAMS, J., in *Douglas v. Douglas* (1), at p. 584:

It is just as well to state the principle. If a husband leaves his wife he is doing wrong: if he leaves his wife without excuse he is doing wrong by wilfully deserting her. But that does not give her the right to relief unless he deserts her for a period of five years continuously. That continued desertion must be without just cause or excuse. If within that five years the wife goes wrong, that is a just cause or excuse for the husband keeping away, even if the husband does not know it.

It has also the weighty authority of a passage in the opinion of LORD HERSCHELL, L.C., sitting in the House of Lords on a Scottish appeal. In *Mackenzie v. Mackenzie* (2), LORD HERSCHELL, L.C., said, at p. 389:

It is not necessary to decide the point, but I so far concur with this view, that I think if a decree of adherence had been obtained it would not have been competent for the spouse to rely on any circumstances existing prior to the action of adherence as a reasonable ground for desertion, and if for a period of four years, during which the spouses were apart, an action for adherence might at any time have been successfully maintained, I do not think it would be possible to establish that there was reasonable cause for desertion. At the same time it appears to me that it would be essential for the party suing for a divorce to show that he or she had during that time used every reasonable endeavour to induce the other to adhere, and been ready and willing to discharge on his or her part all marital duties.

The rival contention was based on the fact that in the Act of 1937 adultery of the petitioner during the marriage is expressed to be a discretionary bar to obtaining a decree of divorce, without discriminating between the various grounds on which such a decree may be pronounced, and that, as desertion for the statutory period is by itself one such ground, it follows that the petitioner's adultery cannot be an absolute bar. It was also argued that the cause for desertion can be only that which actually operates to produce the effect. In other words, the question whether or not the continuance of the respondent's desertion is caused by the petitioner's adultery is to be decided subjectively, and not objectively.

Though it may well be that the contention that adultery can be only a discretionary bar, and not a defence, to a petition based on desertion goes too far, it is manifest that there is no possible reconciliation between these conclusions, the methods of approach to which are fundamentally

different. I have already referred to the conflict of judicial opinion on this subject in Australia. The statutes relating to divorce in the various states are worded somewhat differently from each other, and from the Act of 1937, but, so far as this point is concerned, these differences do not appear to be essential. The Supreme Court of South Australia, for example, followed *Douglas v. Douglas* (1) in *Cook v. Cook* (3), and decided in the opposite sense in *Gilbert v. Gilbert* (4). In the Supreme Court of Victoria and the Supreme Court of Queensland, *Douglas v. Douglas* (1) was either distinguished or not followed in *Gray v. Gray* (5) and *Hopkins v. Hopkins* (6). Finally, the High Court of Australia in *Gilbert v. Gilbert* (4) by a majority composed of DIXON, EVATT and McTIERNAN, JJ., LATHAM, C.J., dissenting, overruled the Supreme Court of South Australia, and decided in accordance with the principle laid down in *Douglas v. Douglas* (1).

That the question was essentially the same as that with which I have to deal appears from the wording of the South Australian Matrimonial Causes Act, 1929-1937. In sect. 6, this particular ground for divorce is expressed simply as: "(c) desertion for five years." In earlier statutes, the words "without just cause or excuse" appeared, but it has been said that they were deliberately omitted from the current Act as being surplusage: *Cook v. Cook* (3) and *Gilbert v. Gilbert* (4). By sect. 7 of the Act, judicial separation may be obtained, amongst other grounds, for:

(c) desertion for two years; (d) failure to comply with an order for restitution of conjugal rights; (e) any ground for which a decree of divorce *a mensa et thoro* might have been pronounced prior to the Imperial Matrimonial Causes Act, 1857.

By sect. 12 (1), the court may refuse to make an order if the plaintiff has been guilty of, amongst other things: "(a) adultery, not condoned." The discretionary bars set out in this section appear to apply equally to an order for judicial separation and to an order for divorce.

Most unfortunately, the full report of the judgments in the High Court of Australia in *Gilbert v. Gilbert* (4) is not yet available in this country. I have, however, seen a short digest of the judgments in the AUSTRALIAN LAW JOURNAL, Vol. 11, p. 347. From this, it appears that the majority of the court founded their judgments upon the principles of the Ecclesiastical Courts, whereas LATHAM, C.J., held that the natural effect of the words of the statute should not be limited by considerations derived from the manner in which the Ecclesiastical Courts exercised a different jurisdiction. As I am deprived by the exigencies of the calendar of the advantage of reading the judgments given in the High Court of Australia, it would be unprofitable to examine in detail the decisions of the several state courts which must necessarily have been reviewed in those judgments. Moreover, I am naturally most anxious to avoid even the faintest appearance of criticising any judgments in their relation to local statutes, with which I have no concern except in so far as they assist me in the solution of a similar problem. I should like to say,

however, that I have read with great care all the judgments in the cases to which I have referred, and that they have been of the greatest assistance to me in forming my own judgment on this difficult question. I will make only one quotation, which expresses succinctly the view opposed to that adopted by the majority of the High Court of Australia. In *Hopkins v. Hopkins* (6), the following passage occurs in the judgment of LOWE, J., at p. 221 :

Once the view expressed above is taken, it is apparent that the adultery of the petitioner, unknown to the respondent, cannot be a cause of his continuing to desert her, and hence cannot afford him just cause or excuse for doing so. Indeed the petitioner's adultery, of which he knows, is not necessarily such cause or excuse, for he may be shown to have overlooked it, and it may be proved that his continued desertion was for reasons apart from the petitioner's conduct.

In the argument before me, this contention was supported by reference to some observations of the late LORD SUMNER in *British Columbia Electric Ry. Co., Ltd. v. Loach* (7), at p. 727. LORD SUMNER, after setting out the various epithets—such as “effective,” “real,” “proximate,” “direct,” “decisive” and “immediate”—which it had been customary to attach to the word “cause,” said that it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of “the cause,” simply and without qualification. It is true that in *Weld-Blundell v. Stephens* (8), at p. 983, LORD SUMNER, while saying that it was tautologous to speak of “effective cause,” permitted himself the luxury of attaching the epithet “direct,” which was one of those which he had formerly rejected, but without affecting the point that, with or without an epithet, “cause” must be that which operates to produce the effect. However, I am not convinced that an argument turning upon the use of the word “cause” is really helpful, for, by authority by which I am bound, the process of simplification has been carried still further. In *Frowd v. Frowd* (9)—a decision of the Divisional Court—SIR F. H. JEUNE, P., said, at p. 179 :

The expression desertion “without reasonable excuse” in the Matrimonial Causes Act, 1857, ss. 27 to 31, and the equivalent of that expression “without just cause” or “without good cause” have always struck me as somewhat loose and inaccurate language. Desertion means the cessation of cohabitation brought about by the fault or act of one of the parties. Therefore the conduct of the parties must be considered. If there is good cause or reasonable excuse it seems to me there is no desertion at all in law.

See also *Oldroyd v. Oldroyd* (10), at p. 182, and *Synge v. Synge* (11). One is brought back, therefore, to the question whether or not “desertion” can subsist in law at a time when the other spouse has, in fact, been guilty of a fundamental breach of the obligations of marriage.

I turn now to the Act of 1937. It is to be observed, first of all, that the statutory period is one of three years relating backwards from the presentation of the petition, and not forwards from the date of the commencement of the desertion. This does not mean, however, that the period of three years is to be isolated from the history of the desertion

- of which it forms a part. It means that the petitioner must establish a state of things amounting originally to desertion, and must also prove that that state of things has continued, whenever it began, throughout the three years immediately preceding the presentation of the petition. In this respect, it differs from the statutory periods under the Matrimonial Causes Act, 1857, and the Judicature Act, 1925, respectively, in that the period cannot be completed until the presentation of the petition. It follows that it is immaterial whether the adultery which is said to terminate the desertion was committed within the last three years or earlier in the history of the desertion. In either case, it would be equally fatal.
- A** I am invited, however, to draw the conclusion that, because, by sect. 2 of the Act of 1937, desertion alone is, for the first time, made a substantive ground for divorce, whereas by sect. 4 adultery is made a discretionary bar only, without discriminating between the several grounds of divorce, it follows that desertion and adultery are mutually independent offences, and that adultery on the part of the petitioner cannot be an answer to the charge of desertion, but calls only for the exercise of discretion. I am not much impressed by this argument. It is true that "desertion" is made a substantive ground for divorce, and that adultery "during the marriage" is a discretionary bar only, but in relation to a petition for desertion this latter provision would be apt to refer to the common case of adultery antecedent to the alleged desertion and already condoned. It does not seem to me that the mere fact that desertion now stands alone as a ground for divorce throws any light on the meaning of desertion. Ever since the Act of 1857, desertion for the requisite period, coupled with adultery, has been a ground on which the wife can obtain the statutory relief of dissolution. Desertion "without reasonable excuse," or "without cause," or, for that matter, "desertion" simply (see *Frowd v. Frowd* (9)) must be the same offence, whether or not it is necessary to couple it with adultery. What is really important, therefore, is to see whether or not adultery on the part of a wife petitioner was held to prevent her from establishing desertion for two years or upwards, where that offence, coupled with adultery, was a necessary ingredient in her petition for divorce.

- However, before passing from sect. 4 of the Act of 1937, there is one respect in which the proviso may throw some light on the question. In all the earlier statutes, "such wilful neglect or misconduct on the part of the petitioner as has conduced to the adultery" has figured as a discretionary bar, and this phrase has always been held to mean such wilful neglect or misconduct as is proved to have brought about the adultery. It is easy to see the reason for extending this discretionary bar to a petition on the ground of unsoundness of mind, as is done by the new sect. 178 (*d*). It is less easy to understand its extension to desertion, and counsel have been unable to explain how wilful neglect or misconduct can bring about that which is expressly stated to be "without cause," even if such wilful neglect or misconduct on the part

of the petitioner does not actually make him or her the deserting, instead of the deserted, spouse. If, however, it is permissible to draw an indirect inference from a phrase the meaning of which is obscure, it does suggest that, if misconduct which can properly be described as conducing to desertion is to be merely a discretionary bar, *a fortiori* should misconduct, even adultery itself, which has, in fact, had no influence whatever on the inception or continuance of desertion be so regarded. A

In considering the statutory provisions regarding desertion, it may be useful to begin by inquiring as to the nature of desertion in English law. Desertion is not defined in any statute. It may well be that Parliament refrained from giving a definition for the wise reason given by SIR HENRY DUKE, P., in *Jackson v. Jackson* (12), when, after disclaiming any attempt to give an exhaustive definition of desertion, he says, at p. 23 : B

No judge, so far as I am aware, has sought to do so, and certainly there is no prospect of its being successfully done. There is a constant change in the modes in which people refuse to perform their elementary duties, and it might be helped by some mechanical statement of what does amount to desertion C

In the preceding sentence, however, SIR HENRY DUKE, P., sets out a description of desertion which, even if it is not exhaustive, is very useful. He says, at p. 23 : D

If there is abandonment by one of the spouses of the other, that is desertion. If one of the spouses causes the other to live separate and apart, that is desertion.

I have already quoted a passage containing another description, by SIR F. H. JEUNE, P., who said, in *Frowd v. Frowd* (9), at p. 179 :

Desertion means the cessation of cohabitation brought about by the fault or act of one of the parties. E

These descriptions make it clear that the intention wrongfully to bring the co-habitation to an end is an essential element in the offence of desertion. If further authority is needed, there is *Pulford v. Pulford* (13), and SIR ERNEST POLLOCK, M.R., in *Thomas v. Thomas* (14), at p. 199, F and in *Bowron v. Bowron* (15), at pp. 192, 193. A spouse wilfully withdrawing without excuse from the matrimonial home and a spouse so misconducting himself or herself as to lead to the natural consequence that the other spouse withdraws from the matrimonial home must equally be taken to intend wrongfully to bring the co-habitation to an G end. In order to succeed under the Act of 1937, however, a petitioner must not only prove the original intention, but must also prove that this intention has persisted during the requisite period, and still persists up to the moment of the presentation of the petition. A spouse wrongfully withdrawing from co-habitation may repent, and return at any H time to co-habitation : see *Jones v. Newtown & Llanidloes Guardians* (16), *per* the EARL OF READING, L.C.J., at p. 384, and *per* SHEARMAN, J., at p. 385. A spouse guilty of such misconduct as to drive the other away, though a mere offer to resume co-habitation will not suffice, may couple with it such assurances of better behaviour as to put an end to the deser-

tion : see *Thomas v. Thomas* (14), per WARRINGTON, L.J., at p. 201, and *Bowron v. Bowron* (15), per SCRUTTON, L.J., at p. 195. It follows that, in a case of "constructive" desertion, of which the two cases last cited are excellent examples, the onus of proving that the intention to desert continues may be much lighter than it is in a case of mere withdrawal from co-habitation. Indeed, as is pointed out by SCRUTTON, L.J., in *Bowron v. Bowron* (15), the facts may be such that the intention may be presumed to continue. It is manifest, however, that the deserter's intention—whether to repent and make amends on the one hand, or to persist in desertion on the other—may be affected by the adultery of the deserted spouse, and, to take a not uncommon example of desertion, if nothing more was proved than that the respondent had left the home and that the petitioner shortly afterwards had set up an adulterous association which was continued down to the time of the presentation of the petition, it might be well-nigh impossible for the petitioner to discharge the burden of proof. However, whether the burden is lighter or heavier, according to the circumstances of the particular case, it seems to me to be impossible to hold that adultery of which the deserter is proved to be entirely ignorant, or to which, if it is known, he or she is proved to be entirely indifferent, can have affected his or her own intention in the matter, which must, therefore, in my opinion, be judged from his other own conduct and declarations, and not solely from the conduct of the petitioner.

Where the intention of a wrongdoer is in issue, the real existence of a state of things, believed by him to exist, is not always an essential element in the proof of intention. For example, a soldier is guilty of desertion, as contrasted with mere absence without leave, if, having been warned for some important service, he deliberately absents himself in order to evade that service, though he may intend ultimately to return to his regiment. If, having been warned for an attack on a particular date, he absents himself with the intention of evading it, the fact that the attack is cancelled or postponed without his knowledge cannot affect the quality of the offence. So also may the man who intends to pick a pocket, which is, in fact, empty, be found guilty of the attempt, notwithstanding the impossibility of carrying out his intention. What is material in such cases is not the actual state of facts assumed by the accused to exist, but his own state of mind. As BOWEN, L.J., said in *Edgington v. Fitzmaurice* (17), at p. 483 :

the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.

The intention may be proved by his own declarations, or inferred from his conduct. If the intention permanently to break up the matrimonial home is established, either by the wrongdoer's own declarations or because his conduct has been such as to lead to the conclusion that he must have intended that result, it seems to me that he is guilty of

desertion, and that he continues to be so, notwithstanding that the other spouse has been guilty of a breach of the matrimonial obligations which is proved to have had no influence on his intention. It may be said that this line of reasoning would enable a spouse whose adultery, not condoned, had preceded the alleged desertion to obtain a decree at the discretion of the court, whereas such adultery, at least, ought on principle to be held to cause or excuse the desertion. In my opinion, however, precisely the same consideration applies. If it is left in doubt whether the respondent knew of the adultery, or, if known, whether his or her conduct was affected by it, the petitioner would fail to discharge the burden of proof. If, on the other hand, it were established that the respondent's intention to withdraw from co-habitation was formed entirely independently of the petitioner's misconduct, the offence would be proved. The question is to be determined according to the circumstances of each case. I do not think that a spouse could be heard to say that adultery at which he or she had connived, or to which his or her conduct had conduced, was a reasonable excuse for desertion. Apart from such a case, it must be rare that antecedent adultery, known to the alleged deserter, has neither been condoned nor has affected the intention to withdraw from co-habitation. It may be that, in the case where the alleged deserter's intention has been entirely unaffected even by the suspicion of antecedent adultery, he or she has nevertheless been actuated in withdrawing from co-habitation by conduct or neglect on the part of the other spouse, which is in truth a consequence of that spouse's adulterous association. If so, it is in that conduct or neglect, not in the adultery itself, that the cause or excuse for the alleged desertion must be found. If, however, the intention to desert is entirely unaffected either by the adultery or by any other misconduct or neglect on the part of the other spouse, the result, in my opinion, is that desertion is proved, and that the adultery of the petitioner is a discretionary bar, and not an absolute defence. However that may be in the case of adultery preceding the desertion—and I have only referred to it because it is necessary, as far as possible, to consider all the implications of this question—in the case of adultery subsequent to the inception of the desertion, with which I am really concerned, Parliament, from the Act of 1857 onwards, has always made "desertion without reasonable excuse" a discretionary bar to a petition based on such adultery. I recognise, on the one hand, that the omission of any reference to desertion subsequent to the adultery complained of may have been due to the belief that there was, in law, no such thing, and, on the other hand, that, as the desertion is described in the past tense, and without reference to any period, it does not necessarily follow that it is to be regarded as persisting after the adultery of which complaint is made. This provision, however, seems to me to be at least equally consistent with the view that—at any rate, as regards adultery subsequent to desertion—the adultery and the desertion may be independent offences, and that, according to

the circumstances of the particular case, each may be a discretionary bar to a petition based on the other.

A I will now consider three cases decided under the Act of 1857 which seem to me to be of very great importance. By way of preface, however, I must observe that, although they were all cases in which a wife based her petition on adultery coupled with desertion, and invoked the discretion of the court in respect of her own adultery, the point which I am now deciding was not discussed, in spite of the fact that the King's Proctor intervened in two of them. The argument in these two cases turned, not upon the question whether there was jurisdiction to exercise discretion at all, because the desertion had been terminated by the petitioner's adultery, but upon the propriety of exercising discretion in the circumstances of the case. In all three cases, the jurisdiction to exercise discretion was assumed. It is also the fact that in none of the cases was attention directed to the question whether the statutory period was already completed before the commission of the adultery.

B In *Symons v. Symons* (18), the facts as stated in the headnote were that a husband who had treated his wife with great cruelty during cohabitation finally deserted her and went to live with another woman. More than seven years after the desertion, the wife, not knowing whether her husband was alive, and without making inquiry, commenced to live with another man. The co-habitation continued long after the time when it came to the wife's knowledge that her husband was alive. Subsequently, and after the wife had ceased to live in adultery, her husband was convicted under the Criminal Law Amendment Act, 1895, of an aggravated offence not amounting to rape, which latter offence would by itself have entitled her to petition for divorce. In a full judgment, SIR F. H. JEUNE, P., gave his reasons for deciding to exercise his discretion in the wife's favour. I need refer to only two of them. He says, at p. 172 :

F Secondly, the misconduct of the petitioner certainly did not conduce to the misconduct of the respondent. This, however, is a consideration of negative rather than positive weight.

Later, he said, at p. 174 :

G Fourthly, I now come to what I regard as the circumstance of most weight in this case. I have no doubt that the husband's adultery and cruelty before his desertion, and his prolonged desertion, were the main causes of the wife's adultery, and he was guilty, therefore, of misconduct conducing to her adultery. So far as I know, this has not yet been decided to be one of the circumstances on which the discretion to allow a divorce may be exercised.

H However, he came to the conclusion, after very careful consideration, that it was safe and proper to hold that this was one of the circumstances which he ought to take into account in deciding to exercise discretion in the wife's favour.

The next case is *Hunter v. Hunter* (19). The wife had obtained a decree *nisi* upon disclosing adultery, said to have been committed at a time after she believed her husband, who had deserted her, to be dead. The King's

Proctor intervened on the ground that she had failed to disclose earlier adultery, as a result of which a child was born, and that the circumstances of the registration of its birth tended to negative her story that she had believed her husband to be dead. Neither in the argument nor in the judgment, as I have said already, was any stress whatever laid upon the question whether or not the adultery, which was the subject of the intervention by the King's Proctor, had been committed within two years of the commencement of the desertion. From a consideration of the dates, as found by SIR GORELL BARNES, P., it is apparent that she was, in fact, guilty of adultery within the two years' period. A

In *Hale v. Hale* (20), discretion was exercised by BARGRAVE DEANE, J., in favour of a wife who undoubtedly began an adulterous association within two years of the desertion by her husband. B

With regard to the point that no notice was taken of the relation between the date of the adultery and the period of the desertion, I am convinced that the explanation is not that this consideration was overlooked, but that it was regarded as immaterial. It is true that, once the statutory period of two years had elapsed, the offence of desertion was completed, so that it could, for example, be revived by a subsequent offence, even after co-habitation had been resumed: see *Blandford v. Blandford* (21). It is quite another thing, however, to suppose that it was constituted irrevocably for all purposes, so that, on the one hand, the deserter could have no *locus pœnitentiæ* though the deserted spouse refrained from taking action, or that, on the other, the completion of the period could operate, so to speak, as a licence to commit adultery. In my opinion, if the petitioner's adultery necessarily put an end to desertion, it would have been held to do so whether committed in or after the statutory period. C D E

It is true that these cases lead to the apparently absurd conclusion that, under the Act of 1857, an adulterous wife could obtain a divorce for desertion for two years or upwards coupled with adultery, though she could not obtain a decree for judicial separation for the same desertion alone. It is, of course, unquestionable that the Ecclesiastical Courts would not allow an adulterous spouse to petition either for the divorce *a mensa et thoro* or for restitution of conjugal rights, which was the only remedy open to a deserted spouse, the offence of desertion, as such, being a creature of the Act of 1857. Moreover, it is equally clear that the Divorce Court, after the Act of 1857, was precluded in such a case from entertaining, not only a restitution suit, but also a petition for judicial separation (see *Otway v. Otway* (22)), and this was so even in a case where the petitioner's adultery was brought about by the procurement or connivance of the other spouse: see *Everett v. Everett & McCullum* (23). It is quite true that in *Otway v. Otway* (22) COTTON, L.J., at p. 150, does appear to go further, and to lay down that an adulterous petitioner is not in a position to ask for any relief which may be granted by the Divorce Court. It must be taken from the earlier part of his judgment, F G H

- however, that he was referring only to relief equivalent to that which could have been granted by the Ecclesiastical Courts. If he intended to refer to divorce, the observation must be regarded as *obiter*, and contrary to authority. Curiously enough, in *Symons v. Symons* (18), SIR F. H. JEUNE, P., in arguing by analogy to the Summary Jurisdiction (Married Women) Act, 1895, falls into the converse error when he says, at p. 176, that he cannot suppose that it was intended that a married woman should be placed in a totally different position in regard to a separation under that Act from her position in regard to “*a separation or*” divorce in the High Court. As, however, he was comparing the statutory relief of divorce with the statutory relief under the Summary Jurisdiction Act, the words quoted are also *obiter*. The analogy itself is destroyed, however, by the fact that the power to grant the summary relief of a separation order is expressly given in circumstances in which the relief of judicial separation would be precluded: see *Everett v. Everett & McCullum* (23).
- C Adultery on the part of a petitioner, however, would be equally fatal to a petition for judicial separation if it were, for example, an adulterous husband who was seeking for relief in respect of his wife’s adultery, or if it were an adulterous wife seeking relief on the ground either of her husband’s adultery, or of his cruelty, as the case might be. This follows
- D from sects. 16 and 22 of the Act of 1857, by the latter of which the court is enjoined:

In all suits and proceedings, other than proceedings to dissolve any marriage . . . to act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to [those] on which the Ecclesiastical Courts have heretofore acted and given relief. . . .

- E The same result has been regarded as following from the wording of the Judicature Act, 1925, s. 185 (1), (2). In my opinion, whatever the position as regards recrimination to a charge of adultery, the true conclusion is that uncondoned adultery was a bar to a petition for judicial
- F separation, whether for desertion or cruelty, not because it was necessarily a defence to the new statutory offence of desertion, any more than it was necessarily a defence to the charge of cruelty, but because, by the principles of the Ecclesiastical Courts, a petitioner must come before the court with clean hands: see *Drummond v. Drummond* (24) and
- G *Otway v. Otway* (22). However, whether or not I have stated the ecclesiastical principle correctly, it is really inconceivable, if the subsequent adultery of a deserted wife was recognised as constituting an absolute defence to the charge of desertion, as distinct from disentiitling her to sue, that the point should have been ignored by three different
- H judges of this Division, as well as by the King’s Proctor and his counsel.

Curiously enough, I can find only one instance where this point is mentioned in an argument of counsel—namely, in *Brooking-Phillips v. Brooking-Phillips* (25). This was a wife’s petition for restitution of conjugal rights in which the husband alleged that the wife had committed adultery but asked for no relief. The wife, while denying her

adultery, recriminated with a charge of adultery by the husband. It was held that this recrimination must be struck out as irrelevant. In support of the wife's right to recriminate, it was argued that, if she did not make the charge against her husband then, she would never be able to do so. In answer to this argument, that very experienced practitioner the late Mr. Le Bas is reported to have said :

A

It is said that if the wife cannot raise the question now she can never do so. That is not true, because she can get a divorce on the ground of her husband's adultery and desertion.

As the material dates were that the wife was alleged to have been guilty of adultery with one man in 1905, and with another in 1910, and to have been deserted by her husband in 1911, the significance of the argument is clear. It is hardly to be supposed that such an argument could have been addressed to the Court of Appeal if it was recognised by practitioners that it was impossible for an adulterous wife to allege that she had been deserted.

C

Though it is unnecessary expressly to decide the question, I think that the real change made by the 1937 Act is, not to alter the nature of desertion, but, as a result of sect. 5, to assimilate the reliefs of judicial separation and divorce by making both subject only to the statute, and independent of the principles and rules upon which the Ecclesiastical Courts acted, while at the same time preserving any grounds for relief which were open in the Ecclesiastical Courts.

D

With regard to the passage in the opinion of LORD HERSCHELL, L.C., in *Mackenzie v. Mackenzie* (2) quoted above, it appears to me that it is impossible to draw any analogy from the Scots law of desertion. This depends upon the statute of 1573. I am not, of course, presuming to lay down Scots law, more especially as, until I myself called attention to this passage, no reference was made in the argument to this aspect of the question. However, from such investigation of the authorities as I have been able to make, I have come to the conclusion that an appreciation of the more obvious differences between the two systems of law does assist in the solution of the problem, and not less so because some of the judgments in the Australian courts are founded on this particular extract from the opinion of LORD HERSCHELL, L.C.

E

F

As regards divorce for adultery, it appears that the doctrine of recrimination has for a long time ceased to form part of the law of Scotland. The adultery of the petitioner is neither a matter for recrimination nor a discretionary bar to an action for adultery. It must be raised, if at all, by a counter-action. In such a case, if it is established that both spouses are guilty, each obtains a decree. The adultery of the respective spouses may affect the consequential reliefs flowing from the decree, but is no bar to the dissolution of the marriage. This essential distinction between Scots law and the English law under the Matrimonial Causes Act, 1857, appears clearly from LORD FRASER'S TREATISE ON HUSBAND AND WIFE, 2nd Edn., Vol. 2, pp. 1196-1199.

G

H

As regards divorce for desertion, it appears to be settled law that adultery of the pursuer committed after the commencement of the desertion is an absolute bar to relief, and there is authority that this is so whether the adultery was committed during or after the quadrennium (see *Auld v. Auld* (26), *Hunter v. Hunter* (27), *Scott v. Scott* (28) and *A Gilfillan v. Gilfillan* (29)); and even though the pursuer believed the defender to be dead, and the adultery consisted of a "re-marriage" in relation to which this belief would have afforded an answer to a charge of bigamy, unless, possibly, the pursuer's belief in the death of the defender, or the continuance of that belief, was brought about by the fraudulent contrivance of the defender, so that he would be barred from relying on the adultery: *Hunter v. Hunter* (27).

I can find no case in which the defender's knowledge of the adultery was referred to as a material circumstance. The reason why adultery of the pursuer is an absolute bar to relief appears to be that, though desertion is a convenient term to express the matrimonial offence created by the Act of 1573, the statutory ground for divorce is non-adherence, and adultery automatically terminates non-adherence. This is still so, though, by the Conjugal Rights (Scotland) Amendment Act, 1861, it is no longer necessary, as a matter of procedure, to institute an action of adherence as a preliminary to suing for divorce: see *Auld v. Auld* (26) and *Mackenzie v. Mackenzie* (2), per LORD HERSCHELL, L.C., at p. 389. It is quite plain that it would have been impossible to pronounce decrees of divorce in the cases of *Symons v. Symons* (18), *Hunter v. Hunter* (19) and *Hale v. Hale* (20) if it had been necessary for the petitioner to couple desertion, as that term is understood in Scots law, with adultery.

On the other hand, as I have already said, the offence of desertion, as such, was unknown to the Ecclesiastical Courts. The remedy for wrongful withdrawal from co-habitation was a decree for restitution of conjugal rights. To this, as to an action for non-adherence, adultery of the petitioner would have been an absolute bar. It is true that by the Matrimonial Causes Act, 1884, s. 5, a respondent who failed to comply with a decree for restitution of conjugal rights was thereupon "deemed to have been guilty of desertion without reasonable cause," and the petitioner might forthwith proceed for a judicial separation, or, if the respondent was a husband who had also been guilty of adultery, for divorce, notwithstanding that two years had not elapsed since such failure. To a restitution suit, as a preliminary either to a judicial separation or to divorce, the bar of adultery would, of course, apply. Nevertheless, though a petitioner was enabled to avoid having to wait two years by taking advantage of this provision (which—as regards divorce, at any rate—no longer survives, by reason of the revised form in which sects. 176 and 185 (1), (2) are re-enacted by the Matrimonial Causes Act, 1937, ss. 2, 5), it was never a condition precedent to a suit for the statutory offence of desertion in this country that the petitioner should obtain a decree for restitution, as before 1861 it was a condition

in Scotland that a decree of adherence should be obtained. Nor was it ever the law that a petitioner in respect of desertion should be able to prove that throughout the statutory period he or she was ready and willing to render conjugal rights. From the earliest days after the offence of desertion was created by the Act of 1857, the courts of this country recognised "constructive desertion," and the right of the offended spouse to refuse to return to co-habitation in the absence of such assurance of future good behaviour as would suffice to bring the desertion to an end. It appears that anything resembling the doctrine of constructive desertion was at one time rejected as being unknown to Scots law, and it was held that, if a wife lived apart because of fear of her husband's ill-treatment, she could not be regarded as willing to adhere, and the spouses must be treated as living apart by mutual consent: see *Bowman v. Bowman* (30). It is evident from more recent decisions, however, that greater latitude is now allowed in defining the circumstances from which the willingness of the deserted spouse to adhere can be inferred, and in absolving him or her from the necessity of prior remonstrance: see *Mulherron v. Mulherron* (31) and *Woodhouse v. Woodhouse* (32). However, one has only to appreciate the nature of the controversy which provoked differences of judicial opinion, for example, in *Gibson v. Gibson* (33), *Murray v. Murray* (34) and *Mulherron v. Mulherron* (31), to realise the essential difference between the English and Scots law relating to desertion: see *Harriman v. Harriman* (35), at p. 148, *per* BUCKLEY, L.J., *Thomas v. Thomas* (36) and *Bowron v. Bowron* (15), *per* SCRUTTON, L.J., at p. 195.

It seems to me, therefore, that to apply to the statutory offence of desertion in this country passages such as those quoted from *Mackenzie v. Mackenzie* (2) because in common parlance "divorce for desertion" is now the law on both sides of the Tweed would be perilously like indulging in the fallacy of constructing a syllogism with an undistributed middle term.

To return to the principle stated in *Douglas v. Douglas* (1), although, as appears from the report itself, the passage which I have already quoted was *obiter*, and although, apart from this fact, it is no more binding on the courts in Australia than it is in this country, it has naturally been treated as an authoritative statement of principle by a very distinguished judge. In the following observations, I must not be taken to be expressing the slightest doubt that it correctly expresses the law of New Zealand. However, supposing, for the sake of argument, that it had been intended to express the English law, it would be open to the following criticisms. The first half of the first sentence is too general. A husband is justified in leaving his wife for good cause, and may nevertheless be the deserted spouse. As regards the last sentence, it appears from what has already been said that no warrant for qualifying the wife's wrongdoing by limiting it to the period of the five years for which the husband's desertion must continue can be derived either from the

principles of the Ecclesiastical Courts before 1857, since there was no offence of desertion ; or from the principles of the Ecclesiastical Courts as applied by the Divorce Court to the statutory relief of judicial separation on the ground of desertion without cause for two years or upwards, since it is clear that adultery committed by the petitioner at any time

A would have been held to be an absolute bar ; or from the principles of the Scots law of desertion, as it is clear that the adultery of the petitioner would be an absolute bar whether it was committed during or after the quadrennium ; or from the principles on which the Divorce Court has acted in exercising the statutory discretion to grant the statutory relief

B of divorce for the statutory offence of desertion for two years, coupled with adultery, since that discretion has been exercised both where the deserted wife's adultery was committed during the statutory period (see *Hale v. Hale* (20) and *Hunter v. Hunter* (19)) and where it was committed after that period had elapsed (see *Symons v. Symons* (18)).

C In my opinion, although there is abundant authority that an adulterous petitioner is barred from certain forms of relief in respect of desertion, there is no authority binding this court for the principle that, if a spouse commits adultery after he or she has been deserted, the desertion is necessarily terminated as a matter of law, regardless of the question

D whether the deserter knows of the adultery, or whether it has any influence on his or her conduct. I am not prepared to adopt any such principle. Nor am I prepared to be guided by those judgments in the Australian courts which, expressly or by implication, are founded either on this statement of principle or on the passage I have quoted from the

E opinion of LORD HERSCHELL, L.C., in *Mackenzie v. Mackenzie* (2) delivered in relation to the Scots law of desertion. On the contrary, I am of opinion that *Symons v. Symons* (18), *Hunter v. Hunter* (19) and *Hale v. Hale* (20), regarded in their setting as examples of the contrast between the jurisdiction depending solely upon the Act of 1857 and that

F expressed to depend upon the principles of the Ecclesiastical Courts, afford direct authority for the proposition that the adultery of a petitioner, committed after desertion by the respondent, does not necessarily terminate that desertion, and, if the circumstances are such that it is held not to do so, that it is merely a discretionary bar to a decree

G of divorce. The Act of 1937 marks still more clearly the divergence from the principles of the Ecclesiastical Courts, not only in abolishing the necessity for coupling adultery with desertion as a ground for divorce, but also in basing the relief of judicial separation expressly on the statutory grounds without reference to those principles. I can find no

H reason for coming to a different conclusion under this Act merely because the statutory period is to be reckoned from a *terminus ad quem* instead of from a *terminus a quo*.

It only remains to apply the law as I understand it to the facts of this case. Finding, as I do, that the wife was probably unaware of, and certainly was in no way affected or influenced by, the husband's adultery,

and that, on the contrary, if the wife's desertion cannot be said to have brought it about, his adultery is somewhat excused by the circumstances in which he found himself, and because it is in the interests of decency that he should be able to marry the woman in question, I shall exercise my discretion in his favour, and pronounce a decree *nisi*.

Decree nisi granted.

Solicitors : *Peacock & Goddard*, agents for *Rothera, Sons & Husbands*, Nottingham (for the petitioner) ; *The Treasury Solicitor* (for the King's Proctor).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

Re OCEANIC STEAM NAVIGATION CO., LTD.

[CHANCERY DIVISION (Simonds, J.), July 25, 26, 29, 1938.]

Companies—Scheme or arrangement—Transfer of undertaking to realisation company—No power to sell in memorandum—Ultra vires—Benefit to creditors without any benefit to shareholders—Jurisdiction of court under Companies Act, 1929 (c. 23) ss. 153, 154.

An insolvent company asked the court, in the exercise of its jurisdiction under the Companies Act, 1929, ss. 153, 154, to sanction a scheme whereby its whole undertaking would be transferred to a realisation company, all the shares of which were to be allotted to creditors of the company. As the memorandum of association of the company did not give the company as a going concern power to sell or transfer its undertaking, objection was taken that the scheme was *ultra vires* the company. Objection was also taken on the ground that the scheme could not possibly benefit the shareholders, and that, therefore, the directors ought not to call in aid the machinery of sect. 153 for the benefit of the creditors without the creditors conceding some benefit to the shareholders. The scheme had been approved as required by the section :—

HELD : (i) in the absence of such a power in the memorandum, the scheme was *ultra vires* the company, and the court had no power to sanction the same under the Companies Act, 1929, ss. 153, 154.

(ii) as the jurisdiction under sect. 153 had been constantly exercised without regard to the interests of shareholders or classes of creditors having no interest in the assets of the company, no effect could be given to the second objection.

[EDITORIAL NOTE. The provisions of the Companies Act, 1929, s. 153, are for the purpose of binding dissentient parties, and do not enable a company to do anything that it has no power to do under its memorandum or articles of association. The proper remedy in such a case is, therefore, to proceed to a winding up of the company.]

AS TO SCHEMES AND COMPROMISES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 795-797, para. 1366 ; and FOR CASES, see DIGEST, Vol. 10, pp. 1053-1057, Nos. 7368-7398.]

Cases referred to :

- (1) *Simpson v. Westminster Palace Hotel Co.* (1860), 8 H.L. Cas. 712 ; 9 Digest 664, 4423 ; 2 L.T. 707.
- (2) *Re Guardian Assurance Co.*, [1917] 1 Ch. 431 ; 10 Digest 1054, 7370 ; 86 L.J.Ch. 214 ; 116 L.T. 193.
- (3) *Re Anglo-Continental Supply Co.*, [1922] 2 Ch. 723 ; 10 Digest 1056, 7385 ; 91 L.J.Ch. 658 ; 128 L.T. 59.

- PETITION AND MOTION in an action heard together. The petition was presented by the Oceanic Steam Navigation Co., Ltd. to obtain an order of the court under the Companies Act, 1929, ss. 153, 154, sanctioning an arrangement between the company and certain classes of its creditors. The motion was made in an action brought by one shareholder on behalf
- A of himself and all other shareholders, and the plaintiff thereby asked that the company, its directors and agents, might be restrained by injunction from proceeding with a scheme of arrangement or from taking any further steps in the proceedings. The petition was heard first, and the decision thereon rendered unnecessary any order on the motion.
- B The petition was opposed by shareholders who were nominees of the International Mercantile Marine of the United States of America. The scheme involved the reconstruction of the company by the transfer of its assets to a realisation company, all the shares of which would be held by the creditors. The grounds of the opposition were two : (i) that the
- C proposed arrangement was *ultra vires* the company, in that it involved the transfer by the company of the whole of its assets, and a power to do so was not included in the company's memorandum of association, and (ii) that, even if there was jurisdiction under sect. 153 to sanction the scheme, it was a discretionary jurisdiction, which, in the circum-
- D stances, ought not to be exercised in favour of the company.

W. Gordon Brown for the petitioners.

F. R. Evershed, K.C., and *Hon. Denys Buckley* for the respondents.

- SIMONDS, J. : The circumstances of this case are unusual. The
- E company was, with a large number of other shipping companies, concerned in a scheme of arrangement under sect. 153 of the Act which was sanctioned by the court on June 24, 1932. The company was then, as it is now, hopelessly insolvent, and I am not concerned with the scheme except to observe that, under cl. 16 (F) of the scheme and the schedule
- F thereto, the board of the company was thereafter to consist exclusively of directors nominated by the creditors of the company, one by His Majesty's Treasury and the Government of Northern Ireland, one by the Bank of England, one by trustees for debenture stock holders, and one by the company's bankers, with power for them to co-opt additional directors.
- G Such directors were duly nominated, and became, and are with directors co-opted by them, the directors of the company. As such directors, they have, under art. 167 of the company's articles, all the powers of the company which are not by the articles or by statute expressly directed or required to be exercised by the company in general meeting. In that
- H capacity, they have formulated this scheme, to which the company in general meeting has not been asked to give its assent and under and as a result of which the shareholders not only take no benefit, but never can take any benefit, in the assets of the company. It is a scheme which, upon the footing that only creditors of the company can have any interests therein, in effect provides for the distribution of the company's

assets among several classes of creditors or individual creditors in a manner which they have severally approved and which I see no reason to think unfair. It is urged that the directors ought to have refused to call in aid the machinery of sect. 153 to enable that to be done which is proposed to be done without the company being first put into liquidation, unless the creditors were prepared to concede something to the shareholders. It is indeed rightly pointed out that, without the assistance of the company, the creditors alone could not avail themselves of sect. 153. They could at any moment put the company into liquidation, but, since they have chosen the path of sect. 153 without a previous liquidation, it is to be assumed that they would pay something to be allowed to take that path, and accordingly the directors should not have assisted them without exacting a price. A B

There is, I suppose, room for different views both upon the general question whether directors of an utterly insolvent company ought to decline without some compensation to assist its creditors to take a course which they deem to be to their advantage and also upon the question whether, upon the facts of this particular case, a refusal by the directors to assist the creditors, except upon the footing of some benefit being given to the shareholders, would have borne any fruit. However that may be, the matter comes before me upon the footing that the directors have thought fit to assist the creditors by putting forward a scheme for their benefit, and that scheme has been duly approved in the manner contemplated by the Act. It appears to me that I cannot, in the circumstances, properly refuse my sanction on the ground that there has been any impropriety in their action, or any unfairness to the shareholders of the company. The jurisdiction under sect. 153 of the Act, and under the corresponding sections of earlier Acts, has consistently been exercised without regard to the wishes of shareholders or a class of creditors which had no real interest in the assets of the company, and it would, I think, be in accordance with that principle if I declined to give effect to the contentions of the shareholders under this head. C D E F

I now turn to the question of the jurisdiction of the court to sanction this scheme, and, for the consideration of this question, it is necessary to refer to two points: (i) that the company has, as I hold, upon the true construction of its memorandum of association, no power as a going concern to sell and dispose of its whole undertaking, and (ii) that the scheme provides for the sale and transfer of the whole of the assets and undertaking of the company to a new company to be formed for the purpose. G

It is, I think, plain that the company cannot, apart altogether from the question of binding dissentient creditors or shareholders, do that which it is proposed to do unless sect. 153 can be invoked: *Simpson v. Westminster Palace Hotel Co.* (1). The question then is whether, under sect. 153, the company can make, and the court sanction, an arrangement which is in excess of the corporate powers as defined by the H

memorandum. There is nothing in the language of sect. 153 which even remotely suggests such a conclusion. It contemplates a compromise or arrangement between a company and its creditors or any class of them or its members or any class of them, and provides machinery whereby such a compromise or arrangement may be made binding on dissentient

A persons by an order of the court. I find nothing here which would indicate that the company can effect an arrangement which would be otherwise *ultra vires* if the court will give its sanction under sect. 153. Rights which are conferred by the memorandum of association upon classes of shareholders may, no doubt, be overridden by a scheme under

B sect. 153, because that is expressly provided by subsect. (5), which is the lineal descendant of sect. 45 of the 1908 Act. However, no case was cited to me by counsel for the company, whose experience in these matters is very large, where an act otherwise *ultra vires* the company had been validated as part of a compromise or arrangement under sect. 153. He

C did not, as I understood him, dissent from the view that a company could not, under sect. 153, embark upon some new object which was outside the scope of its memorandum, but contended that the disposal by the company of its whole undertaking and assets stood in some special category of its own, and, though unauthorised by the memorandum,

D might yet be effected under sect. 153. I am unable to give effect to such a distinction. In *Re Guardian Assurance Co.* (2), YOUNGER, J., whose judgment was not overruled or adversely commented upon on this point, said, at p. 441 :

E The section accordingly has no application to an arrangement which is *ultra vires* the company, nor to an arrangement of a kind which can only be effected in a prescribed way, e.g., a reduction of capital, or a reconstruction under sect. 192.

He was referring to sect. 120 of the 1908 Act, but his observations apply *mutatis mutandis* to sect. 153 of the 1929 Act. I have been able to find no case in which the judgment of YOUNGER, J., on this point has been

F challenged. Later cases, such as *Re Anglo-Continental Supply Co.* (3), do not seem to me to touch the point that YOUNGER, J., was discussing or that I have to determine. It is indeed a cardinal principle that a company's corporate powers are defined and limited by its memorandum of association, and that its memorandum can be altered only in the

G manner prescribed by the Act itself. It would be strange if, by a side wind under sect. 153, without observing the particular prescription of the Act in regard to alterations, new powers could be conferred upon a company, and the contention is more forcible when it is remembered that the new power proposed by this scheme to be conferred on the company—

H namely, to sell or dispose of the whole or any part of the undertaking—is a power for which sect. 5 (1) (f) of the 1929 Act makes express provision. Counsel for the company pressed upon me a course of practice in this court which he said would justify my sanctioning this scheme. However, such inquiries as I have made, in the short time at my disposal, have not produced any case in which the court has sanctioned a scheme in-

volving the company in the exercise of a corporate power, whether by the sale of its undertaking or otherwise, which, apart from the scheme, would not be *intra vires*. On the other hand, I have found at least one case where, when a proposed scheme involved a sale of the undertaking, and the company's memorandum did not include a power to do so, the petition to the court to sanction the scheme contained a prayer to confirm an alteration of the memorandum, so as to include the power, such prayer being supported by proof of a special resolution to that effect previously passed. No doubt in the great majority of cases, where a company wishes, whilst still a going concern, to dispose of its undertaking as part of a scheme under sect. 153, no question arises, for the memorandum of association nowadays commonly contains such a power. If, however, it is not there, and a sale of the undertaking is therefore *ultra vires* the company, I must decline to sanction a scheme of which such a sale forms an integral part. In taking this course, I am, I think, acting in accordance with the judgment of YOUNGER, J., and the plain meaning of the statute. Accordingly, I refuse this petition, and I shall make no order upon it, except that the company do pay the costs of the opposing shareholders, to whom I am indebted for bringing the question of jurisdiction to my notice.

Solicitors: *Linklaters & Paines* (for the petitioners); *William A. Crump & Son* (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

Re A DEBTOR (No. 382 OF 1938), THE DEBTOR *v.*
PETITIONING CREDITORS AND OFFICIAL
RECEIVER.

[COURT OF APPEAL (Greer, Slessor and MacKinnon, L.JJ.), July 27, F 1938.]

Bankruptcy—Deed of assignment for benefit of creditors—Petitioning creditors' conduct at meeting—Acquiescence—Bankruptcy Act, 1914 (c. 59), s. 5 (3).

At a meeting of creditors, a resolution was passed that the debtor be asked to execute a deed of assignment in favour of trustees appointed on behalf of the creditors. No one present voted against the resolution, but after the meeting the respondents' representative said to the chairman: "Of course you will register my objection, as I reserve all my clients' rights":—

Held: as the respondents had not made any objection to the passing of the resolution at the time when it was passed, they were privy to it, and must be regarded as being bound by it.

[EDITORIAL NOTE.] It was argued that a party is not bound by the deed unless he does some act under the deed which shows his assent thereto, and that there cannot be an assent by mere passive acquiescence. This view has been overruled.

AS TO ASSENTING CREDITOR, see HALSBURY, Hailsham Edn., Vol. 2, pp. 18-20, para. 26; and FOR CASES, see DIGEST, Vol. 4, pp. 127-131, Nos. 1161-1198.]

Cases referred to :

- (1) *Re Debtor* (No. 11 of 1935), [1936] Ch. 165 ; Digest Supp. ; 105 L.J.Ch. 146 ; 154 L.T. 397.
- (2) *Re Stray, Ex p. Stray* (1867), 2 Ch. App. 374 ; 4 Digest 128, 1178 ; 36 L.J.Bcy. 7 ; 16 L.T. 250.
- (3) *Re Brindley Ex p. Taylor Sons & Co.*, [1906] 1 K.B. 377 ; 4 Digest 129, 1182 ; 75 L.J.K.B. 46.

APPEAL from a receiving order made by Mr. Registrar KEAN, dated June 14, 1938.

On Apr. 4, 1938, a meeting of the creditors of the appellant debtor was held, at which the respondent creditors were represented. A resolution was passed, *nemine contradicente*, that the debtor be asked to execute a deed of assignment of his assets in favour of trustees appointed by the creditors. After the meeting, the respondents' representative said to the chairman of the meeting : " Of course you will register my objection, as I reserve all my clients' rights." Subsequently the respondents obtained a receiving order, relying upon the execution of the deed of assignment as an act of bankruptcy.

W. P. Spens, K.C., and *W. A. L. Raeburn* for the appellant.

W. N. Stable, K.C., and *A. Melford Stevenson* for the respondents.

Spens, K.C. : If you are a party to a meeting which brings in a deed of arrangement, you cannot take advantage of it as an act of bankruptcy. By remaining silent, the respondents acquiesced in the deed. This is not a case where one creditor ought to be able to hold up the whole deed. [Counsel referred to *Re Debtor* (No. 11 of 1935) (1).]

Stable, K.C. : The decision of the registrar was right ; there are no facts here on which an estoppel could be based : *Re Brindley* (3). The case of *Re Debtor* (No. 11 of 1935) (1) is the only case not based on estoppel. All the other cases depend upon something done after the deed had been made. It is not necessary to say that the 1936 case was wrongly decided, because there was an estoppel there, but that case goes too far. There is no evidence that, if the deed were made, this creditor would benefit. If only one debtor stands out, and will not agree to a deed, an act of bankruptcy must follow. In this case, the respondents did nothing to indicate that they assented to, or were privy to, this deed.

Spens, K.C., was not called on to reply.

GREER, L.J. : This case seems to me entirely within the principle that was the ground of the decision of CLAUSON and LUXMOORE, JJ., in *Re Debtor* (No. 11 of 1935) (1). I think that that case was rightly decided and that the case which we have to determine is within the principle of that case. The matter is now determinable by the Bankruptcy Act, 1914, s. 5 (3), which is as follows :

If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.

I think that there was ample ground upon which the registrar should have held himself to be satisfied for sufficient cause that an order ought not to be made, and therefore that he ought to have dismissed the petition. He had had *Re Debtor* (No. 11 of 1935) (1) cited to him, but he does not seem to have considered in detail what the facts in that case were. The facts in that case were that the particular creditor who petitioned had not opposed a resolution that he should be a member of the committee of inspection to be appointed under the deed. He had in fact by his silence indicated that he did not oppose the resolution that he should be a member of the committee. He did not in fact ever become a member of the committee, and, when he was asked to attend a meeting of the committee, he said :

I am not assenting to the deed and I am not in favour of a committee.

It was only by reason of his silence when the proposition that he should be a member of the committee was made that he was held to be subject to the provisions of the statute to which I have referred in sect. 5 (3).

We need not go beyond the statute, but, if it is necessary to go back to the days before there was such a provision, it seems to me that *Re Stray, Ex p. Stray* (2) supports the decision of the judge in *Re Debtor* (No. 11 of 1935) (1) to which I have referred.

If it is necessary to consider whether or not there was an estoppel, estoppel may arise by conduct as well as by deed. It may arise out of evidence or it may arise by refraining from doing some act whereby the persons concerned are misled. Refraining from opposing a resolution that there should be a committee of inspection is sufficient evidence to support an estoppel.

The evidence on the matter is contained in the affidavit of the chairman, Mr. Goodwin. He says in the first place that the petitioning creditors were represented by a Mr. King. Then he says that the petitioning creditors were ready :

to agree in principle to a deed of assignment, the desirability whereof they recognised, but that they felt that their own nominee should be appointed as trustee thereof jointly with myself.

They failed to secure a seconder for the proposition that their own nominee should be appointed trustee, and then they had an opportunity of saying : " Under those circumstances, as we have failed to obtain the nomination of our candidate jointly with Mr. Goodwin, we decline to have anything more to do with the deed of assignment and reserve all our rights as petitioning creditors to take such course as we may be advised." Mr. King might have said that at that time, and it does not support their case, because there was a subsequent resolution for the appointment of a committee of inspection, and again there was an opportunity to the defendant's representative, if he desired to oppose the carrying out of the deed by the appointment of a committee of inspection, to say : " My clients do not agree to any committee being

appointed at all now that their nominee has not been appointed trustee." Instead of doing that, they allowed the resolution appointing the committee to be carried *nemine contradicente*—without opposition—and they are therefore in exactly the same position as that in which they would have been if Mr. King on their behalf had voted for the resolution. I cannot myself imagine any stronger case to bring the facts within the section of the statute to which I have referred than a case in which it is established that they were themselves privy to the appointment of the trustees and to the appointment of a committee of inspection which could not be appointed unless the assignment went through. For these reasons, I think that the registrar decided the case on a wrong ground, and that this appeal should succeed, with costs.

SLESSER, L.J. : I am of the same opinion. On Apr. 4, 1938, a full meeting of creditors of this debtor was called. There was shown to them a statement of affairs, and the question was put whether they would agree to a deed of assignment. The respondents' solicitor, representing them, stated that he was instructed that they would agree to a deed of assignment in principle, though they desired that their own nominee should be appointed as trustee thereof with Mr. Goodwin. On that, there was some discussion, and a Mr. King, who was representing Messrs. Rogers & Millbourne, moved an amendment to the resolution in order to secure his purpose, substituting the name Fincham for a Mr. Green. The chairman asked for a seconder, and, there being none forthcoming, the amendment failed. The resolution itself was then put to the meeting—namely, a resolution that the debtor be asked to execute a deed of assignment of the whole of his property and assets in favour of Percy Harry Goodwin and Frank Green as joint trustees on behalf of the creditors. That was duly seconded, and an uncertain number of creditors present voted in favour of the proposition. No creditor voted against it, and it was declared that the resolution had been carried *nemine contradicente*.

In my view, on those facts, the position of the respondent creditors was exactly the same as that in which they would have been if they had voted for the resolution affirmatively. I think that it would be contrary to all idea of business and of the conduct of meetings if persons specially summoned to a meeting, and necessarily representing interests which have to be considered, should stand by and assent to the passing of a resolution which could operate only in the absence of dissent, and then turn round, be it early or late, and say : " I will not be bound by this resolution." In other words, I think that the mere fact that, after a resolution was carried which represented the views and decision of the meeting, and which finally concluded the matter, it was no use for Mr. King to say to Mr. Goodwin : " Of course you will register my objection, as I reserve all my clients' rights." He was too late.

Those circumstances, as GREER, L.J., has pointed out, resemble in principle the circumstances in the case which CLAUSON and

LUXMOORE, JJ., decided, *Re Debtor* (No. 11 of 1935) (1), in that there also a creditor by silence and nothing else was held to be privy to what was done, in that he had allowed himself to be proposed as a member of a committee of inspection, albeit on the earliest occasion he said that he would not serve on the committee, and refused to sign the deed. On the principle there accepted—which really, to my mind, needs no authority, because, as I say, the position seems to me the same as it would have been if he had voted positively for the resolution—I can come to no other conclusion than that no order ought to be made within the provisions of the Bankruptcy Act, 1914, s. 5 (3), and that the court ought to dismiss the petition.

I hesitate in a sense to base my decision on estoppel, because, as has been pointed out in many of these cases, there is the public interest to be safeguarded as well as the interest of the creditors of the debtor. It is sufficient to say that, in my view, the respondent creditors here were privy to these proceedings in such a sense that, within the principle laid down in *Re Stray, Ex p. Stray* (2) and the following cases, it would not be right that they should be able to take advantage of a situation in which they were themselves an acquiescing party. I agree, therefore, that this appeal succeeds.

MACKINNON, L.J. : I agree.

Appeal allowed with costs ; receiving order rescinded ; petition dismissed with costs ; money in court paid out to appellant's solicitor.

Solicitors : *Kenneth Brown, Baker, Baker* (for the appellant) ; *Elwy Robb & Co.* (for the respondents).

[Reported by E. FULLER BRISCOE, Esq., *Barrister-at-Law.*]

Re LONDON GENERAL INSURANCE CO., LTD.

[CHANCERY DIVISION (Bennett, J.), July 28, 29, 1938.]

Company—Winding up—Insurance company carrying on different classes of insurance business—Priority of life assurance creditors over other creditors—Assurance Companies Act, 1909 (c. 49), ss. 2, 3, 4, 5.

The Assurance Companies Act, 1909, s. 3, requires that separate accounts shall be kept of all receipts in respect of each class of assurance business, and shall be carried to, and form, a separate assurance fund with an appropriate name. By sects. 31 (*e*), 32 (*d*), these provisions do not apply to fire or accident business. An insurance company carried on life assurance business, bond investment and endowment certificate business, motor, fire, and general accident insurance business. At the time when an order was made for its compulsory winding up, it had creditors in connection with each of those classes of business, and also general creditors, and it was alleged that these funds had become so mixed up that it was impossible to allocate any asset to any particular fund :—

HELD : all the creditors of the company, in respect of whatever class of business their claims might be, were to rank *pari passu* against the assets of the company, except in so far as any particular assets could be

traced to the life assurance fund or the bond investment fund respectively.

[EDITORIAL NOTE. The Assurance Companies Act, 1909, ss. 3, 31 (e), 32 (d), provide, in short, for a separate accounting of the funds of a society for their life assurance business and the various classes of insurance business. The contention here is that the liquidator has to ascertain what proportion of the assets of the company at the date of the liquidation represented the life assurance fund, and then, having realised the assets, to set aside a like proportion for the payment of the life assurance creditors only. It was further contended that the life assurance creditors were entitled, if their claims were not met in full out of that proportion of the realised assets, to rank *pari passu* with all other creditors against the remainder of the realised assets. This contention is rejected, and all creditors are to rank *pari passu* except in so far as any particular assets can be traced to the life assurance fund. The same applies to the bond investment fund.

AS TO SEPARATION OF FUNDS OF LIFE ASSURANCE COMPANIES, see HALSBURY, Hailsham Edn., Vol. 18, pp. 577-579, paras. 938, 939; and FOR CASES, see DIGEST, Vol. 10, pp. 1073, 1074, Nos. 7509-7510; pp. 1079-1090, Nos. 7548-7627.]

C Cases referred to :

- (1) *Re South-East Lancashire Insurance Co.* (1932), 102 L.J.Ch. 27; Digest Supp.
- (2) *Glasgow Assurance Corp., Ltd. (Liquidators) v. Welsh Insurance Corp., Ltd.*, [1914] S.C. 320; 29 Digest 48, case o.
- (3) *Re National Standard Life Assurance Corp.*, [1917] 1 Ch. 193; 10 Digest 1072, 7500; 86 L.J.Ch. 172; 115 L.T. 751.
- (4) *Re Hearts of Oak Assurance Co., Ltd.*, [1936] Ch. 558; Digest Supp.; 105 L.J.Ch. 211; 155 L.T. 407.
- (5) *Wesleyan & General Assurance Society v. A.-G.*, [1933] Ch. 591; Digest Supp.; 102 L.J.Ch. 145; 148 L.T. 403.

E SUMMONS issued by the liquidator, in the compulsory winding up of the London General Insurance Co., Ltd., for the determination of the allocation of the assets under particular classes of funds in accordance with the Assurance Companies Act, 1909, s. 3.

Cecil W. Turner for the liquidator.

Hon. Denys Buckley for the ordinary life policyholders.

F *Neil Lawson* for the bond investment holders.

J. G. Strangman for the fire insurance creditors.

B. M. Cloutman for the motor insurance creditors.

C. A. Settle for the general creditors.

Turner stated the facts of the case.

G *Buckley*: Under the Assurance Companies Act, 1909, separate funds have to be kept for the life assurance policyholders and for the bond investment holders, and they have priority under sect. 3 of the Act. The court should declare with regard to the questions asked in the summons : (i) The liquidator should ascertain what proportions of the aggregate assets of the company represented at the date of liquidation the life assurance fund, and the creditors of the ordinary life business, the policyholders, are entitled to be paid out of a like proportion of the proceeds of the realisation of all the company's assets in priority to the other creditors of the company. (ii) This question should be answered in a similar way as regards the bond investment creditors. (iii) The fire

insurance creditors are not covered by sect. 3. They are unsecured general creditors of the company, and have no priority. (iv) A proportion of the assets of the company bearing the same proportion to the whole of the assets as the amount of the life fund in the balance sheet bears to the aggregate book value of the whole of the assets should be appropriated to the life assurance fund, and should be distributed rate-ably among the policyholders in proportion to their respective claims. The motor fund was in credit in 1926, but not thereafter. Any sums paid out of the life or bond investment funds to meet the losses of the motor fund should be reimbursed to these funds. The motor deposit made under the Road Traffic Act is part of the general assets of the company: *Re South-East Lancashire Insurance Co.* (1). [Counsel referred to *Glasgow Assurance Corpn., Ltd. (Liquidators) v. Welsh Insurance Corpn., Ltd.* (2), *Re National Standard Life Assurance Corpn.* (3), *Re Hearts of Oak Assurance Co., Ltd.* (4) and *Wesleyan & General Assurance Society v. A.-G.* (5).]

Lawson: I adopt the argument of Mr. Buckley. Sect. 34 of the Act deals with bond investment. The same order should be made as in the case of the life assurance creditors.

Strangman: It is impossible here to allocate any asset to any particular fund, the assets have become so mixed up. The life fund is a trust fund of the receipts of the life assurance business, and, in so far as the moneys constituting that fund can be traced in the assets, I have no objection to its being done. Some part of the assets must have been derived from moneys subscribed for the company's share capital. Questions (i) to (v) should be answered by saying that all the creditors of the company rank *pari passu* against the assets of the company, except in so far as any particular assets can be traced to either the life assurance fund or the bond investment fund. The company should have had these separate funds, but may not have done so.

Cloutman: The position of the motor insurance creditors is the same as that of Mr. Strangman's clients. The assets should be applied *pari passu* among the creditors.

Settle followed for the general creditors.

Buckley, in reply.

BENNETT, J.: This is a summons in the compulsory winding up of the London General Insurance Co., Ltd., a company compulsorily wound up under an order made on May 7, 1935. The summons has been issued by the liquidator for the purpose of getting directions as to how the assets of the company are to be distributed amongst the various classes of the company's creditors. I say "classes" because the company carried on a number of different kinds of insurance business. At the time of the winding-up order, it carried on life assurance business, bond investment and endowment certificate business, motor insurance business, fire insurance business and general accident insurance business, and it

has creditors in respect of contracts entered into with the company in connection with each of those classes of business. It also has what are called general creditors.

The answer to the questions that the liquidator asks depends upon the true meaning and effect of the Assurance Companies Act, 1909, s. 3, A a section which I think has been a puzzle to members of the legal profession for a good many years.

The questions which are asked are five in number :

(1) Whether the creditors of the said company whose claims have arisen in respect of its ordinary life business are entitled to be paid to any and what extent and out of any and what assets of the company in priority to the other creditors B of the company or any and which class or classes of such other creditors.

The second question asks the same with regard to creditors in respect of the bond investment business of the company. The third question is the same with respect to creditors whose claims have arisen in connection with fire insurance. The fourth question is as follows : C

Whether or to what extent the creditors of the company whose claims have arisen in connection with the ordinary life business, the bond investment business and the fire insurance business of the company or any and which of such businesses rank *pari passu inter se* against the assets of the company and whether *pari passu* with or in priority to the creditors whose claims have arisen in connection with the motor insurance business of the company and/or the general creditors of the company. D

The fifth question is as follows :

Whether the assets available for distribution amongst the policyholders and creditors of the company should be appropriated to any and what extent and in any and what proportions to any and which of the different funds of the company ascertained as at the date of commencement of the liquidation of the company and how any amounts so appropriated should be distributed. E

The main contest has been between the representatives of the creditors in connection with the life assurance business and the bond investment business on the one side, and the representatives of creditors of the fire insurance business and motor insurance business and the general creditors F on the other side. On the one side, what is said is that, whilst the company was a going concern, the life assurance fund and the bond investment fund were to be treated as undivided shares respectively of the assets of the company, bearing the same proportion to those assets as the amount for the time being of the fund shown in the balance sheet G bears to the aggregate book-value of the company's assets. That is to say, taking the last balance sheet published by this company, which shows the amount of the life assurance fund and the endowment fund lumped together at the end of 1933 as a figure of £289,000 odd, they have a share of the aggregate book-value of the assets represented by H £289,000 over that value, whatever it may be. When one comes to liquidation, however, what the liquidator has to do is to ascertain what proportion of the aggregate assets of the company represented, at the date of the liquidation, the life assurance fund, and to pay to the creditors, whose claims have arisen in respect of its ordinary life assurance business, out of a like proportion of the proceeds of realisation of

those assets the amount of their claims in priority to all other creditors of the company. That is said to be their prior right against a slice of the realised assets, and it is also contended on their behalf that, in addition to the right to have that slice of the company's assets appropriated to them exclusively, they are also entitled, in case their claims are not met in full, to prove for any deficiency there may be *pari passu* with the other A creditors of the company, for whom no fund has to be provided under the Life Assurance Act, 1909.

The argument on behalf of the fire insurance creditors, motor insurance creditors and the general creditors, who are not entitled to have any fund set aside to meet their claims, is that all the creditors of the company, B whether their claims arise in respect of life assurance, in respect of bond investment business, motor insurance business, fire insurance business, or in any other way, rank *pari passu* against the assets of the company, except in so far as any part of the assets can be proved to have been acquired by, or can be traced back to, funds which, under the provisions C of the Act, an assurance company is bound to keep.

Which of those two arguments is to prevail depends upon the language of the Assurance Companies Act, 1909, and in particular upon sect. 3. It is necessary, I think, to approach sect. 3 by a consideration of sect. 2, D which requires an assurance company to make a deposit with the Paymaster-General. Where a company, such as this company, carries on more than one class of assurance business, the material subsection of sect. 2 is subsect. (4), which, so far as relevant, reads as follows :

Where a company carries on . . . assurance business of more than one class, a separate sum of £20,000 shall be deposited and kept deposited under this section as respects each class of business, and the deposit made in respect of any class of business in respect of which a separate assurance fund is required to be kept shall be deemed to form part of that fund, and all interest accruing due on any such deposit or the securities in which it is for the time being invested shall be carried by the company to that fund. E

That subsection seems to me to visualise an asset which is to form part of a fund, a fund to which the interest produced by the asset is to be F added. With that in mind, one goes to sect. 3 :

(1) In the case of an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, G of each class of business, shall be carried to and form a separate assurance fund with an appropriate name ; Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund.

Until one comes to the proviso, the subsection is dealing exclusively with accounts which a company carrying on assurance business and some H other business, or different kinds of assurance business, is to be required to keep. The proviso, however, seems to suggest something else. It seems to suggest the existence of assets, and that idea, I think, is conveyed by the language in subsect. (2), which reads as follows :

A fund of any particular class shall be as absolutely the security of the policy-

holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable.

- A That subsection seems to me to visualise property, a fund, segregated from other property of the company, if the company be one which is carrying on more than one class of assurance business, and applicable exclusively to discharging the liabilities incurred in connection with that class of business. The fund is to belong to, or is to be the security of, the policyholders of that class, and is not to be liable for any contracts of the company for which it would not have been liable had the business of the company been not that of assurance of that class, and that idea seems to run through the forms of account which are to be found in the schedules to the Act, and the provisions which are contained in the schedules to the Act, with respect to the valuations which the Act requires to be made in connection with life assurance business and bond investment business.

Sect. 4 of the Act requires that every assurance company

- D . . . shall, at the expiration of each financial year of the company, prepare (a) a revenue account for the year in the form or forms set forth in the first schedule to this Act and applicable to the class or classes of assurance business carried on by the company; (b) a profit-and-loss account in the form set forth in the second schedule to this Act, except where the company carries on assurance business of one class only and no other business; (c) a balance sheet in the form set forth in the third schedule to this Act.

- E If one looks at the balance sheet in the third schedule to the Act, there are appended to it two notes, Note 3 and Note 4. Note 4 is the relevant one :

- F In the case of a company required to keep separate funds under sect. 3 of this Act, a certificate must be appended, signed by the same persons as signed the balance sheet and by the auditor, to the effect that no part of any such fund [the separate fund required to be kept under sect. 3] has been applied, directly or indirectly, for any purpose other than the class of business to which it is applicable.

- That is to say, going back to sect. 3 (2), as it seems to me, it has been used exclusively for discharging liabilities which would have been incurred if the only assurance business carried on by the company had been assurance business of the class to which the fund related.

- G Sect. 5 of the Act requires that once every five years valuations of the company's liabilities shall be made by an actuary, and continues :

an abstract of the report of such actuary is to be made in the form or forms set forth in the fourth schedule to this Act and applicable to the class or classes of assurance business carried on by the company.

- H The fifth schedule is dealt with by sect. 6 :

Every assurance company shall prepare a statement of its assurance business at the date to which the accounts of the company are made up for the purposes of any such investigation as aforesaid [under sect. 5] in the form or forms set forth in the fifth schedule to this Act and applicable to the class or classes of assurance business carried on by the company : Provided that, if the investigation is made annually by any company, the company may prepare such a statement at any time, so that it be made at least once in every five years.

In the fifth schedule, one finds in Form (A) the form applicable to life assurance business, and in Form (E) the form applicable to bond investment business. Rule 10 in the form applicable to life assurance business is as follows :

The average rate of interest yielded by the assets, whether invested or uninvested, constituting the life assurance fund of the company, calculated upon the mean fund of each year during the period since the last investigation, without deduction of income tax. A

In regard to bond investment business, the requirement is in r. 5 :

The average rate of interest realised by the assets, whether invested or uninvested, constituting the bond investment and endowment certificate fund of the company, calculated upon the mean fund of each year during the period since the last investigation, without deduction of income tax. B

Thus, as it seems to me, what sect. 3 (2) contemplates is that there are investments in the case of an assurance company carrying on separate classes of assurance business with respect to which it can be said that they are the fund which is applicable, and applicable exclusively, to discharging liabilities incurred in connection with that class of business ; and, as it seems to me, in a winding up, unless it be possible for any class of creditors to be able, after an investigation of the company's books and records, to say, " With respect to some particular investment which the company then possesses, that investment has been purchased either wholly with my money or in part with my money," there is nothing to which the creditors of that class can look to the exclusion of all other creditors. Whether or not that is going to impose an intolerable burden upon those responsible for the management of an assurance company carrying on several classes of business I am not at the moment able to say. Why it should I am not quite sure. They can keep in their books—they must keep in their books—an account of the premiums which they receive in respect of each class of business. I do not know whether it is going to be very difficult for them to keep in their books an account which shows, when they invest premiums which they receive in respect of a particular class of business, what the investments are. It does not seem to me to be very difficult. When they have ascertained how much of the purchase money for a particular investment has been provided by, for instance, life assurance premiums, it should not, as it seems to me, be very difficult, when they realise that investment, to determine what proportion of the proceeds of sale belongs to the life assurance business. I hope that it should not, but it seems to me that effect is given to the provisions of sect. 3 of the Act better by attributing to the language that meaning which one finds there, and in the other provisions of the Act to which I have referred, than by attributing to that section the effect which Mr. Buckley and Mr. Lawson, on behalf of the life assurance policyholders and the bond investment policyholders respectively, ask me to give to it. C D E F G H

I think that the answer to the five questions should be that all the creditors of the company, in respect of whatever class of business their

- claims may be, rank *pari passu* against the assets of the company, except in so far as any particular assets can be traced to the life assurance fund or the bond investment fund respectively. I think that that is all that it is necessary to say, except that there is one matter which I did omit to notice, and that is the proviso at the end of sect. 3 (1). I regard that
- A proviso as a proviso which would enable an investment to be made with contributions from the income derived by the company in respect of varying classes of business—in other words, an investment the purchase of which would be contributed to by life assurance premiums, motor insurance premiums or fire insurance premiums.
- B Solicitors : *Richard Rowlands & Co.* (for the liquidator) ; *William Hurd & Son* (for the ordinary life policyholders) ; *Bennett & Bennett* (for the bond investment holders) ; *E. B. V. Christian & Co.* (for the fire insurance creditors) ; *Rule & Cooke* (for the motor insurance creditors) ; *T. & N. Blanco White* (for the general creditors).

C [Reported by T. A. DILLON, Esq., Barrister-at-Law.]

NORTHERN ONTARIO POWER CO., LTD. *v.* LA ROCHE MINES, LTD., AND ANOTHER.

- D LA ROCHE MINES, LTD., AND ANOTHER *v.* NORTHERN ONTARIO POWER CO., LTD.

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Sir Lyman Poore Duff), **July 8, 11, 27, 1938.**]

- E *Privy Council—Canada—Electricity—Power supply—Contract to supply for the mining life of a property—Assignable only with consent of power company—Consumer company selling mine and being dissolved—Whether contract determined.*

- F In 1931, the La Roche company, the owner of two mining claims, contracted as a consumer with the Northern Ontario Power Co. for the supply of electric power, a term of the contract being that it should “extend for the mining life of the properties now or hereafter operated or owned or controlled by the consumer in the Porcupine district.” The contract was made upon a printed form supplied by the power company, and did not contain any definition clause extending the meaning of the word “consumer.” The contract was not assignable except with the consent of the power company. Power was supplied at intervals during 1932, 1933 and 1934, as required, and on Oct. 31, 1934, the La Roche company sold its mining claims to the Delnite Mines, Ltd., no assignment being made of the power agreement, as Delnite Mines, Ltd., did not wish to become bound by it, nor to become entitled to the benefit of it. In Nov., 1934, the La Roche company informed the power company that they no longer had any ownership in the property, and that they were going into voluntary liquidation. In the course of the liquidation, a claim was submitted by the power company for damages for breach of the contract of 1931. The power company claimed that, by reason of the acts of the La Roche company in selling its mining properties, going into voluntary liquidation and refusing further to carry out the terms of its agreement, the power company had suffered damage to the amount of \$524,163.24. The La Roche company pleaded that, as a result of the sale of their mining claims, they had
- G
- H

ceased to operate, own or control any mining properties or other properties in the district of Porcupine, and that the contract had thereby ceased to be operative or binding on the parties thereto :—

HELD : the clause stating the period of the contract was so worded that the mining life which it contemplated was, in the events which had happened, the mining life while the properties were being operated or owned or controlled by the La Roche company. As there was no extended definition of "consumer," it meant the La Roche company only. If an effective assignment had been executed, the assignee would have become the consumer for the purposes of the contract ; but, no one having become by assignment the consumer under the contract, the contract necessarily came to an end.

Judgment of the Court of Appeal for Ontario ([1937] O.R. 824) reversed in part.

[EDITORIAL NOTE. The owner or occupier of property may contract to assume a liability in respect of that property that shall continue after he has ceased to own, occupy or control the same. Such a liability is a very unusual one, and there must be very plain words in the contract to establish it. Where the terms of the contract are not such that the terms clearly impose such a liability, the liability will cease when the owner or occupier ceases personally to own, occupy or control the property.

AS TO CONTRACT FOR SUPPLY OF ELECTRICAL ENERGY, see HALSBURY, Hailsham Edn., Vol. 12, pp. 582-586, paras. 1123, 1124 ; and FOR CASES, see DIGEST, Vol. 20, pp. 206-208, Nos. 44-56.]

APPEAL by the Northern Ontario Power Co., Ltd., and a cross-appeal by La Roche Mines, Ltd., and the liquidator of that company from a judgment of the Court of Appeal for Ontario (ROWELL, C.J.O., MIDDLETON and MASTEN, JJ.A.), dated July 20, 1937, allowing an appeal by the power company from a judgment of the Supreme Court of Ontario (GREENE, J.), dated Jan. 28, 1937, dismissing the action. By their judgment, the Court of Appeal awarded damages for breach of contract to the power company, but limited the term of the contract to a period of 10 years from its date. The power company complained of this limitation of the term of the contract, and the La Roche company* cross-appealed to have the judgment of the trial judge restored.

R. S. Robertson, K.C., and Frank Gahan for the Northern Ontario Power Co., Ltd.

W. N. Tilley, K.C., R. F. Wilson and B. V. McCrimmon for La Roche Mines, Ltd.

The judgment of their Lordships was delivered by LORD RUSSELL OF KILLOWEN.

LORD RUSSELL OF KILLOWEN : These consolidated appeals, from the Court of Appeal for Ontario, relate to the liability, if any, of La Roche Mines, Ltd., under a contract with Northern Ontario Power Co., Ltd., for the supply of electric power. The agreement consists of a printed form, containing general and special conditions, with blanks filled in to deal with the particular customer, with the result, not uncommon in such cases, that the document presents problems of construction which are not easy of solution.

The contract is dated Dec. 30, 1931, at which time the La Roche company was the owner of two mining claims in the township of Deloro in the Porcupine district—namely, H.R. 1001 and H.R. 1002. The form which the contract assumes is that, subject to the general conditions and the schedule of prices, the power company is authorised and requested

A by the undersigned consumer (in this case, the La Roche company) to :

connect its electric system with the wiring of the consumer at a point on the latter's property convenient to the power company's lines and to cause electric current to be there delivered during the period noted or any renewal or continuation thereof as provided and at the rate specified, which current it is hereby agreed shall be used by the consumer only and only for the purposes hereinafter specified.

B The document then sets out the general conditions. Those which appear to be relevant run thus :

C 6. The consumer agrees not to make any major change in or 10 per cent. addition to installation without having first given the company reasonable notice of such additions. During the continuance of this contract, no system of electricity other than that furnished by the company shall be used in said premises, providing company is able and ready to supply same, except with the written consent of the company, and, if at any time, during the term of this contract, the consumer requires additional service in or about the premises over and above the amount herein provided for, it is hereby agreed that the consumer shall take such additional service from the company providing company is able and ready to supply same.

D 8. The company does not guarantee a constant supply of electricity, and will not be liable for any damages to the consumer in consequence of its failure to supply electricity at any time or times nor be considered in default. This clause shall not be interpreted as giving the company any right to arbitrarily interrupt or cease supplying service under this contract.

E In case the company shall be prevented from supplying, or the consumer from taking, the power herein contracted for, by reason of Acts of God, King's enemies, fires, strikes or other acts beyond their respective control, all payments for power shall cease, and the company shall be excused from furnishing power during such prevention, and the consumer shall be excused from taking it, and both parties shall use all diligence to restore the service.

F 9. The right is expressly reserved to the company to supply current for city or municipal lighting, traction or purposes affecting the general public before the consumer.

F 11. The company reserves the right to discontinue its current on 30 days' notice in writing, or to cancel this contract, at its option, in case the consumer is in arrears in payment of any of the company's accounts or fails to take service according to the provisions of this contract, or in case the consumer violates any condition of this contract whatsoever or becomes insolvent, and in case of the company violating any such condition, the consumer shall have the like right to cancel the contract.

13. The benefits and obligations of this contract shall enure to and be binding upon the successors, survivors and executors or administrators, as the case may be, of the original parties hereto respectively for the full period of this contract, but this contract shall not be assignable by the consumer except with the written consent of the company, but such consent shall not be unreasonably withheld.

G After the general conditions, there follow special conditions. These provide for various matters, including the point of delivery, the execution of a transmission-line agreement, the nature of the supply, the period of the contract, the amount of power covered by that installation, and the price. The special condition as to the period of the contract was in
H the following terms :

Period of contract : This agreement when executed shall extend for the mining life of the properties now or hereafter operated or owned or controlled by the consumer in the Porcupine district.

The provision as to the amount of power covered ran thus :

Amount of power covered by this installation : The consumer's initial installation will be approximately 500 h.p. for which the company agrees to supply service ;

and the consumer agrees to pay for at least a minimum quantity of 50 h.p. for the first year of this agreement. Further power will be supplied in accordance with cl. 6.

At the same time as the execution of this contract, the parties executed a transmission-line agreement, which was to be read and construed as a part of the power contract. It provided for the erection by the La Roche company of a power-transmission line connecting a sub-station to be erected by it with the power company's transmission line, and for the grant to the power company of a right of way for the transmission line so to be erected for all such time as the power company should desire to use it for the purpose of its business. The cost of erecting this transmission line was to be recouped by a rebate of 10 per cent. of all moneys for power received by the power company from the La Roche company : or any other person, firm or corporation to whom power is transmitted over the said transmission line . . . during the continuance of this agreement and the said power contract.

Clauses 14 and 16 provided as follow :

14. Notwithstanding anything herein or in the said power contract contained, the company shall be at liberty at any time to cancel this agreement, and the said power contract, if the customer shall fail during any period of three months after first delivery of power to accept and pay for at least 50 horse-power of electrical energy delivered over the said transmission line.

16. This agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

From Jan. 17, 1932, power was transmitted to and received by the La Roche company under the contract until May 31, 1932, when work on the said mining claims was suspended. Power was again supplied during May and June, 1933, while a company called Noranda Mines, Ltd., was making an examination of the said mining claims. No further supply of power took place until Aug., 1934. In that month, the La Roche company (having given a company called Sylvanite Gold Mines, Ltd., an option on the said mining claims, with the right to work on the property during the currency of the option) asked for power to be turned on again. This was done, and power was supplied by the power company continuously down to, at all events, the time when the present action was tried. In the meantime, the Sylvanite company had assigned its interest in the said mining claims to Erie Canadian Mines, Ltd., and on Oct. 31, 1934, an agreement (to which the last-mentioned company was a party) was executed, under which the La Roche company sold its said mining claims to a company called Delnite Mines, Ltd. At the same time, the Delnite company acquired from others certain other adjacent mining claims. No assignment of the power agreement was made to the Delnite company. They did not wish to become bound by it, nor to become entitled to the benefit of it.

On Nov. 30, 1934, the La Roche company wrote to the power company stating that they no longer had any ownership in the property, which was owned by Delnite Mines, Ltd. The letter then proceeded :

We asked Delnite Mines if it would take over the contract that we had with you, and we are advised that they did not care to do so, though they said they would

send you a written acknowledgment of their liability to pay for any power that may be supplied by you in their operation of the property.

If any power is used it will be used by the new company by reason of its ownership of the property, and you will please take notice that Delnite Mines, Ltd., and not our company will be responsible.

We are proceeding to distribute our assets and surrender our charter.

- A A correspondence ensued, in the course of which the rival contentions were put forward which their Lordships think may be summarised thus—that the La Roche company claimed to be no longer bound by the contract, while the power company claimed that it was. Ultimately, the La Roche company went into voluntary liquidation in Nov., 1935, and, in response
B to the usual notice for claims, the power company sent in a claim for damages for breach of the contract of Dec. 30, 1931. The claim was contested, and on Jan. 18, 1936, the writ in the present action was issued.

The statement of claim claims damages for breach of contract, on the footing that, by reason of the acts of the La Roche company in selling

- C its mining properties, going into voluntary liquidation, and refusing further to carry out the terms of its agreement, the power company has suffered loss and damage, and has been deprived of the profits to which it would have been entitled under the contract. The amount of damages claimed was fixed, with some nicety of adjustment, at the sum of
D \$524,163.24. The defendants pleaded that, as a result of the sale of the said mining claims, the La Roche company ceased to operate, own or control any mining properties or other properties in the district of Porcupine, and thereby the contract had ceased to be operative or binding on the parties thereto. They further pleaded a defence under
E Part V of the Public Utilities Act (R.S.O., 1927, c. 249).

The action was dismissed with costs by GREENE, J., he being of opinion that the liability of the La Roche company came to an end with the sale of its mining properties. An appeal to the Court of Appeal was allowed.

That court held that under the contract the La Roche company was

- F under an obligation to see that, during the continuance of the mining life of the properties owned by it at the time of the contract, no system of electricity other than that furnished by the power company should be used on those properties, and that that obligation was still existent. They held, however, that, by virtue of the joint operation of sects. 22 and
G 59 of the Public Utilities Act, the duration of the contract must be limited to 10 years from Dec. 30, 1931. They accordingly declared (i) that the La Roche company was under the obligation stated above, but not after Dec. 30, 1941, and (ii) that it had repudiated that obligation, and that the power company was entitled to the damages resulting therefrom.

- H The power company has now appealed to His Majesty in Council against this limitation of liability to a period of 10 years, and by cross-appeal the La Roche company seeks to have the judgment of the trial judge restored, upon the alternative grounds (a) that, upon its true construction, the contract came to an end with the sale of the said two mining claims, or (b) that in any event the effect of sects. 22 and 59 of the

Public Utilities Act on the present case is not to limit the operation of the contract to a period of 10 years, for that would be to make a new and a different contract between the parties, but to make the contract void *ab initio*.

As regards the effect of sects. 22 and 59 of the Public Utilities Act, their Lordships feel no difficulty. They agree with the view expressed by the Court of Appeal, and with the grounds upon which that view is based, and they are of opinion, assuming that, upon the true construction of the contract, some obligation continued to bind the La Roche company, notwithstanding that it had ceased to own the said two mining claims, that the contract, and with it the obligation, would come to an end with the expiration of 10 years from the date of the contract. They see no reason for holding either that the capacity of the power company to contract for the supply of a public utility is not by the sections restricted to a period not exceeding 10 years, or that a contract which purports to, or which may on its terms, extend beyond that period is not valid and binding during the period.

The question of construction their Lordships find more difficult, the difficulty arising from the structure and language which the power company has chosen to employ in framing its standard forms. The contract presents certain features to which attention must be called. There is no definition clause extending the meaning of the word "consumer." It means throughout, and means only, the La Roche company. General condition No. 13 has no bearing upon this. That condition has only a very limited operation in such a case as the present; the reference to "survivors and executors or administrators" is in relation to these parties meaningless. The condition can come into play only if and when the La Roche company has made an effective assignment of the contract, in which case the assignee will become the "consumer." Further, while the power company is bound to supply, but with the protection which is afforded to it by general conditions Nos. 6, 8, 9 and 11 and cl. 14 of the transmission-line agreement, the consumer is under no liability to take, though he is under a liability to pay for 50 h.p. for the first year. The consumer is, however, bound by the negative provision contained in general condition No. 6—namely, that, during the continuance of the contract, no system of electricity other than that furnished by the power company shall be used "in said premises." Upon the pleadings as they stand, it is difficult to see how any damage could have been sustained by the power company at the date of the writ, because, as already stated, power was being supplied by the power company, and was being paid for, as required by the contract, right up to the time of the trial. The Court of Appeal, however, have treated the real matter in dispute, and their Lordships think rightly, as being whether the negative obligation imposed by general condition No. 6 still existed as an obligation binding upon the La Roche company. General condition No. 6 and the provision which defines the period of contract are the crucial clauses, and the

answer to the question in controversy depends upon what is their joint effect.

On the one hand, it is said that, so long as the claims H.R. 1001 and H.R. 1002 have mining life in them (and it is not disputed that their mining life still continues), then, no matter who operates, owns or controls them, the contract continues on foot, and with its continuance the negative obligation remains binding on the La Roche company. This is the view adopted by the Court of Appeal. On the other hand, it is contended that the period-of-contract clause is so worded that the mining life which it contemplates is, in the events which have happened, the mining life while the properties are being operated or owned or controlled by the La Roche company.

The question is not free from difficulty, but, after a careful consideration of the arguments presented, their Lordships think that the latter view is the correct view, and not the former. The former view attributes to the parties an intention to impose and to assume a most unusual liability—namely, a liability in respect of property which the party liable neither occupies, owns, nor controls. It would require very plain words to establish such an intention. On the other hand, there is every indication that the contract is dealing with the supply of power to the La Roche company while in personal occupation, ownership or control of the property. Thus, as pointed out, there is no extended definition of “consumer.” It means the La Roche company only. The contract is not assignable, except with leave. If an effective assignment were to take place, the assignee would then become the consumer, for the purposes of the contract. The current is to be used by the consumer only. So read, the contract becomes intelligible, and imposes no extraordinary obligation. The consumer (whether the La Roche company or a permitted assign of the contract) is bound, while in occupation, ownership or control of the property, to observe both the positive provisions in regard to power supplied and the negative provision against getting power elsewhere. When, however, as has happened, the La Roche company ceased to occupy, own or control the property, and no one became by assignment the consumer under the contract, the contract necessarily came to an end. Their Lordships are of opinion that the appeal should fail, that the cross-appeal should succeed, and that the judgment of the trial judge should be restored. They will humbly advise His Majesty accordingly. The power company must pay the costs of the appeals to the Court of Appeal and to His Majesty in Council.

Appeal dismissed, and cross-appeal allowed. Judgment of the trial judge to be restored. The power company to pay the costs of the appeals to the Court of Appeal and to His Majesty in Council.

Solicitors : *Blake & Redden* (for the Northern Ontario Power Co., Ltd.) ; *Charles Russell & Co.* (for La Roche Mines, Ltd., and the liquidator of that company).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

DISMORE *v.* MILTON.

[COURT OF APPEAL (Greer and Slessor, L.J.J.), July 26, 1938.]

Limitation of Actions—Statement of claim showing cause of action accruing before statutory period—Whether defendant can have statement of claim struck out—Possibility of plaintiff pleading exceptions to statute—Limitation Act, 1623 (c. 16), s. 7—R.S.C., Ord. 25, r. 4. A

In an action for slander, it appeared from the statement of claim that, except in one instance, the alleged slanderous statements had been uttered more than two years before the issue of the writ. It had been ordered upon an application by summons that so much of the statement of claim as referred to the alleged slanderous statements, except that in the one instance above referred to, should be struck out :—

HELD : where it appears from a statement of claim that the plaintiff's cause of action arose at a time before the period prescribed by the Statute of Limitations, it is not possible for the defendant to have the statement of claim struck out on the ground that it discloses no cause of action, except in cases to which the Real Property Limitation Acts apply. B

[EDITORIAL NOTE. In personal actions, the cause of action remains, even though the period prescribed by the appropriate statute of limitation has elapsed. "It cannot be predicated," EARL CAIRNS, L.C., said in *Dawkins v. Penrhyn* (Lord) (3), at p. 59, "that the defendant will appeal to the Statute of Limitations for his protection; many people, or some people at all events, do not do so; therefore you must wait to hear from the defendant whether he desires to avail himself of the defence of the Statute of Limitations or not." In a claim to real property, the title of the plaintiff is extinguished by the expiry of the period allowed by the statute, and therefore the statement of claim would disclose no title in the plaintiff. It would appear that statements in textbooks have caused some confusion on this point, but the law is now clearly stated in the judgments herein. C

AS TO PLEADING STATUTES OF LIMITATION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 777-779, paras. 1074-1076; and FOR CASES, see DIGEST, Vol. 32, pp. 540-547, Nos. 1926-2000. See also YEARLY SUPREME COURT PRACTICE, 1938, pp. 394-396.] D

Cases referred to :

- (1) *Stile v. Finch* (1634), Cro. Car. 381; 32 Digest 545, 1935. F
- (2) *Hawkings v. Billhead* (1635), Cro. Car. 404; 32 Digest 541, 1934.
- (3) *Dawkins v. Penrhyn* (Lord) (1878), 4 App. Cas. 51; 32 Digest 484, 1463; 48 L.J.Ch. 304; 39 L.T. 583.
- (4) *Price v. Phillips* (1894), 11 T.L.R. 86; 32 Digest 468, 1328.
- (5) *Wakelee v. Davis* (1876), 25 W.R. 60; 32 Digest 545, 1987. G
- (6) *Peru Republic v. Peruvian Guano Co.* (1887), 36 Ch. D. 489; 1 Digest 46, 364; 56 L.J.Ch. 1081; 57 L.T. 337.
- (7) *Murray v. Secretary of State for India in Council*, [1931] W.N. 91; Digest Supp.

APPEAL from an order of LAWRENCE, J., dated July 8, 1938. H

On May 13, 1938, the plaintiff issued a writ claiming damages in respect of slanders which were alleged to have been uttered on June 20, 1934, Jan. 7, 1936, Mar. 18, 1936, and May 2, 1937. The defendant applied by summons to the master for an order striking out the statement of claim in regard to all the slanders except the one alleged to have been

uttered on May 2, 1937. The order sought was made, and upheld by the judge.

A. T. Denning, K.C., and F. Ashe Lincoln for the appellant.

Greer Jackson for the respondent.

- Denning, K.C.* : The judge was misled by the statements in *GATLEY ON LIBEL AND SLANDER*, 3rd. Edn., pp. 416, 512, and in *THE ANNUAL PRACTICE*, 1938, p. 431. They are based on *Price v. Phillips* (4), but that was a case dealing with a claim to real property. The old rule has been established ever since *Stile v. Finch* (1) and *Hawkings v. Billhead* (2). [Counsel also referred to *Wakelee v. Davis* (5).]
- Jackson* : The judge was satisfied by *Price v. Phillips* (4). Here is a statement of claim which, if the Statute of Limitations is pleaded, must fail. If there are facts taking this case out of the Statute of Limitations, they would have been mentioned to the master when this case was before him, and leave to amend would have been given.
- It has been the practice to strike out statements of claim in such a case. [Counsel referred to *Peru Republic v. Peruvian Guano Co.* (6) and *Murray v. Secretary of State for India in Council* (7).]
- Denning, K.C.*, was not called on in reply.

- GREER, L.J.* : Notwithstanding the persuasive argument which has been addressed to us by Mr. Jackson, we are of the opinion that the law of this country upon the point here raised has been settled ever since the decisions of *Stile v. Finch* (1) and *Hawkings v. Billhead* (2). It has been well summarised by *EARL CAIRNS, L.C.*, in *Dawkins v. Penrhyn (Lord)* (3). Where it appears from the statement of claim that the plaintiff's cause of action arose at a time before the period prescribed by the Statute of Limitations, it is not possible for the defendant to have the statement of claim struck out on the ground that it discloses no cause of action, except in cases to which the Real Property Limitation Acts apply. The reason for this is sound. It is because a plaintiff may be able to show that he is entitled to bring his action, notwithstanding the expiration of the statutory period, by reason of one of the exceptions contained in the Limitation Act, 1623, s. 7. When the cause of action arose, he may have been an infant, or *non compos mentis*. I am rather impressed by the fact that Croke himself doubted whether this were so, but he was overruled by his brethren, and the law laid down then has been applied ever since. It is true that there are statements to the opposite effect in *GATLEY ON LIBEL AND SLANDER*, 3rd Edn., pp. 416, 512, and in *THE ANNUAL PRACTICE*, 1938, at p. 431. The consequence is that in the present action there has been made in chambers an order which never ought to have been made. It may well be that the rule should be altered in order to give effect to the argument to which we have listened. It may well be desirable to put an early end to actions which perhaps never ought to have been brought, but, as the law stands, the plaintiff may wait for the defendant to plead the statute of limita-

tions, and, if the latter does so, he may be able in his reply to show that the case comes within one of the exceptions. For these reasons, this appeal must be allowed, with such costs as are applicable on the poor persons' scale.

SLESSER, L.J. : I am of the same opinion, but, in so far as this court is declaring the law to be different from that which is laid down in GATLEY ON LIBEL AND SLANDER and in THE ANNUAL PRACTICE, 1938, I think it desirable to add a few words. The matter was made clear by EARL CAIRNS, L.C., in *Dawkins v. Penrhyn* (Lord) (3), where he draws the very contrast which we have here to consider. Speaking of actions relating to real property, he says, at p. 59 :

The plaintiff has to state his title, the title upon which he means to rely, and the Statute of Limitations with regard to real property says that when the time has expired within which an entry or a claim must be made to real property, the title shall be extinguished and pass away from him who might have had it to the person who otherwise has the title by possession, or in whatever other way he may have it.

Price v. Phillips (4) was also a case dealing with a claim to real property, where the defence relied on the Real Property Limitation Act, 1833. That case is erroneously cited in GATLEY ON LIBEL AND SLANDER and in THE ANNUAL PRACTICE, 1938, as being an authority with regard to the application of the Statute of Limitations to personal actions. It is stated by EARL CAIRNS, L.C., in *Dawkins v. Penrhyn* (Lord) (3), at p. 59 :

... as to personal actions, the cause of action may remain even although six years have passed.

He is speaking of the limitation of six years which applies to many causes of action. Exactly the same considerations apply to a limitation of two years. The Statute of Limitations is not absolute. By reason of the exceptions contained in sect. 7, it may be that a limitation which would otherwise apply will not apply, and, until the statute is pleaded, there is no opportunity for the plaintiff to raise the point that the statute does not apply by reason of one of the exceptions in sect. 7.

From these considerations, and from the earlier cases going back to the reign of Charles I, it follows that it is not appropriate in a personal action, although it appears on the face of the statement of claim that the period was longer than the period allowed by the statute, to apply to have the action struck out as showing no cause of action. The reply may show that there is a cause of action. For these reasons, I agree that the appeal must be allowed.

Appeal allowed, with costs on the poor persons' scale.

Solicitors : *Theodore Goddard & Co.* (for the appellant) ; *Blewitt & Son* (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

JOHNSON v. JOHNSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), **June 27, July 15, 1938.**]

Divorce—Desertion—Previous proceedings for judicial separation abandoned—Whether petition barred—Matrimonial Causes Act, 1937 (c. 57), s. 6.

A

The wife deserted her husband in Nov., 1933. On Sept. 18, 1937, the husband presented a petition for judicial separation based upon his wife's desertion for more than two years. After the wife had entered an appearance, the husband withdrew the petition. On Feb. 10, 1938, the husband presented a petition for divorce based upon his wife's desertion for three years immediately preceding the presentation of the petition.

B

It was suggested that, upon the authority of *Stevenson v. Stevenson* (1), the second petition would not lie :—

HELD : as the Matrimonial Causes Act, 1937, s. 6, enacted that the petition would not be barred if the previous petition had been prosecuted to a decree, it was not barred by the abandoned proceedings.

C

[EDITORIAL NOTE. It seems clear that the result of this decision is that the case of *Stevenson v. Stevenson* (1) is overruled, and that proceedings for judicial separation do not now prevent the continuance of the period of desertion.

AS TO EFFECT OF PETITION OR JUSTICES' ORDER ON DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 658, 659, paras. 968, 969 ; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.]

D

Case referred to :

(1) *Stevenson v. Stevenson*, [1911] P. 191 ; 27 Digest 320, 2986 ; 80 L.J.P. 137 ; 105 L.T. 183.

E

HUSBAND'S PETITION for divorce on the ground of his wife's desertion, the only question being whether the petition was barred by the fact that the petitioner had presented a petition for judicial separation based on the same facts.

Theodore Turner for the petitioner.

F

HODSON, J. : The petitioner was married on Aug. 15, 1927, and his wife deserted him towards the end of 1933. He endeavoured to get her to return to him, but she refused. There is no doubt that the desertion on her part began in Nov., 1933, so that at the time of the coming into operation of the Matrimonial Causes Act, 1937, on Jan. 1, 1938, the period of desertion required by the Act was complete.

G

The difficulty in the case is really of a technical nature, having regard to the decision of the Court of Appeal in *Stevenson v. Stevenson* (1). The petitioner presented a petition on Sept. 18, 1937, for judicial separation from his wife on the ground of her desertion. The duration of the desertion relied on in that petition was two years, which was sufficient

H

to support a petition for judicial separation. The respondent entered an appearance on Sept. 20, 1937, but took no further step, and eventually the petition for judicial separation was dismissed on the petitioner's application. The petition for divorce, dated Feb. 10, 1938, is on the ground of desertion for three years immediately preceding the presentation of the petition. The difficulty which arises is due to the fact that the

Matrimonial Causes Act, 1937, requires a petitioner to prove desertion without cause for at least three years immediately preceding the petition. On the face of it, during part of the period the petitioner, so far from being deserted by his wife, was praying the court to keep her away. By his petition for judicial separation he was asking the court to direct a separation from his wife on the ground of her desertion of him. In *A Stevenson v. Stevenson* (1), SIR H. H. COZENS-HARDY, M.R., said at p. 194 :

The presentation of the petition and its continuance on the files of the court prevented the subsequent desertion from being without excuse. She was praying the court to require her husband to keep away.

I have to consider whether the decision of the Court of Appeal in that case compels me to dismiss this petition. It would be very unfortunate if that were the result. Looking at sect. 6 of the Act of 1937, it appears that the legislature had in mind cases where decrees of judicial separation had been pronounced. It enacted :

(1) A person shall not be prevented from presenting a petition for divorce, or the court from pronouncing a decree of divorce, by reason only that the petitioner has at any time been granted a judicial separation or an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, upon the same or substantially the same facts as those proved in support of the petition for divorce. C

(2) On any such petition for divorce, the court may treat the decree of judicial separation or the said order as sufficient proof of the adultery, desertion, or other ground on which it was granted, but the court shall not pronounce a decree of divorce without receiving evidence from the petitioner. D

(3) For the purposes of any such petition for divorce, a period of desertion immediately preceding the institution of proceedings for a decree of judicial separation or an order under the said Acts having the effect of such a decree shall, if the parties have not resumed cohabitation and the decree or order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce. E

It appears, therefore, that, if the petitioner in this case had prosecuted his petition for judicial separation, and obtained a decree, he could have presented a petition for divorce and relied on the period of desertion immediately preceding the presentation of the former petition. It would be an odd result if he were to be in a worse position because he abandoned the petition for judicial separation and started new proceedings on substantially the same ground. I do not think that I am bound so to hold. It seems to me, therefore, that in this case I am entitled to say that, the desertion having been for a period of three years immediately preceding the presentation of the former petition, the petitioner is entitled to succeed. There will be a decree *nisi*. F G

Solicitors : *Pickard & Co.* (for the petitioner).

[Reported by J. F. COMPTON MILLER, Esq., *Barrister-at-Law.*]

Re FORSTER, GELLATLY v. PALMER.

[CHANCERY DIVISION (Bennett, J.), June 14, 15, July 28, 1938.]

Charities—Relief of poverty—Religious purposes—Advancement of religion—Relief of infirm, sick and aged priests.

A The testatrix bequeathed £200 payable annually out of the income of her residuary estate to the treasurer of a society for the relief of infirm, sick and aged Roman Catholic secular priests in the C. diocese. It was contended that this was a good charitable gift, on the grounds (i) that it was a trust for the relief of poverty, and (ii) that it was a trust for the advancement of religion:—

B HELD: (i) the funds were not clothed with a trust for the relief of poverty.

(ii) they were clothed with a trust for the advancement of religion.

[EDITORIAL NOTE. His Lordship gives as his reason for holding that the trust is not one for the relief of poverty that the effect of so holding would be to make it *ultra vires* the society to aid a priest who was not poor. Such a finding would make poverty an essential qualification of the recipients of relief from the fund. On the other hand, he finds no difficulty in reaching the conclusion that the trust is one for the advancement of religion, since it gives those actively engaged in the ministry a sense of security.

AS TO GIFTS FOR THE ADVANCEMENT OF RELIGION, see HALSBURY, Hailsham Edn., Vol. 4, pp. 118-122, paras. 155-160; and FOR CASES, see DIGEST, Vol. 8, pp. 248-254, Nos. 74-160.]

D Cases referred to:

(1) *Re Lucas, Rhys v. A.-G.*, [1922] 2 Ch. 52; Digest Supp.; 91 L.J. Ch. 480; 127 L.T. 272.

(2) *Re Clark's Trust* (1875), 1 Ch. D. 497; 8 Digest 262, 241; 45 L.J. Ch. 194.

E ADJOURNED SUMMONS for the determination of the question whether the gift of a perpetual annual payment out of the income of the residue of the estate of the testatrix was a valid charitable gift as being a gift for the relief of poverty or for the advancement of religion.

Roger Turnbull for the plaintiff, an executor of the will.

F *C. E. Harman, K.C.*, and *Henry Johnston* for the first two defendants.

J. Norman Daynes, K.C., and *Hon. Charles Russell* for the third defendant, a trustee of the will.

R. F. Roxburgh, K.C., and *Frederick McMullan* for the fourth and fifth defendants, the other trustees of the will.

G *C. R. R. Romer, K.C.*, and *L. W. Byrne* for the Public Trustee.

J. W. Brunyate (*A. Andrewes Uthwatt* with him) for the Attorney-General.

BENNETT, J.: The question to be determined is whether a gift by the testatrix out of the income of her residuary estate of £200 to be paid H annually to "the treasurer of the Society for Infirm Roman Catholic Priests of the diocese of Clifton" takes effect or fails. There is no society of that name, which is the name mentioned in the will, but there is a society named the Society for the Relief of Infirm, Sick and Aged Roman Catholic Secular Priests in the Clifton Diocese, of which society the defendant, the Very Rev. Canon Iles, is the treasurer. It is admitted that this was

the society which the testatrix intended to benefit. The gift is, however, a gift in perpetuity, and it will, therefore, fail unless the Society for the Relief of Infirm, Sick and Aged Roman Catholic Secular Priests in the Clifton Diocese is a charity, or its funds clothed with charitable trusts.

The society was constituted by a deed of settlement dated Nov. 10, 1862, and its affairs are managed in accordance with that deed. The purposes for which its funds may be used are settled by the provisions of that deed and of a supplemental deed of Sept. 29, 1897. A

The earlier deed recited that the parties thereto were, with others, desirous of establishing at Clifton a society for the relief of aged and infirm priests of the Roman Catholic religion, to be supported by donations and subscriptions, and that the sum of £700 had then already been subscribed or given for that purpose, and was vested in certain named trustees for the purposes thereafter declared. The deed contained provisions for determining who might be the members of the society, how its funds were to be applied, and how and by whom its affairs were to be managed. The provisions of this deed in regard to membership of the society and the application of its funds were superseded by the supplemental deed of 1897. The relevant provisions in regard to these matters are now contained in the lettered paragraphs of cl. 2 of that deed, which read as follow : B

(A) The name of the society shall be "the Society for the Relief of Infirm, Sick and Aged Roman Catholic Secular Priests in the Clifton Diocese." (B) Any Roman Catholic secular priest if formerly incorporated in the diocese of Clifton and not now a member may apply to be admitted a member of the society. Every member shall pay an entrance fee of £2 2s. and an annual subscription of £1 1s. Any member may become a life member so far as regards future immunity from the payment of subscriptions on payment of the entrance fee and a gross sum of £15 15s. (C) Applications for membership shall be considered by the committee and the committee may proceed to elect or decline to elect the applicant. The committee shall have regard to the age and state of health of the applicant, the date of his ordination and the length and circumstances of his connection with or work in the diocese. (D) The funds of the society shall be applicable for the relief of infirm, sick and aged Roman Catholic secular priests members of the society. (E) Relief may be voted and paid by the committee in such manner to such an amount and for such period as the committee may from time to time direct having regard to the circumstances of each case, the funds available, and the calls, or probable calls, thereon. All relief so voted shall be reported to the next general meeting. (F) In case a member shall leave the diocese for any other than a temporary purpose he shall except in the event hereinafter mentioned cease to be a member, provided that any member leaving the diocese may apply to the committee for permission to remain a member, and the committee shall in that case decide whether such permission shall be granted or refused. A member applying in such case for permission to remain in the society and to whom a refusal shall be given and who may not have rendered himself liable to expulsion under subsect. H shall be entitled to a return of all subscriptions paid by him to the society (but not the entrance fee) less the amount of any relief which may have been granted to him. (G) Any income not required for the purposes of the current year shall be invested and accumulated. The accumulations may however be applied as income in any subsequent year. (H) The society in general meeting may expel any member who shall have ceased to profess the Roman Catholic religion or who may have been guilty of any scandalous misconduct. Any member who shall be expelled under this clause shall forfeit his entrance fee and all subscriptions paid. (I) All capital moneys and unapplied income from time to time remaining in the hands of the society or the trustees thereof may be invested in the names or under the legal control of the trustees in or upon any of the government securities of the United Kingdom or any colony or dependency thereof upon freehold or leasehold securities in England or Wales or the debentures, shares or stocks of any municipal corporation or trading company carrying on business in the United King- C

D

E

F

G

H

dom or any colony or dependency thereof, and the investments may be varied. (J) The society may in general meeting frame and from time to time repeal or alter bye-laws as to the general management of the society, and in particular may vary cl. 2, 5, 6, 9, 10, 11, 14 and 15 of the said settlement. Such bye-laws shall be valid if passed by a resolution carried by a majority of the votes of the members present at such meeting. Such bye-laws shall not vary the clauses hereinbefore contained and distinguished as cl. 2, subsects. A to J inclusive, or cl. 19 and 21 of the said settlement.

A

Those are the provisions which have to be considered in order to determine whether the society is a charity, or its funds clothed with charitable trusts.

The first argument advanced on behalf of the defendant, Canon Iles, and supported by the Attorney-General, was to the effect that the priests to be relieved out of the funds of the society must be not only infirm, sick and aged, but also poor, and that, therefore, the purpose of the society was the relief of poverty. Reliance was placed upon the decision of LORD RUSSELL OF KILLOWEN, when a judge of first instance, in *Re Lucas, Rhys v. A.-G.* (1), where there was a gift of income in perpetuity to the oldest respectable inhabitants in Gunmill to the amount of 5s. per week. The judge was able to imply, from the amount of the gift, that poverty was a necessary qualification of a beneficiary. The present case is quite a different one. The gift is to the society for the purpose of augmenting its funds, and the question whether or not the priests to be relieved must be qualified by poverty depends entirely upon the provisions in the trust deed by which it is constituted, and not upon the terms of the will of the testatrix. The argument was almost entirely based upon the use of the word "relief" in the title of the society, and in cl. 2 of the supplemental deed of 1897. This word, it was said, connoted poverty, and showed that the intention of the deed was that those who were to be relieved must be poor. I agree that the word "relief" is often used in a context which indicates poverty, but it is not so used exclusively. If I were to give effect to this argument, a consequence of it would be that the trustees of the society would be acting *ultra vires* if they assisted a priest who was not poor. I am not prepared to hold that poverty is an essential qualification of the recipients of relief out of the society's funds, and, in my judgment, the argument that the society is a charity because its funds are clothed with a trust for the relief of poverty fails.

G

The second ground taken was that the society is a charity because its funds are clothed with a trust for the advancement of religion. I hold that on this ground the gift can be supported. Indirectly, I think that the cause of religion is advanced by a fund which is to be employed to assist sick, aged and infirm ministers of religion. Such a fund, I think, tends to make the ministry more efficient, by making it easy for the sick and old to retire and give place to the young and healthy. It may also, I think, ease the minds of those actively engaged in the ministry to know that there is this fund to be used for their relief when they are overtaken by old age or struck down unexpectedly by sickness.

H

It was argued that the society was not a charity at all, but a mere friendly society, indistinguishable from the friendly society which had to be considered by SIR CHARLES HALL, V.-C., in *Re Clark's Trust* (2). It appeared from the rules of that society that it was one whose members were to provide, by subscriptions and fines, a fund to be distributed for their common benefit, in case of sickness, lameness, or old age, and that poverty was not required to entitle a member to an allowance. It was, therefore, held that that society was not a charitable institution. It was a mere businesslike association. The society in this case seems to me to be quite different. Its purpose is to relieve ministers of religion, in case of old age, sickness or infirmity. Its funds are mainly derived from donations from non-members. It is not a mere businesslike association of members. Its purpose is to assist a particular class of priest. Since that purpose, in my judgment, tends to advance religion, I hold it to be a charitable institution, and so I distinguish the case from *Re Clark's Trust* (2).

Solicitors: *Gellatly, Son & Taylor* (for the plaintiff and the Public Trustee); *Barlow, Lyde & Gilbert*, agents for *Ivens, Thompson & Green*, Cheltenham (for the first two defendants); *Gibson & Weldon*, agents for *New & Saunders*, Evesham (for the third defendant); *Wedlake, Letts & Birds*, agents for *Gidley & Wilcocks*, Plymouth (for the fourth and fifth defendants); *Treasury Solicitor* (for the Attorney-General).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

WATSON v. WATSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), June 27, July 28, 1938.]

Divorce—Desertion—Separation agreement five years after commencement of desertion—Husband's failure to pay thereunder—Whether continuing desertion—Matrimonial Causes Act, 1937 (c. 57), s. 2 (b).

In 1924, the respondent deserted the petitioner, leaving her with a young child of 6 years of age. Three months later he made an offer to provide a room for his wife, which it was held that she was entitled to reject. In 1929, a separation agreement was signed by the parties, reciting that the wife was entitled to an order for maintenance in a court of summary jurisdiction and containing in the operative part a clause providing that they should live separate and apart and an agreement for the payment by the husband of 15s. weekly during the joint lives. Under this agreement the total payments made by the husband were £4 10s. :—

HELD: the parties did not separate under the separation agreement, and it was a mere incident in the desertion. The terms of the agreement were not observed by the respondent, nor sought to be enforced by the petitioner. On the facts, there had been desertion for a period of three years and upwards preceding the date of the petition, and the petitioner was entitled to a decree *nisi*.

[EDITORIAL NOTE. In the present case, the separation agreement was entered into, not upon the separation of the parties, but some time after they had been

living apart. It contained a provision that they should live apart, and it was therefore possible to regard it as a termination of the desertion. This view is avoided, however, by the fact that the husband never in substance observed its terms.

AS TO DESERTION AND SEPARATION DEEDS, see HALSBURY, Hailsham Edn., Vol. 10, p. 657, para. 966; and FOR CASES, see DIGEST, Vol. 27, pp. 317, 318, Nos. 2940-2956.]

Cases referred to :

- (1) *Tress v. Tress* (1887), 12 P.D. 128; 27 Digest 280, 2501; 56 L.J.P. 93; 57 L.T. 501.
- (2) *Cock v. Cock* (1864), 3 Sw. & Tr. 514; 27 Digest 317, 2941; 33 L.J.P.M. & A. 157; 10 L.T. 726.
- (3) *Hussey v. Hussey* (1913), 109 L.T. 192; 27 Digest 317, 2948.
- (4) *Smith v. Smith*, [1915] P. 288; 27 Digest 317, 2949; 85 L.J.P. 16; 113 L.T. 1166.

WIFE'S UNDEFENDED PETITION for dissolution of marriage on the ground of desertion for a period of at least three years preceding the presentation of the petition. The facts are fully stated in the judgment. *Acton Pile* for the petitioner.

HODSON, J. : In this case, the petitioner has proved to my satisfaction that her husband deserted her in 1924, when he walked out of the house using some abusive expressions to his wife, since when he has never returned. It is true that, having left his wife and a young child, a girl then only six years of age, three months later he did make an offer of a kind—to provide a bed-sitting room for his wife, in another part of the town in which he and his wife had lived together. The petitioner looked over the premises, and was told by her husband that there was room for her, but not that there was any room for the little girl, to whom no reference was made. Having seen the sort of place it was, she decided—as I think she was entitled to do—that the offer was not a genuine offer, and she did not accept it. Thereafter the desertion continued. The case stood over, in order that I might consider the effect of an agreement signed on July 17, 1929, more than five years after the actual separation. The agreement signed by the husband and by the wife begins with this recital :

Whereas the husband has deserted the wife and she is entitled to an order for maintenance in a court of summary jurisdiction and whereas the parties are desirous of avoiding the publicity of proceedings for such an order they have agreed to enter into the arrangement hereinafter contained.

That recital involves an admission by the husband that he had deserted his wife during the preceding five years, and confirms the view which I have taken as to the desertion which existed up to that time. The operative part of the agreement, however, begins with a clause in the following terms :

Now it is hereby agreed : That the parties shall henceforth live separate and apart from each other and neither of them shall molest the other. . . . The husband shall pay to the wife during their joint lives the weekly sum of 15s. so long as she shall remain chaste such weekly payment to commence on July 23, 1929, and to be paid on every Tuesday morning.

The next provision is that the wife shall have the custody of the child, and there is a further provision that, if, by reason of the neglect of the wife, the child shall become chargeable to the parish, the agreement shall be void. The concluding provision states that :

Nothing herein contained shall operate to bar the wife in the event of a breach of this agreement on the part of the husband from her right to a maintenance order or other order under the Summary Jurisdiction Acts. A

No support was ever forthcoming from the husband to the wife, either for herself or for the child, until the execution of this document. In 1929, the wife was in financial need, and it was in those circumstances that she consulted solicitors, and the document came into existence as being a means by which she hoped she might obtain some financial provision from her husband. He never paid any substantial sum under the agreement. Indeed, his total payments amounted in all to £4 10s. The wife has never enforced the agreement against her husband, and has never attempted to do so. She carried on as best she could, by letting rooms, and by keeping, or helping in keeping, a shop. The husband repudiated the deed, and, indeed, scarcely complied with it at all. B

The question is whether the fact that this document was signed prevents the desertion, which had run for five years from 1924 to 1929, from running thereafter until the date of this petition. It was argued before me that, the husband not having set up the deed as a defence, it was not incumbent upon the court to do so, on the authority of certain cases, of which an illustration is *Tress v. Tress* (1). *Tress v. Tress* (1) was a suit for restitution of conjugal rights, and I do not think that one can get authority for the proposition that the court is not bound to set up the deed in a case such as the present from a suit for restitution of conjugal rights. In those cases, it is incumbent upon a petitioner to prove that the respondent has refused, and still refuses, to render conjugal rights, and, in order to satisfy the burden of proof, the petitioner has to prove a demand and a refusal, and it is implicit in that that the petitioner must be ready and willing to take the other spouse back. It is not necessary, however, as it is in this case, affirmatively to prove desertion. The parting preceding a suit for restitution of conjugal rights may have originated in desertion by the petitioner. In *Cock v. Cock* (2), the Judge Ordinary stood over the case, where desertion was alleged, in order to consider the effects of a deed entered into by the husband and the wife some months before the actual parting. He said, at pp. 514, 515 : C

It is clear that any separation between husband and wife, which is the result of mutual agreement, cannot constitute the "desertion" which the statute has made a ground of divorce. D

I think that it is quite clear that, if the separation is really, on investigation of the facts, found to be a separation by agreement, there can be no desertion, and, of course, a document such as a separation agreement is one of the matters at which one has to look. E

There have been cases, however, where, notwithstanding the existence of agreements of separation, the court has been able to find desertion, and F

A

B

C

D

E

F

G

H

two cases to which I have been referred are *Hussey v. Hussey* (3) and *Smith v. Smith* (4). In both these cases, desertion having taken place, the deserting spouse entered into an agreement with the deserted spouse, and repudiated the agreement after making a few payments. In *Smith v. Smith* (4), HORRIDGE, J., said, at p. 289 :

A I am prepared to hold that there was desertion, but I do so on the particular facts of this case. . . . It must not be taken, where parties separate under a deed, that I should hold there has been desertion merely because the husband has failed to pay the allowance provided by the deed.

B In this case, the parties did not separate under a deed at all, but because the husband deserted the wife, and the execution of the separation agreement was a mere incident in that desertion. It was not followed by the respondent observing the terms of the agreement, nor was it in any way sought to be enforced by the petitioner.

C On the facts of this case, I find that the respondent has deserted his wife for a period of three years and upwards immediately preceding the date of this petition, and there will be a decree *nisi*.

Solicitor : *H. W. Newton* (for the petitioner).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

D

STARKEY v. STARKEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (HODSON, J.), July 25, 1938.]

E

Divorce—Desertion—Separation agreement—Treated as nullity—Continuance of desertion—Matrimonial Causes Act, 1937 (c. 57), s. 2 (d).

F

On a wife's undefended petition for divorce on the ground that the husband had deserted her without cause for a period of at least three years immediately preceding the presentation of the petition, it appeared that the parties had entered into a deed of separation in 1932, but that no payment had ever been made under the deed, and that the husband had treated it as a nullity :—

HELD : the desertion had continued, notwithstanding the execution of the deed.

G

[EDITORIAL NOTE. Under the old law, it had been decided that desertion ceased upon the execution of a separation agreement. An exception to this was made where the deed was not acted upon by the parties thereto. It is now clear that this exception also applies to the three-year period under the Matrimonial Causes Act, 1937, which is necessary for divorce on the grounds of desertion.

H

AS TO DESERTION AS AFFECTED BY SEPARATION AGREEMENTS, see HALSBURY, Hailsham Edn., Vol. 10, p. 657, para. 966 ; and FOR CASES, see DIGEST, Vol. 27, pp. 317, 318, Nos. 2940-2963.]

PETITION by wife for dissolution of marriage on the ground of desertion without cause for three years immediately preceding presentation of the petition.

H. B. D. Grazebrook for the petitioner.

HODSON, J. : In this case, difficulty is presented by reason of the fact that a deed of separation was entered into between the parties. Having been married in 1914, the respondent and petitioner lived happily together until July, 1925, when their child was born. After the birth of the child, the respondent began to drink to excess, and to remain away from home for long periods, returning only at irregular intervals—more A irregular than those required by the exigencies of business. The situation really became very serious by the end of 1931 and the beginning of 1932, when the respondent, after an absence from home, returned for a short time. He left in a drunken temper, since when he has not returned. The child remained with the wife. Thereafter, the wife made a number B of efforts to get her husband to return to her, she being anxious that the home should be restored, but it never was restored. The wife consulted solicitors, but the husband did not. An agreement was drawn up which provided for a payment by the husband to the wife of £2 10s. per week. It is difficult to discover why the agreement was signed. The hus- C band, at any rate, from the start treated the agreement as if it were not an agreement at all. In these circumstances, I think that it is right to say that the desertion which began at the beginning of 1932 has continued, notwithstanding the fact that the separation agreement was entered into, until the date of the petition. The last attempt by the D wife to get the respondent to return to her was made as recently as 1935. The child has been with the wife all the time, and the husband has not seen the child latterly at all. I do not think that it can be said that the deed of separation has operated in any way, or to any material extent, so far as the relations between the husband, the wife, and the child are E concerned. There will be a decree *nisi*, with costs and custody.

Solicitors : *Prebble & Elson* (for the petitioner).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

SIMONS v. WINSLADE.

[COURT OF APPEAL (Greer, Slessor and MacKinnon, L.JJ.), July 8, 1938.]

Negligence—Invitee—Yard forming part of licensed premises—Customer slipping in yard—Standard of care owed by proprietor. G

At 9 p.m. on Aug. 2, 1937, the plaintiff, who was a customer at a public-house kept by the defendant, was crossing a yard attached to the public-house in order to get to a convenience situated at the far end of the yard, when he slipped on some vomit and sustained injuries. It was dusk at the time, and the yard was unlighted. It was proved in evidence that the landlord had inspected the yard at 6 p.m. and cleaned it out then. It was further proved that during the two previous years H only one other customer had vomited in the yard :—

HELD : (i) the plaintiff, while in the yard, was still an invitee.

(ii) this was a danger which the landlord could not reasonably be expected to guard against, and he had not failed in any duty owed to an invitee.

[EDITORIAL NOTE. The principles applicable to a case of this nature have long been settled, the only difficulty that can arise being their application to varying classes of facts. The present case raises two questions: (a) the extent of the invitation, if there was one, and (b) whether there was an invitation or merely a licence. These questions in relation to the particular facts of this case do not appear to have been made the subject of a previous decision.

- A** AS TO INVITEES ON LICENSED PREMISES, see HALSBURY, Hailsham Edn., Vol. 18, pp. 148-150, para. 206; and FOR CASES, see DIGEST, Vol. 29, pp. 9, 10, Nos. 116-127.]

Case referred to:

- (1) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274; 36 Digest 35, 208; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867), L.R. 2 C.P. 311.

B

APPEAL from a decision of His Honour JUDGE OWEN THOMPSON at Bow County Court, dated Jan. 14, 1938.

The plaintiff was a customer at a public-house kept by the defendant. On Aug. 2, 1937, at 9 p.m., he was crossing a yard at the public-house, in order to use a convenience at the far end thereof, when he slipped on some vomit that was lying in the yard, and sustained injuries. The yard was open to the air, but did not communicate with the street except through the public-house. It was twilight at the time, and the yard was not lit by artificial light. It was proved in evidence that the landlord had inspected the yard at 6 p.m. and had cleaned it out then. It was also proved that there had been only one occasion during the previous two years upon which a customer had vomited in the yard.

D

Philip Vos, K.C., and *Julian Fuller* for the appellant, the defendant.
L. Caplan for the respondent, the plaintiff.

E

Vos, K.C.: The plaintiff was an invitee only for the purposes of entering on the premises and consuming liquor. In so far as he was availing himself of lavatory accommodation, he was a licensee. There is no legal obligation upon the keeper of a public-house to provide any conveniences. This was not a hotel, but a public-house. In the case of a hotel, it is part of the contractual liability that there shall be the usual amenities. The landlord must take reasonable care. This was a danger which might occur at any moment. It is reasonable for a landlord who has inspected a yard at 6 p.m. not to inspect it again until 9 p.m. His duty was to see at reasonable intervals that it was clean.

F

G Otherwise he would have to employ a special man to observe the yard constantly.

Fuller, following on the same side: The licensed premises ended at the door, and this yard was not part of the licensed premises at all. This was not a danger that could reasonably have been expected. It was so remote that it could not have been guarded against.

H

Caplan: This was a danger of which the landlord ought to have known. On a bank holiday, it is not reasonable not to examine this yard between 6 p.m. and 9 p.m. It is not a sufficient excuse to say that this is only a small public-house. The measure of duty owed to an invitee cannot depend upon the pocket of an invitor. There are

three ways in which the duty could have been carried out : notice of the danger could have been given by lighting the yard, an extra person could have been employed for this one busy day, or the landlord could himself have exercised additional supervision. The extra supervision might not have prevented the accident, but there would not then have been any breach of duty.

Vos, K.C., was not called on in reply.

GREER, L.J. : In this case, two points are taken on behalf of the appellant. First of all, the appellant says that the judge was wrong in finding that the man who was injured was an invitee in the yard when he met with his injuries. We are all agreed that that contention is untenable. The place where the man was injured was part of licensed premises, and it is in the interest of the licensee as well as in that of the visitors that the latter should have the opportunity of using the accommodation provided by the licensee. We therefore think that the case falls to be determined by estimating whether there was evidence of a breach of duty on the part of the licensee. The material evidence on this question was that in this particular place there had been only one accident of this kind in two years, and that the only way in which the accident could have been prevented by the exercise of reasonable care would have been to have had a man in the yard on behalf of the licensee watching everybody coming in, so that he might warn the next man who came in after somebody had been sick in the yard that there was danger in the yard. It seems to me that to put a duty of that sort upon the licensee is to put a duty upon him in excess of the duty which is involved in the position of an invitor as against an invitee. In the leading authority on the question, *Indermaur v. Dames* (1), it is stated, at p. 287 :

... he [the invitee] is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know. . . .

It seems to me that there was no evidence in this case which enables us to say that the danger to which the invitee was exposed was a danger of which the occupier of the premises ought to have known. He could know it only if he had a man in the yard looking out all the time and warning anybody coming in after one of the customers had vomited in the yard. That is putting upon him a duty which is more than by law is put upon an invitor in favour of an invitee. For these reasons, I think that the appeal must be allowed with costs.

SLESSER, L.J. : I agree.

MACKINNON, L.J. : I agree.

Appeal allowed, with costs in both courts. Leave to appeal refused.

Solicitors : *Wm. Easton & Sons* (for the appellant) ; *Saunders, Sobell & Greenbury* (for the respondent).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

R. v. WHIBLEY.

[COURT OF CRIMINAL APPEAL (Branson, Humphreys and du Parcq, JJ.),
May 16, 1938.]

*Criminal Law—Children—Abandonment—Children left in children's court—
Children and Young Persons Act, 1933 (c. 12), s. 1.*

A The appellant, having to attend a children's court, took his five children with him. In a moment of passion he left them there. He was charged under the Children and Young Persons Act, 1933, s. 1, with wilfully abandoning the children in a manner likely to cause them unnecessary suffering or injury to their health:—

B HELD: to leave children in such a place was not an exposure to injury within the section, and the facts did not, therefore, amount to a wilful abandonment under the section.

[EDITORIAL NOTE. The section in question is directed against the exposure of children to moral and physical danger, and there must be a likelihood of such danger to the children if the abandonment is to be brought within the section.

C AS TO ABANDONMENT OF CHILDREN, see HALSBURY, Hailsham Edn., Vol. 17, pp. 745-747, para. 1520; and FOR CASES, see DIGEST, Vol. 15, pp. 856, 857, Nos. 9402-9405. FOR THE CHILDREN AND YOUNG PERSONS ACT, 1933, s. 1, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 26, p. 172.]

D APPEAL against conviction and sentence of three months' imprisonment with hard labour at the West Kent Quarter Sessions on a count of an indictment charging the appellant with wilfully abandoning five children in a manner likely to cause the said children unnecessary suffering or injury to their health under the Children and Young Persons Act, 1933, s. 1.

E *E. N. Landale* for the appellant.

B. H. Waddy for the Crown.

F BRANSON, J. [delivering the judgment of the court]: This appellant was found guilty at the West Kent Quarter Sessions on a count of an indictment charging him with wilfully abandoning five children in a manner likely to cause the said children unnecessary suffering or injury to their health under the Children and Young Persons Act, 1933, s. 1, and he was sentenced to 3 months' imprisonment with hard labour. He now appeals against his conviction and sentence by leave of the court.

G The facts of the case may be stated quite shortly. The appellant went to a children's court in order to apply with his sister-in-law for the return into her custody of three of her children. He took with him five children of his own, and, when he was told at the court that his application for the return of the three children could not be dealt with on that day, according to the evidence, he said, in a truculent manner:

If I cannot have my own three children back, I do not want the other five, you can have them; I will leave them here. They are not mine, you look after them.

He then walked out of the court, leaving the children there.

On those facts, he was charged under the Act of 1933 with abandoning

those children and causing them unnecessary suffering, and, upon the direction of the chairman as to the law applicable, the jury found him guilty of the charge. What the chairman said was :

I daresay some of you may think that for young children, even for boys of eleven, finding themselves alone in a court, knowing quite well it is a court, and surrounded by people who are what are colloquially described as limbs of the law, would be a little bit frightening to very young children and might be overawing to boys of eleven, and that there was at any rate a possibility that, in leaving children like that in a court, surrounded by these officials of the law, it might cause them, at any rate, some mental suffering, and some anxiety as to what was to happen to them next. A

Upon that direction, the jury found that the offence had been committed, and the main point of this appeal is whether or not the abandonment—assuming that this was an abandonment—in such circumstances as disclosed in this case, could properly be called an abandonment in a manner likely to cause the children unnecessary suffering within the Children and Young Persons Act, 1933, s. 1. B

I do not think that it is necessary to attempt any exhaustive exposition C of the circumstances in which that section might be invoked in the case of abandonment of children. All that it is necessary to say in the present case is that to leave the children in the way they were left, in the children's court where the magistrates were sitting under the Summary Jurisdiction Act for considering cases relating to the care of the children, could not D possibly be brought within this subsection. It is to be observed that sect. 1 is preceded by the words :

Part 1 : Prevention of cruelty and exposures to moral and physical danger.

Those are words which give some kind of indication as to the suffering E which the subsequent words were intended to cover.

As I said, I do not propose in anything I say to limit the ambit of that language in a proper case, but it does appear to me that it is wrong to say that, if the circumstances are such that a child is a little frightened, or that there may be some mental suffering caused by its being left in F such circumstances, it is a case which can be brought within this section of the Act. It appears to us that the conviction is wrong, and it must be quashed.

Conviction quashed.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ; G *Church, Rackham & Co.* (for the Crown).

[Reported by REGINALD TOWNSEND, Esq., *Barrister-at-Law.*]

WILLARD v. WHITELEY, LTD.

[COURT OF APPEAL (Greer, Slesser and MacKinnon, L.JJ.), **July 19, 1938.**]

Master and Servant—Lorry and driver hired to defendant firm—Accident to lorry while so hired—Responsibility for negligence of driver.

A

The plaintiff, who owned a number of lorries, let one of them out on hire, with a driver, to the defendants, in order to remove some furniture. The defendants paid a lump sum for the use of the lorry, and could instruct the driver where to go and when to go, but had no power to dismiss him. His wages continued to be paid by the plaintiff. In the course of the hiring, an accident occurred which resulted in damage to the lorry. The plaintiff contended that during the hiring the driver was the servant of the defendants:—

B

HELD: on the facts of this case, the driver was still employed by the plaintiff, who could not, therefore, recover against the defendants.

C

[EDITORIAL NOTE. The position here has been thought to be one of some doubt, and it was strenuously argued that the opposite conclusion ought to be reached upon the authority of *Leggott (G. W.) & Son v. Normanton (C. H.) & Son* (3). It is said, however, that, if there is anything in that case inconsistent with the conclusion here reached, then it is wrongly decided.

AS TO POSITION WHERE THERE ARE TWO MASTERS, see HALSBURY, Hailsham Edn., Vol. 22, pp. 112, 113, para. 191; and FOR CASES, see DIGEST, Vol. 34, pp. 22-27, Nos. 23-58.]

D

Cases referred to:

- (1) *Donovan v. Laing, Wharton & Down Construction Syndicate*, [1893] 1 Q.B. 629; 34 Digest 26, 49; 63 L.J.Q.B. 25; 68 L.T. 512.
- (2) *Quarman v. Burnett* (1840), 6 M. & W. 499; 34 Digest 23, 29; 9 L.J. Ex. 308.
- (3) *Leggott (G.W.) & Son v. Normanton (C. H.) & Son* (1928), 98 L.J.K.B. 145; Digest Supp.; 140 L.T. 224.
- (4) *Jones v. Scullard*, [1898] 2 Q.B. 565; 34 Digest 22, 25; 67 L.J.Q.B. 895; 79 L.T. 386.

E

F

APPEAL from a decision of His Honour JUDGE STURGES sitting as deputy county court judge at the Bloomsbury County Court, dated Mar. 10, 1938.

G

The plaintiff owned a number of lorries. The defendant firm were, *inter alia*, furniture-removers. When the defendants had more work on hand than they could carry out with their own lorries, they used to hire lorries, together with drivers and the necessary teams of removal men, from the plaintiff. When a lorry was so hired, the defendants paid a lump sum, and the wages of driver and men continued to be paid by the plaintiff. The defendants could order the driver to go where they wanted him to go, and to go at the times they desired, but they had no power to dismiss him, and any complaints—for example, concerning his driving—would be made to the plaintiff. One lorry so hired met with an accident, and the plaintiff brought the present action to recover the damage caused to his lorry.

H

W. A. Fearnley-Whittingstall and *C. Rodger Winn* for the appellant, the plaintiff.

Philip Vos, K.C., and *E. R. Haylor* for the respondents, the defendants.

GREER, L.J. : This is an appeal from the decision of His Honour JUDGE STURGES, sitting as deputy county court judge, in which he held that, at the time the damage was caused to the vehicle, it was being driven by a man who was the general servant of the plaintiff, and that he could not recover, on the ground, as the judge put it, that there was no reason to suppose that Willard's servant, who was admittedly A his servant when he went out in the morning to assist Messrs. Whiteley, ever became the servant of Messrs. Whiteley. The doctrine *respondet superior* applies only in cases where it can be established that, at the time of the servant's act complained of, he was in fact the servant of the defendants. The county court judge quite rightly addressed B himself to that question, and came to the conclusion that the permanent master never intended by his conduct to part with the control of his own servant to Messrs. Whiteley, but allowed his servant to exercise his own judgment, he acting continuously throughout the job as servant for Mr. Willard, and not for Messrs. Whiteley. It is quite true that the C county court judge uses as one of his tests the question as to whether or not Messrs. Whiteley were entitled to dismiss the driver, and in doing so I think that he was using one test as to who was the master of the driver at the time when the damage was occasioned. One of the tests is D whether at the time the alleged master could have discharged the servant. If he was only entitled to complain to his real master, it seems to me to go a long way towards showing that he remained the servant of his general master, and was not lent to Messrs. Whiteley as their servant. That, I think, is the meaning of the judgment of LORD ESHER, M.R., in *Donovan v. Laing, Wharton & Down Construction Syndicate* (1) to which E our attention has been called, where he says, at p. 632 :

So, indeed, he was as to a great many things [under the orders of the persons to whom he was lent]; but as to the working of the crane he was no longer their servant, but bound to work under the orders of Jones & Co., and, if they saw the man misconducting himself in working the crane or disobeying their orders, they would have a right to discharge him from that employment. F

Our attention has also been called to the valuable judgment of BOWEN, L.J., but I see nothing in that inconsistent with the view expressed by LORD ESHER, M.R. He says, at p. 634 :

The coachman does not become the servant of the person he is driving; and if the coachman acts wrongly, the hirer can only complain to the owner of the carriage. G

He is there referring to *Quarman v. Burnett* (2), and what he says equally applies to the present case, because these employers had no power to discharge this man, and had no right of control over him. If he was not driving properly, their only right was to complain to his master, the H plaintiff in this case, Mr. Willard, who remained his master throughout. For these reasons, I think that the county court judge was right. If there is anything in *Leggott (G. W.) & Son v. Normanton (C. H. & Son)* (3) inconsistent with that, I disagree with it. Our attention was called, and quite properly called, by Mr. Fearnley-Whittingstall to the

judgment of LORD RUSSELL OF KILLOWEN, L.C.J., in *Jones v. Scullard* (4). There the facts were quite different from these. The man who hired the driver owned the brougham, and he had hired the driver of the horse. He had hired the same driver for a period of 6 weeks, and the driver had continually driven the defendant for the preceding 6 weeks, while at the time of the accident he was wearing a suit of livery which had been supplied to him by the defendant. In that case, there was evidence which justified the judge in coming to the conclusion that, since he had been hired and continuously used for the period of 6 weeks, and had been put into the livery of the man who was hiring him, he was for the time being the servant of that man. It does not seem to me to affect the question which the county court judge had to decide in this case. I think that his decision was not wrong in law—indeed, I agree with it—but we have to deal with it only as a question of fact. For these reasons, I think that the appeal must be dismissed.

C SLESSER, L.J.: I agree.

MACKINNON, L.J.: I agree.

Appeal dismissed with costs.

D Solicitors: *Stanley & Co.* (for the appellant); *Wm. Easton & Sons* (for the respondents).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

E GEORGE WIMPEY & CO., LTD. v. MIDDLESEX COUNTY COUNCIL.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Macnaghten, JJ.), **April 5, 6, 1938.**]

F *Compulsory Purchase—Local authority—Land acquired for open space—Assessment of compensation—Acquired land partly developed for building purposes—Damage to adjoining land by severance—Betterment of land by provision of open space—Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), s. 2.*

G Land, which had been partly developed as a building estate, was acquired by the local authority for the purpose of an open space. Adjoining land belonging to the same owners was damaged by the loss of access to an arterial road, but would, it was alleged, be bettered by the provision of the open space:—

H HELD: (i) the amount of the compensation in respect of the land acquired was its value in the open market, the expenditure thrown away in part development, the amount of damage by severance, and the increase of overhead charges, but no allowance could be made in respect of the loss of builders' profits.

(ii) in assessing the compensation in respect of the adjoining land, its increase in value, due to the provision of the open space, was to be taken into account.

[EDITORIAL NOTE. The main contention in this case was that the builders were entitled to compensation for their loss of profit because there was no other land available in the district to which they could transfer their building operations. The

assessment of compensation in such a case is purely a question of the construction of the relevant statutory enactments, and the court has decided that such profits are not to be taken into account in assessing the compensation.

AS TO LAND ACQUIRED FOR PURPOSES OF LOCAL GOVERNMENT, see HALSBURY, Hailsham Edn., Vol. 6, pp. 186-188, paras. 230-232; and FOR CASES, see DIGEST, Vol. 11, pp. 291-298, Nos. 2184-2298.]

APPEAL BY WAY OF CASE STATED from the decision of an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6 (1).

The claimants, a firm of builders, were the owners of property at Wembley which they were developing as a building estate. Plans for the erection of 362 houses and new streets which were part of a development under the Town and Country Planning Act, 1932, were submitted to the local authority in July, 1935, and approved in Aug., 1935. In pursuance of the development of this estate, the claimants had expended a sum of £1,040 in road construction, when the Middlesex County Council decided to acquire the estate as an open space. Thereupon, the claimants made the following claims: (i) the value of the land thus acquired for an open space; (ii) the £1,040 already spent on the land acquired, stated to be money thrown away; (iii) the loss of builders' profit; and (iv) the diminution in value of an adjoining estate, which, by reason of the acquisition of the land for the open space, was deprived of its access to an arterial road. The Middlesex County Council claimed that they were entitled to set off against the damage to the adjoining estate any betterment occasioned to that estate by reason of its abutment on a public park, which was intended to be constructed on the acquired land, and that, as to the land acquired, the claimants were only entitled to the value as between a willing seller and a willing buyer at the date of the notice to treat (which was agreed to be Dec., 1935) and the money thrown away by part-development.

The decision of the High Court was asked as to whether any account was to be taken of the betterment of the adjoining estate, and, if so, if the value of the betterment was to be deducted from the compensation for severance; and, in respect of the acquired land, whether the compensation was restricted to the value in the open market and the expenditure thrown away, together with any damage by severance, or whether there was to be added to these amounts compensation for the loss sustained by being deprived of builders' profits.

The specific questions stated by the arbitrator, together with the answers of their Lordships thereto, are hereinafter set out. It will be remembered that, in a case stated in these circumstances, the practice of the court is to answer the questions only in the affirmative or negative.

A. M. Trustram Eve, K.C., and Arthur Capewell for the claimants.

Cyril Radcliffe, K.C., and H. B. Williams for the Middlesex County Council.

Trustam Eve, K.C.: If the builders could go elsewhere in the district, there might not have been a claim for loss of profit. There is no further land available in the district, and the result must be that the profit will be irrevocably lost to the claimants.

Radcliffe, K.C.: The claimants will receive interest on their money, and they cannot claim also for loss of profit. A trader who has his stock taken, and receives compensation with interest, must use that compensation to buy fresh stock and trade with it elsewhere.

The questions for the decision of their Lordships, and the answers of their Lordships thereto, were as follow :

(i) Whether claimants were entitled to be paid compensation on the basis that, in assessing the sum for severance, no account was to be taken of any "increase" in the value of estate No. 1 on the ground that some building plots on that estate would by reason of the acquisition adjoin an open space.

No.

(ii) Whether claimants were entitled to be paid compensation on the basis that, in assessing the amount for severance, the effect of any such "increase" in value referred to in (i) above was to be deducted from the compensation.

Yes.

(iii) Whether claimants should be paid on the basis that they were entitled to recover (in addition to the value of the land in the open market, expenditure thrown away and damage by severance (if any) and increased overhead charges) the loss sustained by being deprived of builders' profits.

No.

(iv) Whether claimants could only be paid compensation in respect of value of the land in the open market and the expenditure thereon thrown away, the amount of damage by severance and increased overhead charges.

Yes.

Questions answered as stated. Claimants to pay the costs of the county council.

Solicitors : *Charles Rogers, Sons & Abbott* (for the claimants) ; *C. W. Radcliffe* (for the Middlesex County Council).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

R. v. FIRTH.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **March 21, 1938.**]

Criminal Law—Evidence prejudicial to accused—Police evidence of other pending charges—Necessity to discharge jury.

In the course of the accused's trial for breaking and entering a dwelling-house and stealing jewellery valued at £200, a police officer, in cross-examination by counsel for the accused, gave certain evidence highly prejudicial to the accused relating to another case and to other police inquiries. The assistant recorder directed the jury that they should not consider this evidence, but refused to discharge them and begin the trial again before another jury :—

HELD : the jury should have been discharged and the trial begun again.

[EDITORIAL NOTE. While the evidence here given in cross-examination did not amount to evidence of a previous conviction, it was considered so highly prejudicial to a proper trial that it warranted the discharge of the jury and the commencing of the proceedings anew.

AS TO DISCHARGE OF JURY DURING TRIAL, see HALSBURY, Hailsham Edn., Vol. 9, pp. 173, 174, para. 252; and FOR CASES, see DIGEST, Vol. 14, pp. 363, 364, Nos. 3848-3856.]

Case referred to :

(1) *R. v. Peckham* (1935), 154 L.T. 275; Digest Supp.; 25 Cr. App. Rep. 125.

APPEAL from a conviction by the assistant recorder of Leeds, dated Jan. 27, 1938. The facts are fully stated in the judgment of the court.

Clive Salter for the appellant.

G. H. B. Streetfeild for the Crown.

LORD HEWART, L.C.J. [delivering the judgment of the court]: This appellant, Harry Firth, was found guilty before the assistant recorder of Leeds upon an indictment which charged him with breaking and entering the dwelling-house of a woman named Edith Petty on Dec. 8, 1937, and stealing a quantity of jewellery to the value of £200. There was also a second indictment against the appellant which charged him with waiting for an opportunity to commit an offence contrary to the Prevention of Crimes Act, 1871, s. 7. That indictment was marked :

This indictment to remain on the file and not to be proceeded with except by judge's order or by the order of the Court of Criminal Appeal.

In the result, on Jan. 27, 1938, this appellant was sentenced to 3 years' penal servitude, and he now appeals by leave against this conviction and sentence.

Because of the view which this court takes of the main question involved here, it is not necessary to enter into subsidiary questions. There is no doubt that there was a good deal of evidence against this appellant. There were some things to urge and re-urge in his favour, but one thing was made very plain, and that was the course which the trial took upon the cross-examination of one of the police witnesses by counsel then appearing for the prisoner. Dealing with certain matters which were dealt with in cross-examination. Mr Hylton Foster said to the officer :

Among other things you looked at the saws ?—Yes.

You took possession of them ?—Yes.

Did you send them to Nottingham ?—Yes.

What else is there that you sent to Nottingham that you have not told us about ?—I think it is all here now, apart from what is mentioned.

Apart from the saw ?—There was a plus four suit.

Any sawdust ? Did you send any sawdust ?—No, sir.

Scraps off the bench ?—To explain this matter, I was very interested in the wood in the cellar. That was most of my time, looking in the cellar. There was nothing else taken I can remember now, apart from what I have mentioned. There was some hemp, but this matter was relating to other things which if mentioned here might not be in favour of the prisoner.

Did you regard that explanation as necessary in answer to my question ?—Well, yes.

Were you unable of your own intelligence to devise any way in which that matter might not have been mentioned?—I thought that was the better way to mention it.

Why?—That it had best not be mentioned.

It should not have been mentioned had you been able to avoid it, should it?—Well, I have not mentioned anything.

A What you mentioned was this, that there was another matter which might be prejudicial to the accused were it to be mentioned. In your view, is that a way of disguising from the jury the fact there is something else which, if mentioned, might be prejudicial to the accused?—Well, there were other matters under police investigation.

B The cross-examination having been continued to that point, counsel for the accused said: “I ask that this jury be discharged, sir.” To this the assistant recorder rejoined: “You brought it out.” Then counsel for the Crown said:

I was going to say it was entirely in consequence of his questions, with the greatest possible respect to my learned friend, that the witness answered it in the only possible way to answer it.

C To this the assistant recorder replied: “I think so.” Counsel for the Crown then said: “The officer was unwilling to do so.” The assistant recorder added:

It brought out the fact there were other police investigations. I do not think it is a ground for discharging the jury—no.

D Afterwards, when the summing up was reached, the assistant recorder added this passage:

E At one period of the case there were questions put to a witness for the prosecution by defending counsel, who was asking him about certain things that were submitted to the expert witnesses, two of whom we have had called from Nottingham, whereupon the police officer said that there were some other inquiries, and made some reference to another case. That, if it is evidence at all, has nothing to do with the case. We do not know anything about another case, whether the inquiries were with a view to charging this man or some other man, or whether he was going to be asked to assist the police. Anyhow, it was some other case. I direct you that, whatever else you consider, you consider that no more. There is no evidence before you at all, except that some inquiries were going on, and that is irrelevant. So, if it was in your minds—I daresay you have entirely discarded it already—cut it right out. Consider this case against the man Firth purely and simply on the evidence as to the breaking and stealing which is brought before you against him.

G The assistant recorder did everything in his power to remove or mitigate the mischief that had been done, but one thing he refrained from doing, for a reason which is a little difficult to fathom—he did not say that in these circumstances the jury would be discharged and the proceedings commenced anew. It seems a little unfortunate that he did not take that course, because the whole trouble might have been avoided.

H It is a very difficult matter always to arrive, with certainty, at what effect a particular incident may have on the minds of the jury, and it is important to remember that the jury is not one person, but twelve persons. It might be a profoundly difficult matter to arrive with real certainty at the effect of such an incident on the mind of each of the twelve persons in the jury-box. Ought a prisoner to be called upon to take that risk? Is it right that he should be exposed to the perils arising out of an inadvertent answer given in cross-examination? He

had not asked for it himself, and he had not gone out of his way in inviting any sort of trouble. The police officer was asked a question in cross-examination, and he volunteered—we do not say it in any disparaging sense or criticising sense—a piece of evidence which cannot be regarded as being other than highly prejudicial. That he tried to avoid it is plain enough, but we have to consider what was done. A

This is a matter which is not open to any real doubt, and the court has expressed its opinion more than once on what is the right and proper course to take in the circumstances which arose here. The matter was put with sufficient clearness in the judgment of this court in 1935 in *R. v. Peckham* (1), where the judgment used these words at p. 275: B

It may be that in particular cases and on particular facts it is not necessary for a reference to be made in the summing up to a prejudicial statement of this kind inadvertently made by a witness. [Every case must be looked at in relation to its own facts.] But there is a great difference between those cases and the present case in that here there was an application by counsel for the prisoner that the trial should be started afresh. It was in those circumstances that the deputy chairman refrained even from alluding to the topic when he came to sum up. [In the present case the assistant recorder did refer to the matter in his summing up.] In the opinion of this court, where a statement with regard to a prisoner's previous record is inadvertently made from the witness box to his prejudice, and his counsel applies for the trial to be begun again before another jury, the court ought to begin the trial again. C

Those words are, I think, sufficiently free from ambiguity. There are three elements: (i) statements with regard to a prisoner's record, and statements of that kind, inadvertently made from the witness-box; (ii) statements of that kind to the prejudice of the prisoner; and (iii) in these circumstances, an application by the counsel for the prisoner for the trial to be begun again before another jury. D E

In Nov., 1935, this court was of the opinion that, in such circumstances, the trial ought to be begun again, and to that opinion we adhere. It is not very profitable or useful to enter into a speculation as to what effect might be produced in the minds of the jury, still more in the minds of a collection of jurors, on hearing this piece of evidence. If an incident of that kind takes place, then there ought to be an end of the trial, unless it is plain that the jury would inevitably have arrived at the same conclusion notwithstanding that irregularity. In the opinion of this court, it is impossible to say with certainty what conclusion the jury arrived at on hearing this piece of evidence, and it seems to us in a high degree dangerous to allow a trial to continue to the end after such an irregularity. In these circumstances, it seems to us that we have no alternative but to quash the conviction. There is another indictment on the file, and the usual course must be followed. The indictment is before the court now, and it is marked in this way: F G H

This indictment to remain on the file and not to be proceeded with except by judge's order or by order of the Court of Criminal Appeal.

In the circumstances, we think that it is right to order that that indictment be proceeded with.

[*Salter* then made an application that the appellant be released on bail pending the trial on the second indictment. The application was granted.]

Conviction quashed. Order that the further indictment be proceeded with.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ;

A *Sir Charles McGrath* (for the Crown).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

R. v. MORRISON.

B [COURT OF CRIMINAL APPEAL (Branson, du Parcq and Wrottesley, JJ.),
August 15, 1938.]

Criminal Law—Bigamy—Invalid first marriage—Subsistence of prior marriage—Direction to jury—Non-production of statement to police by witness.

C H. was married in 1919 and went with her husband to live in Canada. She last saw her husband in Canada in 1928. On Mar. 11, 1938, the appellant married H. It was stated in evidence that the registrar had been informed of the facts and that he had said that H. could describe herself as a widow. On Mar. 16, 1938, the appellant married I., and he was charged with bigamy. The jury were directed that, the first marriage on Mar. 11 being *prima facie* lawful, it was for them to consider whether the evidence was such as to make it unlawful : in effect, that, if they had any doubt about the legality of the first marriage, they had to acquit the prisoner. H. was cross-examined on the basis that she had said nothing of her first marriage. In fact she had mentioned it to the police in a county different from that in which the trial was held. As this statement, being first mentioned in re-examination, could not be produced, it was contended that its non-production affected the minds of the jury, who found the appellant guilty :—

E HELD : (i) the direction to the jury was a proper one.

(ii) the non-production of H.'s statement provided no reason for interfering with the verdict.

[EDITORIAL NOTE. On a charge of bigamy the legality of the second marriage is immaterial, but it is essential to prove the legality of the first marriage. Where the legality of the first marriage is dependent on the facts, e.g., proof of the subsistence of another marriage, it is purely a question for the jury to decide under a proper direction from the judge.

F AS TO INVALID FIRST MARRIAGE, see HALSBURY, *Hailsham Edn.*, Vol. 9, p. 390, para. 659 ; and FOR CASES, see DIGEST, Vol. 15, pp. 739, 740, Nos. 7990-7994.]

G Case referred to :

(1) *R. v. Willshire* (1881), 6 Q.B.D. 366 ; 15 Digest 740, 7991 ; 50 L.J.M.C. 57 ; 44 L.T. 222.

APPEAL against conviction for bigamy at the Lewes Assizes.

H. J. Brown for the appellant.

H Eric Neve for the Crown.

BRANSON, J. [delivering the judgment of the court] : This appellant was convicted at the Lewes Assizes of bigamy, and upon that conviction he pleaded guilty to a charge of false pretences, and was sentenced to 15 months' imprisonment with hard labour concurrent. He now appeals

against his conviction upon the charge of bigamy. His first point is that the judge misdirected the jury in certain respects, the chief respect, and really the only one which has been argued, being that the judge left the jury under the impression that, in the circumstances of the present case, it was for the defendant to establish his defence.

The circumstances out of which the prosecution arose may be stated A
shortly. The appellant went through a form of marriage with Florence
Ide on Mar. 16, 1938, and it was alleged that that was a bigamous
marriage by reason of the fact that he had gone through a form of
marriage with a Mrs. Holman on Mar. 11, 1938. It was alleged by the
defence that the marriage with Mrs. Holman on Mar. 11 was not a valid B
marriage by reason of the fact that Mrs. Holman had a husband living.
The evidence upon the question was that Mrs. Holman went into the
witness-box and swore that she had married Mr. Holman in June, 1919,
that they had gone to Canada, and that she had last seen Mr. Holman,
who was then 44 years of age, in Canada in 1928. No direct further C
evidence was given as to whether Mr. Holman was alive or dead, but,
when Mrs. Holman set out to be married on Mar. 11, according to her
story, she informed the registrar, who performed the ceremony, of the
fact that she had been married to Mr. Holman, and of the fact that she
had not seen him since 1928, and she alleged that the registrar had D
said that it was all right, and that she could properly describe herself
as a widow. In these circumstances, it was urged on the part of the
prosecution that the marriage between Morrison and Mrs. Holman on
Mar. 11 was, on that basis, a good and valid marriage. It was then
urged on the part of the defence that insufficient direction had been E
given to impeach the marriage of Mrs. Holman and Morrison, and, unless
and until they established that it was a good and valid marriage, there
was no evidence to prove the bigamous marriage of this man.

In these circumstances, it became necessary for the judge to direct
the jury with regard to the law applicable to the case of this man, and the F
complaint made by the appellant is that the judge failed to direct the
jury properly. It is alleged that he should have told them in so many
words: "Unless you are satisfied that Mr. Holman was not dead, you
should acquit the defendant Morrison, and should convict only if you
are satisfied that Mr. Holman was already dead." In these circum- G
stances, it is necessary to turn to the summing up to see what in fact
the judge told the jury. He began by telling the jury that the defence
had raised this matter, and then he said:

They say that, although the defendant in this case did go through a ceremony
of marriage with Mrs. Holman on Mar. 11, and although he believed at that time
that it was a lawful marriage, and although she believed at that time that it was
a lawful marriage, it now turns out—and they say that they are able to prove it—
that it was not a marriage at all, because she was not free to marry, as she had a
husband living. H

The judge then went on to point out that, if the defence could have
produced the husband, that would have been an end of the case, because

it would then have been established that Mrs. Holman had a husband when she went through a form of marriage with the appellant on Mar. 11. He pointed out that Mr. Holman was not called, and he went on to discuss the question of law. He referred to *R. v. Willshire* (1), which was considered and argued, and he told the jury that :

A The Court of Crown Cases Reserved said that that was quite wrong, and that what the judge ought to have done was to leave it to the jury, on the evidence of both sides, for them to say what the facts were and what they believed in the matter.

Then he proceeded with a direction to the jury, which I think it right to quote, as it seems to put the matter fairly and clearly to the jury,
B and to be as favourable to the appellant as it could be. He said :

The marriage between the defendant and Mrs. Holman being *prima facie* a lawful marriage, do you entertain any doubt about its lawfulness in consequence of the evidence you have heard ? If you think it may have been no marriage at all, then the prosecution will not have proved that this man had two wives at the same time, but only one, Mrs. Ide, because the first woman was not his wife, if
C that is the view you take of the evidence.

It seems to us that in that passage the judge told the jury the precise point which they had to consider, and that he told them in perfectly plain language that, if they had any doubt about the first marriage, they had to acquit the accused. It is said that in other passages in the
D summing up this direction is whittled away by the other directions to the jury. I find, however, that he again discussed the facts as to Mrs. Holman, and he used the following words, speaking of the defence which had been raised :

E Has it been made out ? Do you believe it ? That is the question. According to whether you find the story credible or incredible, it may be that your verdict will go.

That is telling the jury that, if they think it credible, notwithstanding that they may not believe it all, they should acquit.

F The only other passage which has been referred to is where the judge says :

If, in spite of there being no merits in it, he has established the technical defence that, although he believed he was committing bigamy, it turns out that he was not, because the woman with whom he had previously gone through a ceremony of marriage had at the time a husband alive, then you will acquit him.

G I suppose that one might suggest as a possible amendment that the judge might have repeated what he had already said and added, "if you believe that the woman may have had a husband living." Then no possible exception could be taken to the passage in the summing up. It seems to us that, in a short summing up of this sort, where the judge has put
H the law very fully and clearly in a few passages, it is quite unnecessary to repeat the statement to the jury in these references to the defence. It seems that he must have been understood to have said that, if any uncertainty or doubt had been raised in the minds of the jury, they were to act in accordance with what he had already told them was the law. In our view, the summing up adequately put the law before the

jury, and the suggestion that this appeal should be allowed upon the ground raised of misdirection fails.

Another ground has been raised, and that is that the jury might have been led to take an unfavourable view of the evidence of Mrs. Holman by reason of the fact that Mrs. Holman was cross-examined on the basis that she had said nothing about the previous marriage. A It is said that this took the prosecution by surprise. She was re-examined by Mr. Brown, and in the re-examination she said that that was not the real state of affairs, as she had given a statement to the Bicester police telling them about the previous marriage. B Thus, the jury had before them the uncontradicted fact that in a statement she had told the police the same story as that which she was telling the jury in the witness-box. Then it was said that Mr. Brown asked for the production of the statement but was told that that statement was in the possession of the Bicester police, and not in the possession of the West Sussex police, and was therefore not produced. C It was said that, by reason of that non-production of the statement, some doubt might have been caused in the minds of the jury. We think that that argument is too far-fetched to form any ground for interfering with this verdict. D It is said that the incident led to the making of a mistake by the judge in his summing up, but it seems to us that, when one looks at the passage complained of, the judge is not suggesting that Mrs. Holman had told a last-minute story, but that it had not been raised at the police court. E It was a comment on the evidence of Morrison, and not upon the evidence of Mrs. Holman, and, as such, it was quite unaffected by the statement. That point has no substance in it at all, and the result is that this appeal is dismissed.

Appeal dismissed.

Solicitors: *Hillman & Sons*, Lewes (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by W. K. SCRIVENER, ESQ., *Barrister-at-Law.*] F

GEORGE HOTEL (COLCHESTER), LTD. v. BALL.

[KING'S BENCH DIVISION (Branson, Humphreys and du Parcq, JJ.),
May 12, 1938.] G

Factories and Shops—Shop—Hotel—Dining-room open to non-residents—Waiter—Shop assistant—Weekly half-holiday—Shops Act, 1912 (c. 3), ss. 1, 19 (1).

A residential hotel had accommodation for about 40 guests. There was only one dining-room, which was used by residents and non-residents. A waiter, wholly employed in the dining-room, was found by the justices to be mainly employed in serving meals to non-residents. In these circumstances, the justices held that the dining-room was a shop, and the waiter a shop assistant within the Shops Act, 1912, s. 1 :— H

HELD : it followed from the findings of fact of the justices that the dining-room was a shop, and the waiter a shop assistant, within the section.

[**EDITORIAL NOTE.** The decision here is based upon that in *Gordon Hotels, Ltd. v. London County Council* (1). The residential parts of a hotel are not a shop within the Shops Act, 1912, and it is a question of fact whether any part of the hotel is sufficiently used by non-residents, or whether the employment of any employee is sufficiently in connection with service of non-residents, to bring it or him within the Act.

A AS TO DEFINITION OF SHOP, see HALSBURY, Hailsham Edn., Vol. 14, pp. 674-676, para. 1284; and FOR CASES, see DIGEST, Vol. 24, pp. 928-930, Nos. 192-207.]

Case referred to:

(1) *Gordon Hotels, Ltd. v. London County Council*, [1916] 2 K.B. 27; 24 Digest 928, 193; 85 L.J.K.B. 1042; 114 L.T. 1126.

B APPEAL BY WAY OF CASE STATED from a decision of the borough justices of Colchester.

The appellants were charged under the Shops Act, 1912, s. 1, with not allowing, during the week commencing Aug. 8, 1937, the statutory half-holiday to a waiter in their employ. They were at all material times the proprietors and occupiers of the George Hotel, Colchester, a hotel having 23 bedrooms and accommodation for some 40 resident guests. There was only one dining-room, used by both residents and non-residents, having accommodation for about 50 persons at the same time. The proportion of meals served to residents and to non-residents was approximately 37 per cent. to 63 per cent. The justices found the following facts: (a) the hotel was principally a residential one; (b) a portion had been opened to non-residents; (c) the waiter in question was mainly employed in serving non-residents; and (d) the waiter was a shop assistant within the meaning of the Shops Act, 1912, s. 1.

E G. G. Raphael for the appellants.
Frank Phillips for the respondent.

F BRANSON, J.: The question for this court is whether the justices came to a correct determination in point of law, which depends upon whether the facts proved show that the waiter was employed as a shop assistant within the definition in the Shops Act, 1912, s. 19 (1). That definition is as follows

... any person wholly or mainly employed in a shop in connection with the serving of customers or the receipt of orders or the despatch of goods.

G The question then arises whether the dining-room in which he was wholly engaged can be said to be a shop. "Shop" is defined in the same subsection as including

... any premises where any retail trade or business is carried on.

H There is no doubt that the waiter's employment was mainly in connection with the serving of meals in this dining-room, and the justices have found that he was mainly employed in serving those guests who were non-residents. The attack on their decision is on the basis that, once they had found that this was a residential hotel, there is no room for the finding that any part of it was a shop. Reliance was placed upon *Gordon Hotels, Ltd. v. London County Council* (1), but that case, far from helping

that contention, disposes of it. It is clear that the court was so far from holding that a finding that a hotel was a residential hotel made it impossible to find that any part of it could be a shop that it decided the very opposite. BRAY, J., said, at p. 36 :

It has been contended that the hotel is a shop within the meaning of [the Shops Act, 1912]. In my opinion it is not. The Act implies, and states, that it is dealing with shop assistants who are employed to serve customers ; but people who are staying in hotels are never spoken of as customers, but as visitors or guests, and it seems to me, therefore, that for the purposes of this Act a shop must necessarily be a place where customers are served. An hotel is not a place of that sort. That is sufficient to dispose of the second appeal, for all the waiters were engaged in rooms in the hotel proper, and, although persons not staying in the hotel had access to those rooms, the magistrate has found that there was no evidence that the waiters were wholly or mainly employed in serving non-residents. They were, therefore, not shop assistants within the meaning of the Act. . . .

That seems to me to mean that the judge was assuming that the two rooms, the dining-room and the smoking-room, used by both residents and non-residents, might have been held to constitute shops, but for the purposes of that case it was immaterial to discuss the matter, because there was no evidence that the waiters in question were wholly or mainly employed in serving non-residents.

Once the justices in this case had come to the conclusion that the waiter in question was mainly employed in serving non-residents, it was perfectly open to them on that finding of fact to hold that this portion of the hotel was a shop, and that the waiter was a shop-assistant.

HUMPHREYS, J. : I am of the same opinion. The question turns upon the Shops Act, 1912, s. 19, which is the definition section, and, in considering whether a particular place is a shop, one must consider how the word is used in a particular statute. It

. . . includes any premises where any retail trade or business is carried on.

In *Gordon Hotels, Ltd. v. London County Council* (1), it was admitted that a hotel restaurant was a shop, and not the less so because forming part of a residential hotel. Sect. 19 (1) defines "shop assistant" as : . . . any person wholly or mainly employed in a shop in connection with the serving of customers. . . .

Therefore, it appears to me to be impossible to say that a place which is a restaurant, and which is used by persons coming from outside, cannot be a shop, or that persons whose main business is to wait upon such persons are not persons "wholly or mainly employed in a shop in connection with the serving of customers"—that is, shop assistants. I think that the justices applied their minds to the correct questions, and that their findings are conclusive on the evidence.

DU PARCQ, J. : I agree, and have nothing to add.

Appeal dismissed.

Solicitors : *Wilberforce Allen & Bryant*, agents for *F. S. Collinge & Co.*, Colchester (for the appellants) ; *Jones & Son* (for the respondent).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

R. v. ORAM.

[COURT OF CRIMINAL APPEAL (Branson, du Parcq, and Wrottesley, JJ.),
August 15, 1938.]

Criminal Law—Evidence—Statement to police by co-defendant—Verdict of jury only possible if statement acted upon—Validity of conviction.

A

Two prisoners O. and S. were charged with an attempt to procure the commission of an act of indecency. The first count charged them together, the second charged O. as the instigator of the crime, and the third charged S. as the instigator. The jury were told to disregard the first count, and an application for separate trials was refused. The only evidence was that of two police officers who found the prisoners in a public lavatory. S. had made a statement to the police and this was put in, but at the trial S. denied its accuracy. The jury were directed that the statement of S. was not evidence against O. The jury acquitted S. and convicted O. :—

B

HELD : as the jury acquitted one and convicted the other prisoner, they did not act upon the police evidence, but upon the statement of S. As this was inadmissible against O., the conviction of O. must be quashed.

C

[EDITORIAL NOTE. The difficulty in the present case is that the verdicts of the jury, acquitting one defendant and convicting the other, can only be satisfactorily explained by assuming that they felt that they could not act upon the evidence of the police officers, and accepted the statement by the one defendant. They returned these verdicts in spite of a plain warning by the judge. It would seem that, in such circumstances, the only safe course is to order separate trials of the two defendants.

D

AS TO STATEMENTS BY ONE OF TWO OR MORE DEFENDANTS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 207, 208, para. 293 ; and FOR CASES, see DIGEST, Vol. 14, p. 427, Nos. 4506-4514.]

E

APPEAL against a conviction at the Nottingham Assizes.

S. H. Granville-Smith for the appellant.

G. G. Raphael for the Crown.

F

BRANSON, J. (delivering the judgment of the court) : This appellant, Colin Charles Oram, was indicted at the Nottingham Assizes upon an indictment which in the first count charged him, together with one Dennis Salter, of attempting to procure the commission of an act of gross indecency with each other. In the second count of the indictment the appellant Oram was charged with attempting to procure an act of gross indecency with Salter, and in the third count Salter was charged with attempting to procure an act of gross indecency with Oram. So that in the first count they were charged together, in the second count Oram was charged as the instigator of the offence, and in the third count Salter was charged as the instigator of the offence. The judge told the jury to disregard the first count and that they only should consider the second and third counts. An application was made on behalf of the appellant Oram that the two prisoners should be tried independently. The ground of the application was that Salter had made a statement to the police which plainly charged Oram with having

G

H

invited Salter to commit an offence not of gross indecency but of buggery. The judge ruled that it was not a case in which it was necessary to separate the trials, and evidence of the police was called. A detective sergeant and a detective constable gave evidence that they had gone to a public lavatory and there they had heard a tapping noise proceeding from one of the cubicles which was locked. They broke open the door A of the cubicle and inside they found the appellants Oram and Salter, both with their trousers unfastened. They were taken to the police station and there they made statements. At the trial the statement made by Salter was given in evidence as Salter was a person quite properly charged and was entitled to have the jury decide upon it. B When the judge came to sum up to the jury, he quite properly directed them that, in dealing with the case of Oram, they should disregard, so far as was humanly possible to do so, the statement made by Salter. I say quite properly because when this statement was read out, Salter denied its accuracy and in evidence Salter disputed it and confirmed C the evidence given by Oram. With that warning the jury considered their verdict and the verdict they came to was to find Oram guilty on count 2 and Salter not guilty on count 3, and it appears to us that the only possible way in which the jury could have arrived at these two respective verdicts was that they felt that the evidence given by the police officers D was not sufficient for them to act upon. If they had not come to that conclusion they must have found Salter guilty as well as Oram. But if they felt that the evidence given by the police officers could not be acted upon they should also have found Oram not guilty. It is necessary therefore to see how it came about that they found Oram guilty, and E the only explanation we can find is that, notwithstanding the proper warning given by the judge, they found it not humanly possible to disregard the statement given by Salter, and that they disregarded the statement made in the witness box and preferred to accept the statement F given to the police by Salter, which of course was not a statement which could be given in evidence against Oram. It was a statement not even upon oath, and in these circumstances the court has come to the conclusion that this conviction cannot stand and it must be quashed.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ;
Director of Public Prosecutions (for the Crown). G

[Reported by W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]



R. Banks 1916 2/K B 621

